Doubtful Aspects of the Application of the Features Aggravating Theft in Lithuania Case Law

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Abstract:
VOSYLIŪTĖ, Andželika – ABRAMAVIČIUS, Armanas: *Doubtful Aspects of the Application of the Features Aggravating Theft in Lithuania Case Law*. The article[1] deals with the problematic aspects of criminalization and application in court practice of the features qualifying theft provided for in Para 2 and 3, Art.178 of the Lithuanian Criminal Code (further – Lithuanian CC). The aggravating features of theft are assessed in terms of criminological justification and clarity of criminal law. A systematic analysis of the theory of criminal law and case law identifies some problematic aspects of the criminalization of aggravating features of theft in the Lithuanian CC and formulates suggestions for improving the law related to some aggravated thefts.

Key words:
theft; open theft; aggravating features; criminological justification; clarity of criminal law.

Introduction

According to statistics, thefts in Lithuania account for more than a quarter of all registered criminal offenses in recent years: 2008 - 49 percent, 2009 - 46 percent, 2010 - 48 percent, 2011 - 46 percent, 2012 - 39 percent, 2013 - 37 percent, 2014 - 38 percent, 2015 - 36 percent, 2016 -38 percent, 2017 - 31 percent, in 2018 – 26 percent[2]. When assessing these data, the following trend can be observed: since 2008 until

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2 Statistics from the Department of Informatics and Communications on Crimes Recorded in Pre-trial Investigation Offices (Form 3Ž-ITĮ), (Form-1Ž) // https://www.ird.lt/lt/paslaugos/nusikalstamu-veiku-zinybinio-registro-nvzr-paslaugos/ataskaitos-1/nusikalstamumo-ir-ikiteisminiu-tyrimu-statistika 1/view_item_datasource?id=7610&datasource=30608 (žiūrėta 2019-10-12).

2018 the relative share of thefts decreased with some fluctuations, however, theft still occupies a fairly significant place in the system of recorded offenses. The legislator, considering certain circumstances (the specifics of the thing of theft, the place where the theft is committed, the method, the prevalence of a particular type of theft, etc.), considers some thefts more dangerous and imposes more severe punishment for them.

In the process of differentiating the criminal responsibility for theft, the creation of the *corpus delicti* of aggravated theft is also important. *Corpus delicti* of aggravated theft are formed by supplementing *corpus delicti* of the principle theft with one or several characteristics which distinguish a higher dangerousness of theft. It should be noted that the legislator has not established clear criteria, on the basis of which a certain circumstance should be acknowledged as an essential feature aggravating theft (increasing the dangerousness of theft). This is why the list of the essential features aggravating theft is constantly updated: some essential features are cancelled, new ones are included, the features of aggravation are changed, etc. A review of the historical development of criminal laws regulating criminal liability for aggravated theft has shown that as many as eight amendments and supplements of the criminal law related to aggravated theft were made since 1990, when the independence of Lithuania was restored. The number of aggravating essential features of theft was constantly decreasing until 2003; however, it started to increase remarkably from 2003. When the new Criminal Code entered into force on 1 May 2003, theft was aggravated by the following two features: "*intrusion into a premises, storage facility or guarded area*" and "*high value assets*". Since 2003, the list of essential features aggravating theft has been expanded continuously, i.e. in 2003, the system of essential features aggravating theft was supplemented with the aggravating feature "*car*"; in 2004, with "*pick-pocketing*[3] *"*; in 2007, with "*overtly*", "*valuables of considerable scientific, historical or cultural significance"*, and "*organised group"*; in 2013, with *„intrusion into a communications cable duct system*" and „*an asset comprising the infrastructure of legal persons of strategic or considerable importance to national security or a part thereof"*. Currently, the system of essential features aggravating theft is one of the broadest and is formed by as many as nine aggravating features[4] . Therefore, although the dangerousness of various types of theft is a historically variable category, which is usually determined by the changing state structure as well as by economical, social and other factors; although approach towards the dangerousness of an action may change within a relatively short historical period even without changes in the state structure, the question now arises of whether it is possible to justify such a rapid chan-

3 Pickpocketing - is a seizure of another person's property in a public place from the person's clothing, bag or another item (Para 2, Art. 178, CC).

4 Under Para 2, Art. 178 of the CC, liable a person who openly seizes another person's property or seizes another person's property by intruding into a room, a communications cable duct system, storage facility or guarded area or seizes another person's property in a public place from the person's clothing, bag or another item (pickpocketing) or a vehicle or seizes a property comprising the infrastructure of legal persons of strategic or considerable importance to national security or a part thereof. Under Para 3, Art. 178 of the CC, liable a person who seizes another's property of a high value or the valuables of a considerable scientific, historical or cultural significance or seizes another's property by participating in an organised group (Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios,* 2000, Nr. 892741).

ge in essential features aggravating theft after the Lithunian CC entered into force. All the more so, as that law was a result of long and careful work of qualified legal experts which had continued since 1990.

The aim of this work is to assess the criminological validity of aggravated thefts, to disclose the actual problems of the determination of the aggravating features of theft in the case law and some aspects of the qualification. In order to achieve this goal, the following tasks were pursued: to carry out an analysis of the criminological validity of the aggravating features of theft; identify the problematic issues in the determination of the aggravating features of theft in case law; formulate proposals to address these issues; to discuss certain peculiarities of qualifying these features in case law.

1. Criminological justification and clarity of the aggravating features of a crime

1.1 Criminological justification of the aggravating features of a crime

It should be noted that over a decade ago (2008), the number of aggravated theft accounted for more than half (57 percent), [5] of all thefts committed; and as the legislator continues to expand the list of aggravating features of theft (eg. new aggravating features introduced in 2013) it may happen so that the basic essential features of theft will be applied to a minimal extent. Such situation would be viewed as contradicting the provision of the criminal law, according to which features characteristic to a majority of offences of a certain type should be acknowledged as basic essential features, and they shall be taken into account when constructing the sanction of the first part of a certain article of the Criminal Code. Furthermore, rapid changes in aggravating features frequently complicate application of the criminal law. This is proved by the practice of the courts in theft cases, i.e. the classification of an act is often changed due to unsubstantiated incrimination of an feature aggravating theft or, on the contrary, due to non-incrimination of such feature. Proper establishment of features aggravating theft also has special practical significance, i.e. it helps to distinguish a violation of the administrative law from a criminal act, a criminal violation from a crime, and an ordinary crime from an aggravated one. The feature aggravating the act of the offender determines incrimination of a heavy or even a grave crime, which involves much more serious legal consequences, instead of a violation of the administrative law or a criminal violation. Unsubstantiated inclusion of certain circumstances in the list of aggravating features and unclear formulation of a feature aggravating theft precondition infringement of the basic principles of the criminal law, establishing such punishability which does not correspond to the dangerousness of the act when an obviously too strict punishment, which became an act of cruelty rather than an act of justice in the eyes of the public, turns the offender into the injured person. Incomprehensive investigation into features aggravating theft and their inaccurate assessment often determines wrong implementation of norms regulating criminal liability for theft, imposition of incorrect punishment on the accused person, and uneven understanding

5 VOSYLIŪTĖ, A.: Baudžiamoji atsakomybė už kvalifikuotą vagystę. *Daktaro disertacija.* Vilnius, 2009. P. 101.

and application of laws which causes violation of the principles of legitimateness and justice and fails to ensure protection of human rights and property.

