

Criminal Characterization of Appropriation and Embezzlement and Their Separation

Jumber Mailashvili, PhD student

Grigol Robakidze University, Tbilisi, Georgia

Abstract

During the implementation of the study we will review the definition set forth following the amendments and additions made by the Parliament of Georgia on October 23, 2008 in the Article 182 (appropriation or embezzlement) of the Criminal Code of Georgia. After the amendments in legal literature and judicial practice, there are critical remarks with regard to the norm disposition. In the above study I will refer to the qualification issues of appropriation or embezzlement in terms of both similarity and separation. We aim to examine and highlight the main problems that can be created in the activities of investigative and judicial bodies unless the Parliament of Georgia includes relevant amendments and additions in the Article 182 of the Criminal Code of Georgia. I will provide hypothetical cases and comparison examples and try to justify the legal qualification with regard to the Article for discussion. I will try to highlight the main issues that, during the application of the norm, will rise a problem in judicial practice due to the vagueness of the norm. In the last part of the paper, I will provide the similarities and differences of appropriation and embezzlement. As well as the analysis of the issues that create the problem during the qualification of the action.

Keywords: Criminal Code, appropriation, embezzlement, other's property, property rights, legal ownership or governance

Introduction