The criteria for the selection of aggravating features of an offense are the subject of a number of authors. For example, V. Karlov points out that one of the criteria for defining aggravated *corpus delicti* of the crimes, is the occurrence of an additional object of crime.[6] However, Lesnijevski-Kostareva argues that the imposition of such a criterion would make the emergence of some basic *corpus delicti* of the crime more difficult, such as composite *corpus delicti* of the crime (with two objects). Therefore, it is better to formulate the criterion by referring not to the additional object of the crime but to the obvious influence of the circumstance on the degree of danger of the crime. The aggravated *corpus delictis* of the crimes are characterized by the identification of an additional object that does not completely coincide with the main object, for example, the manner in which the offense is committed and so on. Therefore, the appearance in the act of an additional object, which is usually not the same as the object of the main crime, implies the influence of this criterion on both the degree and nature of the crime.[7]

A. I. Svinkin, T. A. Lesnijevski-Kostareva and others refer to the criterion of danger to the society, which is determined by the extent of the circumstance and its non-specificity for many types of crime and the impossibility of including the circumstance within the framework of the main crime, having regard to the sanction for that crime.[8] Majer writes: Usually, the nature of the action increases the punishment and the motives mitigate, so the former can be defined by law.[9] Maiwald and Kalas point out that it is a matter for the legislature to address the question of whether or not to determine a circumstance as an aggravating feature of the crime in criminal law.[10] Merkel emphasizes that a circumstance that supplements the usual meaning of features of main *corpus delicti* of the crime increases penalty.[11] G. Radbruch argues that in determining the aggravated *corpus delicti* of a crime, it is necessary to assess the importance of the legally protected value and the degree of its violation. For example, stealing from a church where, in addition to property, another object is violated - the order prescribed by the church.[12] E. Dreher attempts to list all the circumstances that characterize an act or person that may be identified as aggravating features: infringed right is considered a special value; specific crime (eg. with a weapon); damage to the extra value; special criminological characteristics of the offender (professional, recidivist); a group of individuals; extremely negative motives for committing the crime (selfishness). He also states that those circumstances must be typical, frequently occurring. However, circumstances

6 KARLOV, V. V.: Kriterii otbora zakonodatelem kvalifitsirovannykh sostavov prestupleniy. Sverdlovsk, 1990.

7 LESNIYEVSKI-KOSTAREVA, T. A.: Differentsiatsiya ugolovnoy otvetstvennosti. Teoriya i zakonodatel'naya praktika. Moskva, 2000. p. 249.

8 Ibid.

9 RADBRUCH, G.: *Die gezetzliche Strafänderung.* P. 201, 202. In: Vergleichende Darstellung des deutschen und ausländischen Strafrechts, Allgemeiner Teil, Berlin: Liebmann, Vol. II, 1908, pp. 189-219.

10 MAIWALD, M.: *Bestimmtheitsgebot, tatbeständliche Typisierung und die Technik der Regelbeispiele.* P. 152.

11 MAIWALD, M.: ibid, p. 202.

12 MAIWALD, M.: ibid, p. 193.

occurring before or after the commission of the crime cannot be considered as aggravating features and can only be taken into account when individualizing the sentence.[13] T. A. Lesnijevski-Kostareva emphasizes that only those circumstances which are directly evident in the act may be indicative of a significant change in the degree of danger and may therefore be recognized as aggravating.[14]

Summarizing the criteria stated by the authors, it can be stated that the criminal law doctrine requires that only the criminologically justified circumstances be included in the list of aggravating features, and in particular it is required to evaluate: 1) the obvious influence of the circumstance on the degree of danger; 2) the prevalence of the circumstance; 3) the relation of the circumstance to the act or to the act and the personality of the perpetrator.

1.2. The clarity of the aggravating features of a crime

The Constitutional Court of Lithuania has repeatedly held that the constitutional principle of a state under the rule of law implies a requirement for the legislator and other legislative entities that legal regulation established in laws and other legal acts must be clear, accurate, the consistency and internal coherence of the legal system must be ensured.[15] Criminal law doctrine emphasizes that the legal description of an act as criminal in a criminal law must be comprehensive, accurate and clear[16]. Some authors point out that "the task of the court would be much simpler if the legislature would develop the norms that fit into and easily integrate into the system of existing laws; be clear, precise and contain all or at least definitions and explanations of essential terms, and be accompanied by material on the consideration of the law, the opinions which led to the wording of the provision". Then, by applying the law, it would not be necessary to create concepts and definitions each time based on the traditions of case law, one's own legal consciousness, ethics, political attitudes prevailing in society, and social attitudes, in order to reveal the semantic code of the law.[17] In a number of cases, the European Court of Human Rights, in its interpretation of the fundamental principle of criminal law *"nullum crimen, sine lege"*(which requires a written form of criminal law), emphasized that "any crime must be precisely defined by law, and it is necessary for everyone to understand from the text of the article what actions or omissions may lead to criminal liability.[18] Later the requirement for a written text of the law was subsequently relaxed by the addition of the words "*or, where appropriate, a judicial interpretation of that law*".[19] As some jurists point out, the "*precision*

13 DREHER, E.: *Die erschwerenden Umstände im Strafrecht.* p. 223–225.

14 LESNIYEVSKI-KOSTAREVA, T. A.: ibid., p. 268.

15 Official Gazette, 2006, No. 7-254.

16 ŠVEDAS, G.: Veikos kriminalizavimo kriterijai: teorija ir praktika. *Teisė,* 2012, t. 82. p. 21.

17 PIKELIS, A.: Baudžiamųjų įstatymų teisėkūra. Teisėjo požiūris. *Lietuvos Respublikos baudžiamajam kodeksui-10 metų. Recenzuotų mokslinių straipsnių rinkinys.* Vilnius, 2011, p. 69-88.

18 Lietuvos Respublikos Konstitucinio Teismo 2005 m. lapkričio 10 d. nutarimas „Dėl Administracinių teisės pažeidimų kodekso 163(2) str. 5 ir 6 dalies atitikties Konstitucijai". *Valstybės žinios*, 2005, nr. 134-4819.

19 *Case of Radio France and others v. France,* no. 53984/00, § 20, ECHR 2004-II; VERŠEKYS, P. Vertinamieji nusikalstamos veikos sudėties požymiai. *Daktaro disertacija.* Vilnius, 2013, p. 169.

and clarity" of the criminal law has been modified by this Court jurisprudence in the newly developed qualitative criteria of *"foreseeability and accessibility of the law*", which are much more flexible and associated with judicial jurisprudence.[20] It is therefore advisable to take the view expressed in the criminal law doctrine that "not only those articles of the CC which are badly edited, unclear, but also those for which there are essentially no objections, require interpretation". The only difference is that if the law is clear in its content, it is usually resolved quickly, often without much attention. Meanwhile, where the content of the criminal law is not quite clear (which is often enough), its interpretation becomes a difficult issue.[21]

The thesis will further analyze the features aggravating theft in terms of criminological justification and clarity.

2. Criminologically justified aggravating features of theft

Some of the aggravating features of theft enshrined in the Lithuanian CC do not pose any major problems in evaluating them from the point of view of criminological justification. For example, "*high value assets*" and "*valuables of considerable scientific, historical or cultural significance"*. These or very similar features as aggravating theft are enshrined in the criminal laws of many other states: "*high value (scale) assets"* (Poland, Estonia, Russia, Ukraine, Sweden); *"valuables of considerable scientific, historical or cultural significance"* (Estonia, Poland, Russia, Germany), etc. It is worth noting that the latter feature is more precisely defined by German criminal law: these valuables must be publicly displayed. In Italy, the theft thing does not have to be of considerable scientific, historical or cultural significance, it is important that the item is publicly displayed or used in the provision of certain public services. In Lithuania, in order to avoid the objective accusation of the abduction of valuables of considerable scientific, historical or cultural significance (see below), it should be considered whether it would be appropriate (as in Germany, for example) to state that these values should be publicly displayed or belong to a collection accessible to all.[22]

3. Aggravating features of theft lacking criminological justification

However, not all the features aggravating the theft provided for by the Lithuanian CC are criminologically substantiated, for example, not all the aggravating features listed in Para 2 and 3, Article 178 of the Lithuanian CC obviously affect the degree of danger of theft. Attention should be paid to the *"intrusion into the premises, storage facility or guarded area"* of the feature aggravating theft (Para 2, Art.178, CC).

If "*an intrusion into a (dwelling) premises, its accessories, including a guarded dwelling area"*, shows a marked increase in the degree of dangerousness of the act, which is justified by the invasion of an additional object – "*the inviolability of the*

20 VERŠEKYS, P.: *Daktaro disertacija.* p. 62.

21 PAVILONIS, V. et al.: *Baudžiamoji teisė. Bendroji dalis (Trečiasis pataisytas ir papildytas leidimas)*. Vilnius: „Eugrimas", 2003, p. 104.

22 See more: VOSYLIŪTĖ, A.: *Daktaro disertacija.* p. 221–230.

dwelling",[23] such intrusion into *a non- dwelling premises, storage or non-dwelling guarded area* shall not result in such an increase. Nevertheless, since 1995, when the legislator provided for the said features in the same part of the Article (Para 2, of Art. 271, old CC), the influence of these features on the penalty was equalized. The resulting situation has been reasonably criticized by some authors and suggested to remove these features from the list of aggravating features of theft.[24]

The next aggravating feature *"an intrusion into the communication cable duct system*", also criticized for its lack of criminological justification. In this case, it is unclear whether the dangerousness of act is due to the fact that the intrusion should cause some damage to the system or the mere fact that it has been intruded. According to case law,[25] it is important to determine the threat of system damage, which means that only the intrusion into the system is established, but this fact does not indicate a higher dangerousness of the act. It is also questioned whether there is a criminological justification for the aggravating feature of *pickpocketing*. Some authors point out that the dangerousness of pickpocketing is not higher than, for example, stealing from an apartment, and that the special professionalism of pickpocketing is better to assess by special recidivism.[26] On the other hand, the identification of pickpocketing as an aggravating feature in the Lithuanian CC was determined by the prevalence of such types of theft and by the prevailing impunity of pickpockets. It was almost impossible to prosecute a pickpocket because his stolen assets was mostly below the threshold of 1 BAPP[27] (currently 3 BAPP), from which criminal prosecution is possible.[28]

It should be noted that the inclusion of the feature of *overtly* in the list of aggravating features was determined by the fact that in 2004, when the law established the aggravating feature of *pickpocketing*, illogicality emerged. The actions of a person who stole the property from the person's clothing, bag or another item were qualified under Para 2, Art. 178, CC, and if he stole the whole clothing, bag or another item, the offense was qualified under Para 1, Art. 178, CC, and the person was less severely punished, because the offense he committed was not covered by the aggravating feature of pickpocketing provided for in Para 2, Art.178, CC.[29] The intention of the legislator

23 Unlawful Violation of Inviolability of a Person's Dwelling is defined as an unlawful <...> intrusion into another person's residential house, apartment or other residential premises or fixtures thereof, including the dwelling's guarded territory (Para 1, Art. 165, CC).

24 USTINOV, V. S.: Aref`yev A. YU. Ob imushchestvennykh prestupleniyakh. Voprosy ugolovnoy otvetstvennosti i yeye differentsiatsii (v proyekte Osobennoy chasti UK RF), Yaroslavl', 1994. p. 88.

25 The certificate from "ESO" AB states that the property of the company was in risk by loosening the drain screw and stealing the oil from the transformer, because the transformer could have been irreparably damaged and the power supply cut off. Price of the stolen oil was 89 Eur (Ruling of Marijampolė District Court in criminal case no. 1-397-564/ 2018).

26 LESNIYEVSKI-KOSTAREVA, T. A.: Differentsiatsiya ugolovnoy otvetstvennosti. Teoriya i zakonodatel'naya praktika. Moskva, 2000.p. 255.

27 The 1 BAPP (Basic Amount of Penalty and Punishment) is 50 Eur. Lietuvos Respublikos Vyriausybės 2008 m. spalio 14 d. nutarimas Nr. 1031 „Dėl bazinio bausmių ir nuobaudų dydžio patvirtinimo" pakeitimo. TAR, 2017-09-05, Nr. 14215.

28 VOSYLIŪTĖ, A.: *Daktaro disertacija.* p. 152.

29 Aiškinamasis raštas „Dėl Lietuvos Respublikos baudžiamojo kodekso 20, 38, 42, 45, 47, 63, 66, 70, 75, 82, 93, 129, 172, 178, 182, 225, 227, 231, 252, 284, 285 straipsnių, XXVI

to unify the liability in the above situations is welcome, but the way in which this is done is debatable. After all, the illogicality was not caused by the unequal evaluation of open theft and pickpocketing, but rather the different qualification of stealing the property from the person's clothing, bag or another item and directly from a person's hands. Therefore, it would have been more appropriate to address this problem by adjusting the concept of pickpocketing (see below) rather than by introducing a new aggravating feature "*openly".* Establishing such aggravating features in the law unnecessarily complicates case law, since often the same situation can be qualified under both features (pickpocketing and open theft) and, in some cases, theft of property from the victim's hands would be regarded as main theft (see below). Furthermore, it is debatable whether the trait overtly influences the change in the degree of dangerousness of the act. For example, V. I. Plochova denies the obvious influence of open theft on the change in the dangerousness of the act. She argues that the criteria in criminal law that justify the higher dangerousness of open theft are unfounded.[30] In particular, the allegation that the culprit has the opportunity to use violence against the victim in the case of open theft, is inadequate, since in most cases of open theft, the culprit reaches the victim from the back or the side and takes off his hat, pulls a purse from his hand or from his shoulder.

In all cases, the culprit expects success due to sudden, unexpected movements, the ability to hide quickly, and of course the physical weakness of the victim (usually the victims of open thefts are minors and women). Seizing a stranger's property with a sudden motion also often happens in a secret way; just after losing his hat or handbag and seeing the culprit fleeing with his property, the victim realizes what happened.[31] When the victim starts shouting and the culprit refuses to continue stealing and throws the taken property away, the act qualifies as an attempt to commit a simple (secret) theft. Thus, the seizure of property directly from or at the hands of the victim is not always qualified under Para 2, Art.178, CC. The question therefore arises whether, by establishing an aggravating feature *"openly"*, the legislator has succeeded in achieving the desired goal, unifying liability for the seizure of another's property from the person's clothing, bag or another item (pickpocketing) and, for example, directly from the victim's hands. In addition, the case-law explicitly imposes similar penalties for both secret and open theft (average imprisonment for 9 months for secret theft, 1 year and 1 month for open theft).[32] The question, therefore, is whether open theft is obviously more dangerous than secret one, all the more so since the peculiar impudence of the culprit's personality is also not disclosed in the case-law.

The lack of obvious influence on the change in the degree of dangerousness of the offense also calls for criticism of the inclusion of the feature of the *car* in the list

skyriaus pavadinimo pakeitimo įstatymo projekto"; Ruling of Kaunas Regional Court in criminal case No. 1A-554-401/2006, Ruling of Alytus District Court in criminal case No. 1-123-543/2006; Ruling of Kaunas District Court in criminal case No 1-2607-029/2006.

30 PLOKHOVA, V. I.: Nenasil'stvennyye prestupleniya protiv sobstvennosti. Sankt-Peterburg, 2003. p. 230–235.

31 Ibid.p. 230–235.

32 The data are based on a summary of 117 convictions for secret theft (Para 1, Art. 178, CC) and 46 convictions for open theft (Para 2, Art. 178, CC) in 2008.

of aggravating features of theft. According to A. Pikelis, "A regular car, if it is not of considerable scientific, historical or cultural significance, is certainly nothing special or exceptional than a motorcycle, tractor, self-propelled machine or other similar technical device of the same value. <...> it can be speculated that the car's distinctiveness from other items is the result of the rudimentary Soviet era traditions where the car was a limited and merit-based merchandise. Criminogenic factors may have… contributed to the increase in car thefts over a period of time, but this should not be recognized as leading to a higher dangerousness of crime.[33] Currently, if a car worth 200 Eur is seized, a person would be liable for aggravated theft (Para 2, Art.178, CC) and would be punished more severely than the seizure of a tractor or motorcycle of 12 000 Eur (Para 1, Art. 178, CC). It should be noted that the criminal laws of many countries (Poland, Germany, Finland, Italy, Denmark, Ukraine, USA, England, etc.) do not determine the car as an aggravating feature of theft, and the qualification of the offense mostly depends on the value of the car or the method of seizure.[34] Therefore, some authors agree that a car theft as an aggravating feature of theft is undoubtedly a conceptual mistake in the system.

In addition, other issues of application of the Lithuanian criminal law related to theft which are being resolved in case law, are also highlighted in car theft cases. For example, in Lithuania until 1995, 1 January, the rule governing criminal liability for the unauthorized temporary use of a vehicle (Art. 250, old CC) was in force. Although Art. 178, CC does not provide for the purpose of appropriation as a necessary indication of theft,[35] it is clear that under the influence of this article the seizure of another's property had to be interpreted as the seizure of another's property for the purpose of appropriation. O. Fedosiuk emphasized that the rule regulating criminal liability for the unauthorized temporary use of a vehicle had an important function in the system of CC.[36] Unfortunately, in 1994, Art. 250 of the old CC, concerning unauthorized temporary use of a vehicle, was abolished and cases of "dropping off" of vehicles were treated as theft.[37] As some authors point out, "after the abolition of the above norm, the theory of property appro-

33 PIKELIS, A.: Baudžiamųjų įstatymų teisėkūra. Teisėjo požiūris. *Lietuvos Respublikos Baudžiamajam kodeksui 10 metų. Recenzuotų mokslinių straipsnių rinkinys.* Vilnius, 2011. P. 80.

34 For example, according to Polish case law, when a car is stolen by breaking a mechanical or other vehicle lock (breaking a window, breaking a door lock, using fake keys), the act qualifies as a burglary (theft made by breaking into) (Art. 279 of Polish CC). It is also interesting that this article also qualifies for cases where a car is stolen without burglary (for example, loading a car on a tow truck and transporting it to a certain location) and then breaking into it). (*Kodeks karny, Csęsc szczególna, Komentarz.* Tom II. Red. Prof. Dr hab. Andrzej Wąsek. Warszawa. 2004. P. 717; *Kodeks Karny, Edycja druga.* Warszawa, 2005. P. 312).

35 The Lithuanian legislature defines theft as the seizure of another's property (Art. 178, CC). (Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios,* 2000, Nr. 892741).

36 FEDOSIUKAS, O.: Turtinių nusikalstamų veikų normų sistema naujame Lietuvos Respublikos baudžiamajame kodekse: probleminiai klausimai. Šiuolaikinės viešosios teisės problemos (Rusija-Lietuva) *Mokslo darbų rinkinys.* Voronežas, 2007. p. 310.

37 1994 m. lapkričio 10 d. įstatyme „Dėl Lietuvos Respublikos įstatymo „Dėl Lietuvos Respublikos baudžiamojo, Pataisos darbų ir Baudžiamojo proceso kodeksų pakeitimo ir papildymo", priimto 1994 m. liepos 19 d., įsigaliojimo tvarkos" it was stated that cases of „dropping off" of vehicles (unauthorized temporary use of a vehicle) after the new laws came into force were to be treated as theft or robbery (*Valstybės žinios,* 1994, nr. 92).

priation in Lithuanian criminal law was somewhat "skewed", since the unauthorized temporary seizure of another's car is now recognized as theft, even if the case shows no signs of misappropriation or loss of property.[38] A. Drakšienė criticizes such a step of the legislator and points out that in this way the legislator not only substantially tightened the criminal liability for the said act, but also abandoned the essential feature of theft - the misappropriation of another's property.[39] Some authors (O. Fedosiuk) try to justify the purpose of misappropriation by expanding the feature of non-compensation which is characteristic of seizure. In this case, the consideration is also linked to the irreversibility of the loss of the property (the fact that it is permanently taken from the lawful management.[40] However, it must be acknowledged that in the absence of the Lithuanian CC regulating criminal liability for the unauthorized temporary use of a vehicle, it is more difficult to justify the purpose of misappropriation as a necessary feature of the seizure.

This problem is also reflected in different Lithuanian case law of car theft. In one case, A.T. was convicted of theft with no purpose of misappropriation. The court states: "<…> although the accused had no intention of appropriating the item, <…> the car was actually stolen. The fact that the car was soon abandoned by the accused <…> is not a reason to believe that the car was not actually stolen.[41] In another case, the perpetrator was acquitted of theft without identifying the purpose of misappropriation. The court states: "<…> since the seizure of another's property is an intentional act, it must be recognized that the content of the seizure, in conjunction with the subjective features of the act, must also include a feature of misappropriation. Meanwhile, the circumstances of the case show that the convict intended to use the car temporarily, only the administrative offense committed by M.K. and the arrest of the vehicle on that basis were the essential motive for R.D. to apply for the car theft.[42]

It should be noted that the criminal laws of most other countries provide for liability for the unauthorized temporary use of a vehicle (vehicle) without intent to steal[43].

38 FEDOSIUKAS, O.: Turtinių nusikalstamų veikų normų sistema naujame Lietuvos Respublikos baudžiamajame kodekse: probleminiai klausimai. Šiuolaikinės viešosios teisės problemos (Rusija-Lietuva) *Mokslo darbų rinkinys.* Voronežas, 2007. p. 311.

39 *Baudžiamoji teisė. Specialioji dalis.* 1 knyga. Vilnius 2001. p. 350.

40 FEDOSIUKAS, O.: Turtinė nauda kaip nusikalstamos veikos dalykas: sisteminė normų analizė. Baudžiamosios teisės specialiosios dalies klausimai. *Jurisprudencija,* 2004, t. 60(52), p. 89.

41 Ruling of Klaipėda Regional Court in criminal case No. 1-52-50/2007.

42 Ruling of the Supreme Court of Lithuania in criminal case No. 2K-228/2013.

43 Art. 165.05, 165.06, 165.08 of the New York CC distinguish among three degrees of unlawful use of a vehicle, depending on its repeatability. (New York Penal Law *http://wings.buffalo.edu/law/bclc/web/NewYork/ny3%28a%29%281%29-,htm)* (viewed 12-05-2018); Art. 335 of the CC of Canada provides for criminal liability for seizing a vehicle without consent (Criminal Code of Canada (R. S., 1985, c. C-46 *) http://wings.buffalo.edu/law/bclc/web/website. codecomp2.htm* (viewed 10-07-2018); Para 248b of German CC provides for criminal liability for use of a car or motorcycle against the will of the owner (Criminal Code of the Federal Republic of Germany https://www.legislationline.org/documents/section/criminal-codes/country/28/Germany/show) (viewed 13-05-2019); Art. 166 of the Russian CC - for unauthorized seizure of a motor vehicle or other means of transport with no intent to appropriate (The Criminal Code Of The Russian Federation No. 63-Fz Of June 13, 1996 https://www.legislationline.org/documents/section/criminal-codes/country/7/Russian%20Federation/show) (viewed 13-05-2019); Art. 494 of the Turkish CC - for unauthorized

This approach is welcomed, as seizure of the car and unauthorized temporary use of a car are completely different acts.[44] In addition, many authors emphasize: "if the culprit obviously wants to use the thing only temporarily, his act cannot be qualified as theft".[45] Currently, Lithuanian case law attempts to justify the purpose of misappropriation through the necessary feature of theft "*the content of specific intent"*. The court states: *"*<...>even though the property of another is unlawfully taken, but not intentionally directed towards the irreversible seizure of the another's property and the consequent damage to the victim, the act may be considered not to be in the nature of theft. If the culprit obviously wishes to use the thing only temporarily, has the purpose of returning it at a later date or does not otherwise intend to appropriate it, such conduct does not constitute all the features of *corpus delicti* of the offense<…>.[46]

There are also some issues regarding the criminological justification of the feature aggravating theft *"an organized group"*. The feature of an organized group qualifies theft in many countries (Estonia, Latvia, France, Czech Republic, Slovakia, Switzerland, Russia, Ukraine, Germany) as it is obvious that theft by such a group should be more dangerous. On the other hand, an organized group increases the danger not only of theft but also of many other crimes, therefore it is debatable whether the identification of this feature in the special part of the Lithuanian CC is appropriate.[47]

It should be noted that the concepts of an organized group differ from country to country. For example, an organized group under the Lithuanian CC[48] may be formed at any stage of the crime, neither the prior agreement of the group to commit certain crimes nor its permanence is required (Para 3, Art. 25, CC). Meanwhile, in order to establish the character of an organized group in Russia, both of these conditions are required (Art. 35 of the Russian CC). In Germany and Switzerland, for a theft to be recognized as a gang theft, that gang must be formed not for any crime, but for continuous robbery or theft (Art. 244 of the Germany CC, Art. 139 of the Switzerland CC).

It should be noted that according to Lithuanian case law the concept of organized group is interpreted more narrowly than under the CC, because the feature which states

short-term use of a private vehicle if it is returned to the owner or left in a place where the owner could easily find it or was taken with the clear intent to return it. (Уголовный кодекс Турции. Санкт–Петербург, 2003. С.313); Para 293a of Danish CC - for unauthorized use of another's vehicle (Jensen M. F., Greve V. The Danish Criminal Code & The Danish Corrections Act. 2nd Edition – Denmark, 2003. P. 59); Art. 289 of the Polish CC - for short-term use of a foreign motor vehicle (Criminal Code of the Republic Poland https://www.legislationline.org/documents/section/criminal-codes/country/10/Poland/show) (viewed 13-05-2019).

44 VOSYLIŪTĖ, A.: *Daktaro disertacija.* P. 55

45 *Baudžiamoji teisė. Specialioji dalis.* 1 knyga. Vilnius 2001, P. 350; ЛИСТ, Ф.: Учебник уголовного права.Особенная часть. Москва, 1905. С. 143.

46 Rulings of the Supreme Court of Lithuaniain in criminal cases No.: 2K-122/2012, 2K-108/2013, 2K-63-648/2016, 2K-406-507/2016.

47 More: VOSYLIŪTĖ, A.: *Daktaro disertacija.* P. 106, 230.

48 Under Para 3, Art. 25 of CC, an organised group shall be one in which two or more persons agree, at any stage of the commission of a criminal act, on the commission of several crimes or of one less serious, serious or grave crime, and in committing the crime each member of the group performs a certain task or is given a different role (Lietuvos Respublikos baudžiamasis kodeksas. *Valstybės žinios,* 2000, Nr. 892741).

that organized group "*may be formed at any stage of the crime*" provided for in Para 3, Art. 25, CC is not provided for in case law. On the contrary, according to Lithuanian case law, the identification of an organized group requires such features as "*prior agreement of the group"* and "*permanence*" of that group.[49] These features lead to a higher degree of organization of the group, which may influence the increase in the degree of dangerousness of the crime. Considering that under Lithuanian criminal law such features as "*prior agreement of the group"* and "*permanence*" are not necessary features of an organized group, it is difficult to justify the higher dangerousness of this group. Therefore, Lithuanian case law requiring a higher level of organization (prior agreement and permanence) to identify an organized group is welcome.[50] In view of this, it is advisable to adjust the definition of organized group in the Lithuanian criminal law, and to replace the feature *"possibility of agreement at any stage of the offense"* with the features *"prior agreement"* and "*permanence*" necessary for this group.

As to the prevalence of a particular circumstance (a type of theft) and its influence in recognizing that circumstance as the feature aggravating theft, it is necessary to assess whether the circumstance is unitary and not common to many thefts. According to G. Švedas, the prevalence of an act (circumstance) can be neither extremely rare nor very frequent.[51] T. Lesnijevski-Kostareva points out that in order to be recognized as an aggravating feature, a circumstance cannot be characteristic of the absolute majority of crimes (to be the "norm") because the features that are the norm for a particular crime fit into the framework of the *corpus delicti* of main crime.[52] In this respect, the features aggravating the theft as *"intrusion into a non-dwelling premises, ducts, storage facility, guarded area*" are to be criticized. Such cases account for 79 percent of all intrusions in case law.[53] These features, unlike intrusions into a (dwelling), its

49 Rulings of the Supreme Court of Lithuaniain in criminal cases No.: 2K-7-96/2012, 2K-304-942/2015, 2K-545-489/2015, 2K-103-976/2016, 2K-109-746/2017, 2K-60-942/2019.

50 Rulings of the Supreme Court of Lithuaniain in criminal cases No.: 2K-7-96/2012, 2K-304-942/2015, 2K-545-489/2015, 2K-103-976/2016, 2K-109-746/2017, 2K-60-942/2019.

51 ŠVEDAS, G.: *Baudžiamosios politikos pagrindai ir tendencijos Lietuvos Respublikoje.* Vilnius, 2006. P. 30. Some authors, such as V. I. Tkachenko, point out that the degree of danger of the crime does not depend on either the prevalence of the circumstance or the increase in the number of crimes (TKACHENKO, V. I.: Sostavy prestupleniy s otegayushchimi obstoyatel'stvami. Ugolovnaya otvestvennost' i yeye realizatsiya v bor'be s prestupnost'yu. M., 1988. p. 41) T. A. Lesnijevski-Kostareva agrees with that, but she emphasizes that the degree of danger of the act, and thus the qualification of the circumstance as an aggravating one, is assessed not by one but by two independent criteria of criminological selection. Therefore, the unitary circumstances or circumstances specific to most crimes, although affecting the degree of danger of the crime, should not be recognized as an aggravating feature of a crime. This requirement derives directly from the fact that aggravating features acquire the status of a feature of *corpus delicti* of a crime (LESNIYEVSKI-KOSTAREVA, T. A.: Differentsiatsiya ugolovnoy otvetstvennosti. Teoriya i zakonodatel'naya praktika. Moskva, 2000. p.264, 265).

52 Ibid.p. 264.

53 Data for 2007 and 2008 an analysis of Marijampole District Local Court and Vilnius City 1st District Court convictions for theft by intrusion into premises, storage facility or a guarded area (Para 2, Art. 178, CC) shows that in 18 cases theft was committed by intrusion into a dwelling, in 28 cases - into non-dwelling premises, in 36 cases - into a storage facility, and in 4 cases - into a guarded area (86 cases was reviewed).

accessories or *guarded* (dwelling) area, do not harm the additional object. It should also be emphasized that recognizing such a circumstance as an aggravating feature may lead to a minimal use of the main *corpus delicti* of theft,[54] which would be contrary to criminal law. For this reason, it is advisable for those authors[55] who criticize the introduction of these features into a single paragraph of the article.

4. Aggravating features of theft lacking clarity and (or) criminal justification

As regards the features aggravating theft, it is noteworthy that not all of them are defined precisely and clearly, not all of their contents are disclosed in the criminal law. As a result, case law often presents different interpretations of the features aggravating theft. For example, when incriminating an aggravating feature *"an intrusion into a premises, a communications cable duct system, storage facility or guarded area"* it is required to determine not only the intrusion (unauthorized access), but also the location of the intrusion (a premises, a communications cable duct system, storage facility or guarded area). As regards the feature of *storage facility,* it should be noted that the legislator does not provide the concept of *storage facility.* According to the case law of the Supreme Court of Lithuania, "a storage facility is defined as a facility specially designed or intended for the permanent or temporary storage of material goods, protected by physical, mechanical, special electrical or electronic safeguards".[56] It is therefore necessary to establish that a facility has a specific purpose and protection in order to be considered as a storage facility. However, there was no consensus in case law on whether *"a fuel tank of a car"* and *"a passenger compartment of a car*" should be recognized as a storage facility. In some cases, theft by intrusion into a car's fuel tank is considered simple theft and qualifies for the value of the property stolen,[57] in other cases as an aggravating one (as intrusion into storage facility).[58] However, since the end of 2011, the car's fuel tank is not considered storage facility in case law. The court has stated: "<…> although the fuel tank of the combine was protected by a cover, the primary purpose of the tank is not to store fuel. The fuel is not filled into the fuel tank for storage or protection purposes but to allow the vehicle to move and perform other tasks. Therefore, the fuel tank of a vehicle is not a storage facility by

54 Following the 2008 (till October 1) analysis of most of the rulings of the first instance courts of Lithuania convicting persons of theft (Art. 178, CC) shows that during the first nine months of 2008, a total of 1716 thefts were committed, of which 970 (57 percent) were aggravated thefts, of which 541 (56 percent) were *intrusion into premises;* 146 (15 percent) of *cars*; 55 (6 precent) of *pickpockets*; 199 (21 percent) - *openly*; 2 (0.2%) - *organized group*; 27 (2.8%) - *high value assets*. During this period thefts of *valuables of considerable scientific, historical or cultural significance* were not made.

55 LESNIYEVSKI-KOSTAREVA, T. A.: Differentsiatsiya ugolovnoy otvetstvennosti. Teoriya i zakonodatel'naya praktika. Moskva, 2000. p.264.

56 Bulletin of the Supreme Court of Lithuania. 2005, no. 23, P. 321.

57 Ruling of the Supreme Court of Lithuania in criminal case No. 2K-624/2010.

58 The court states: "<…> that G.A., acting together with R.S., attempted to steal diesel (540 Litas worth) from a fuel tank of the lorry, damaging the lock of the fuel tank <…>. Under the circumstances of the case, the criminal law (Para 1, Art. 22; Para 2, Art. 178, CC) - was properly applied <…>" (Rulings of the Supreme Court of Lithuania in criminal cases No. 2K-256/2010; 2K-142/2011).

its intended use".[59] This position of courts is to be welcomed as one of the necessary features of the *storage facility* is the purpose of the site (i.e. specially equipped or intended for the permanent or temporary storage of material goods) otherwise it would be difficult at all to justify the increased danger of the offense in question, since in the event of any theft, the property is held somewhere.

In Lithuanian case law, a seizure of another's property by intruding into a truck is usually qualified as a seizure of another's property by intruding into a storage facility.[60] In addition, a passenger car is in some cases of law recognized as storage facility, as well. The Supreme Court of Lithuania has stated: "A standard car is a vehicle for its intended purpose, but if a person's personal belongings or car accessories (car stereos, loudspeakers, etc.) are stolen from a car protected by mechanical or electronic means, theft is considered as intruding into a storage facility".[61] Such a position can be justified by the fact that the person, by locking or installing electronic storage devices in the car, gives this object another purpose, which is to protect not only the car itself, but also the material valuables contained therein. It should be emphasized that Lithuanian courts qualify theft from a passenger car by overcoming obstacles as intrusion into storage facility.[62] It should be noted that not only the car interior, but also the trunk of the car is considered a storage facility.[63] When another's property is stolen from an unlocked car, the act qualifies as simple theft[64] and the car is not considered storage facility because the property owner did not take special measures to protect the property in the car. In this case, the car does not meet the main feature of the storage facility - the purpose of storing material goods. Consequently, recognizing a car as a storage facility also depends on the car owner's actions.

Another aggravating feature of theft that is debatable is the *intrution into a communications cable duct system.* Criminal law does not reveal what that system is. Pursuant to Art. 50 of the Law on Electronic Communications: *Communication cable dust system* is a part of the electronic communications infrastructure consisting of

59 Ruling of the Supreme Court of Lithuania in criminal case No. 2K-534/2011.

60 For example, A.V. was convicted under Para 2, Art. 178, CC for <...> acting in cooperation with J.S., breaking a window glass and breaking into a commercial van belonging to the victim K.K., stole the property for 1 309,82 Litas. (Ruling of Marijampolė District Local Court in criminal case No. 1-236-537/2006).

61 Bulletin of the Supreme Court of Lithuania. 2005, no. 23, P. 321.

62 For example, G.B. property was stolen after breaking the mechanical security measures of his car, i.e. the property from the car was appropriated by breaking the car's rear window. The Court stated, that the seizure of property was carried out by intrusion into a storage facility and therefore qualified the offense under Para 2, Art. 178 of the CC. The Supreme Court of Lithuania supported this decision (Ruling of the Supreme Court of Lithuania in criminal case No. 2K-725/2005).

63 V.B. and S. G. were convicted of intrusion into a storage facility (car boot) and stealing two loudspeakers worth 120 Litas each (Ruling of Klaipėda Regional Court in criminal case No. 1A-366-417/2006).

64 *For example, V.V. was convicted under Para 4, Art. 178 of the CC of stealing J.N.'s property (150 Litas worth) from an unlocked boot of the car* (Ruling of Trakai District Court in criminal case No. 1-139-01/2004.39). A.B. was convicted under Para 1, Art. 178 of the CC of stealing a handbag (380 Litas worth) and its belongings from an unlocked car<…> causing 20 780 Litas damage to the victim (Ruling of Kaunas District Court in criminal case No. 1A-167-19/2006).

communication cable ducts, pipes, manholes and other devices (manhole hatches, covers, latches, communication cable supports, brackets, adjusting rings, etc.), for the putting through and (or) pulling out of communication cables, connection, repair and installation of communication cables and other electronic communications equipment.[65] With this definition, it is unclear whether the seizure of any property by intruding into manhole that is part of this system constitutes such a feature. On the other hand, whether theft of the cover of a manhole is to be regarded as having been committed by intruding into this system is questionable, since in this case the feature of intrusion (i.e., unauthorized access) which requires that the boundary of the object being crossed, will be disputed.[66]

In the Lithuanian criminal law, the aggravating feature of the theft "*pickpocketing*" is unclear and does not reflect the criterion of increasing the degree of danger. Under Para 2, Art. 178, CC for the purpose of qualifying pickpocketing, it is sufficient to determine two features: the place where the offense was committed (public place) and the location from which the property was stolen (clothing, bag or another item). However, these features do not indicate higher dangerousness of theft, since in this case a purse stolen from a bag left on a bench in the street would be pickpocketing (Para 2, Art. 178, CC), which is punishable more severely than the seizure of a whole bag, which is a simple theft (Para 1, Art. 178, CC). The court seeks to clarify this inaccuracy and illogicality of the legislature. For example, according to case law, the location of clothing, bag or another item (*possessed by the person*) is an additional feature required to incriminate pickpocketing. For example, the courts have stated: "<…>from the outer pocket of the jacket worn by L.B. <…>[67]", "<…>from K.R. backpack, which was on her back, stole her cell phone<…>".[68] Therefore, while another's property is stolen in public from the clothing, bag or another item not directly related to the victim, there is no pickpocketing on the grounds that: "purse stolen from a handbag hanging in a shop <…>".[69] In another case, the pickpocketing feature was removed because the bag from which the wallet had been stolen was placed on a grave next to the monument, and the victim had gone to another grave at that time. The court states: "<…> only the offense of seizure in the public place by stealing another's property from a person's clothing, bag or another item that the person directly possesses ... shall be classified as pickpocketing <...>".[70] On the other hand, sometimes the case law defines the term "*possessed by the person*" more broadly, i.e. this also recognizes situations where clothing, bag or another item is not only in direct contact with the person but also by or near him (for example, the culprit stole another's property from a bag standing on the ground near the victim.[71] Such a position is open to criticism because it may give uncertain and unequal interpretations of that feature, i.e. subjective assessment of the concepts of "near" and "by". Therefore, it is appropriate to include

65 Lietuvos Respublikos elektroninių ryšių įstatymas. *Valstybės žinios,* 2004-04-30, nr. 69-2382.

66 VOSYLIŪTĖ, A.: *Daktaro disertacija.* P. 149.

67 Ruling of Kaunas City District Court in criminal case No. 1-01671-579/2006.

68 Ruling of Kaunas City District Court in criminal case No. 1-2511-226/2006.

69 Ruling of Kaunas City District Court in criminal case No. 1-01984-579/2006.

70 Ruling of the Supreme Court of Lithuania in criminal case No. 2K-364/2005.

71 Ruling of Vilnius 1st City District Court in criminal case No. 1-1307-365/2006.

this feature only in situations where the clothing, bag or another item is physically present with or directly with the person.

Another feature aggravating theft, questioning both its lack of apparent increase in the degree of dangerousness and its clarity, is *an. asset comprising the infrastructure of legal persons of strategic or considerable importance to national security or a part thereof.* In order to incriminate that feature, it must first be established that the asset which has been seized belongs to a legal person of strategic or considerable importance to national security. It is not difficult to do this, because the list of these persons is specified in a separate law, according to which such persons are the company managing the international airports of Vilnius, Kaunas and Palanga, AB Lietuvos Geležinkeliai (private limited company „Lithuanian Railways"), AB Lietuvos Paštas (private limited company „Lithuania Post") and so on.[72] Secondly, all or part of the assets forming part of the infrastructure of the said companies must be seized. In this case, the question arises whether a part of the asset is not an asset, and it was necessary to distinguish the part of the asset as well, since in many words, the very essence of the norm is often lost. In addition, it is unclear what is meant by infrastructure assets.[73] In a general sense, it is a set of interrelated structural elements that enable or support the whole structure and its functioning.[74] Therefore, theft of a bicycle belonging to the Lithuanian Post would be treated as a much more serious theft than the theft of a bicycle belonging to a private person. So, don't we go back to the times when seizure of state assets (in this case, would involve companies) was punished much more severely than private. The above features do not require that the assets forming part of the corporate infrastructure are also relevant to national security, and therefore the seizure of any assets, even of non-strategic or non-strategic importance to national security, would be consistent with that feature. This also makes it difficult to see the obvious influence of these circumstances on the increase in the degree of dangerousness of the crime.

In addition, according to the principle of subjective culpability, a feature aggravating act is incriminated only if the culprit is aware of it.[75] Many of the features

72 2018 m. sausio 12 d. Lietuvos Respublikos strateginę reikšmę nacionaliniam saugumui turinčių įmonių ir įrenginių bei kitų nacionaliniam saugumui užtikrinti svarbių įmonių įstatymo Nr. IX-1132 pakeitimo įstatymas Nr. XIII-992. TAR, 2018-01-23, Nr. 1004**.**

73 http://zodynai.igloro.info/z/infrastruktūra/

74 http://zodynai.igloro.info/z/infrastruktūra/

75 Professor G. Švedas points out: "if *corpus delicti* of a crime are characterized by aggravating features describing the thing <…> or the act <...> then the culprit must also be aware of those features" (B*audžiamoji teisė. Bendroji dalis.* Vilnius, 2001. P. 206). Such a position was followed in the criminal law of interwar Lithuania. (STANKEVIČIUS, V.: Baudžiamoji teisė, 1925. p. 54; *Baudžiamoji teisė. Specialioji dalis.* Pirma knyga. Vilnius, 2001, P. 37). According to the established case law of the Supreme Court of Lithuania in criminal cases of theft, when there are features aggravating the act, it is necessary to establish that the culprit was aware of these features (Lietuvos Aukščiausiojo Teismo senato 2005 m. birželio 23 d. nutarimo Nr. 52„Dėl teismų praktikos vagystės ir plėšimo baudžiamosiose bylose"14 punktą. *Teismų praktika,* 2005, nr. 24). In other countries the position is similar (SCHÖNKE, A., SCHRÖDER, H., STERNBERG-LIEBEN, D.: *Strafgesetzbuch.* Kommentar. 27. Auflage. C.H. Beck, 2006. § 15. Rn. 26; WESSELS, J.: *Baudžiamoji teisė. Bendroji dalis,* 2003. p. 89, 90; GROPP, W.: *Strafrecht.* Allgemeiner Teil, 2001. p. 469; ROXIN, C. *Strafrecht. Allgemeiner Teil,* 1997. p.

aggravating theft are only listed in the criminal law, their contents disclosed in other laws or through experts, so some of these features are hardly comprehensible to the ordinary citizen without specific knowledge. Some authors (A. Abramavičius) argue that the current feature aggravating theft "*intrusion into a communications cable duct system*" is contrary to the principle of clarity of the criminal law. It is unlikely that the ordinary citizen would understand by this definition what exactly that system is. In addition, this subjective moment should be identified when qualifying such activities i.e., the culprit should understand that he is intruding into the communication cable duct system. There may be difficulties in proving this, especially given that it is not clear to every citizen exactly how that system looks.

In the prosecution of the *seizure of valuables of a considerable scientific, historical or cultural significance*, it is also necessary to identify the subjective side of the act: to determine the culprit's will to steal not any valuables, but valuables of a considerable scientific, historical or cultural significance. When assessing the culprit's perception of the importance of these valuables to science, history or culture, one must consider whether he or she was aware that these valuables are of considerable scientific, historical or cultural significance or, if he did not, whether he foresaw the seizure of such values as imminent or highly probable. This perception of the culprit may be determined by certain objective (location of the theft, nature, specificity, quantity, etc.) and subjective (age, profession, education, possession of expertise, etc.) circumstances.[76] In one of the cases, the court found that the circumstances of the case had reliably confirmed that, by stealing the bell, D.G. realized that the bell had considerable historical and cultural significance. In these circumstances, the court recognized: (1) the location of the stolen property - the bell - in the church, built in 1883, and (2) the fact that the church's architecture shows that these buildings were built before World War I; 3) appearance of the bell (exterior decorations, notes); 4) and the fact that D.G. and his accomplices stole the bell only on a second attempt, so they had a chance to see what it was.[77] In another case, the factual circumstances of the case testify to the perpetrators' perception of stealing valuables of considerable historical or cultural significance: "P. showed that B. often talked about the theft of some artwork; B., suggesting the accomplices commit the theft, pointed to a particular lodge and explained that it contained pictures (i.e., icons). In addition, since B. was not satisfied with the cheap items K. had taken from the lodge, he climbed through the window and selected the most valuable items.[78] There have been cases in the case-law where the culprits have been deprived of this aggravating feature without establishing their perception of it. For example, the removal of this feature in the case also took

424; JESCHECK, H. H. - WEIGEND, T._ *Lehrbuch des Strafrechts.* Allgemeiner Teil. Berlin, 1996. p. 309, 310; TAGANTSEV, N. S.: Russkoye ugolovnoye pravo, 1994. p. 233, 234; POZNYSHEV, S. V.: Osnovnyye nachala nauki ugolovnogo prava, 1912. p. 302; DAGEL', P. S. KOTOV, D. P.: Subyektivnaya storona prestupleniya... 1974, p. 86; VOROSHILIN, Ye. V. KRIGER, G. A.: Sub"yektivnaya storona prestupleniya, 1987. p. 60, 61).

76 Ruling of the Supreme Court of Lithuania in criminal case No. 2K-6/2012.

77 Ruling of the Supreme Court of Lithuania in criminal case No. 2K-122-693/2015.

78 Conviction of the murder of priest R. Mikutavičius in a criminal case (*Teisės problemos*, 2001, Nr. 2. P. 58, 62).

into account the behavior of the accused after the seizure, i.e. when they learned from the media that the stolen items were of considerable historical and cultural significance, they themselves reported to the police the location of these items.[79] Thus, the aggravating feature *"valuables of a considerable scientific, historical or cultural significance"* is lacking clarity and is attributed to the competence of experts with special vocational education, which may also raise questions of compliance with the principle of subjective culpability.

Conclusions

1. Not all the features aggravating theft provided for in Para 2 and 3, Art. 178 of the Lithuanian CC are criminologically justified: "*intrusion into a non-residential premises, communication cable system, storage or guarded area*", "*pickpocketing*", "*openly*", "*car*", "*an. asset comprising the infrastructure of legal persons of strategic or considerable importance to national security or a part thereof"* do not obviously affect the degree of dangerousness of the crime. Moreover, the feature "*intrusion into a non-residential premises, communication cable system, storage or guarded area*" does not meet the prevalence criterion, therefore, the inclusion of these features in the list of aggravating features of theft is criminologically unjustified.

2. It should be considered whether the aggravating feature "*the intrusion into the premises, the storage or guarded area"* should be abandoned and only the *"intrusion into the dwelling, its accessories or the guarded housing area*" should be considered as an aggravating feature of theft.

3. The feature *"openly"* that aggravates the theft does not explicitly guarantee the legislator's goals (to unify liability for pickpocketing and theft of another's property directly from a person) and does not indicate the greater danger of theft and is therefore redundant and must be eliminated.

4. According to the Lithuanian CC, the feature of pickpocketing that aggravates the theft is determined by two features, the place of the crime (public), the location of the property (clothing, bag or other item), according to case law, and an additional feature – the location of clothing, bag or other item (possessed by the person).

5. As seizure of a car does not indicate a clear increase in the dangerousness of the crime, it is appropriate to remove this feature from the list of aggravating features of theft. Having regard to the fact that the criminal law theory, case law and criminal laws of many other countries, contrary to the Lithuanian CC, establish the necessary purpose of appropriation for theft, it is advisable for the Lithuanian legislature to define theft in Art. 178, CC as seizure of another's property for the purpose of appropriation, or to return to the CC a norm providing for liability for the unauthorized temporary use of a vehicle, which would be interpreted as seizure of another's property for the purpose of appropriation.

6. The features that aggravate theft as *"intrusion into the communication cable system"* and *"valuables of considerable scientific, historical or cultural significance"* do not comply with the principles of clarity of law and subjective culpability, as their evaluation is the responsibility of experts with specialized vocational education.

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Summary: Doubtful Aspects of the Application of the Features Aggravating Theft in Lithuania Case Law

The article deals with the problematic aspects of criminalization and application in court practice of the features qualifying theft provided for in Para 2 and 3, Art.178 of the Lithuanian CC. The aggravating features of theft are assessed in terms of criminological justification and clarity of criminal law. Based on a systematic analysis of criminal law theory and jurisprudence, the authors note that not all the features aggravating theft provided for in Para 2 and 3, Art. 178 of the Lithuanian CC are criminologically justified: “intrusion into a non-residential premises, communication cable system, storage or guarded area”, “pickpocketing”, “openly”, “car”, “an. asset comprising the infrastructure of legal persons of strategic or considerable importance to national security or a part thereof“ do not obviously affect the degree of dangerousness of the crime. Moreover, the authors state, that the feature “intrusion into a non-residential premises, communication cable system, storage or guarded area” does not meet the prevalence criterion, therefore, they propose to remove these features from the list of features aggravating theft. The authors also point out that the features that aggravate theft as “intrusion into the communication cable system” and

"valuables of considerable scientific, historical or cultural significance" do not comply with the principles of clarity of law and subjective culpability, as their evaluation is the responsibility of experts with specialized vocational education.

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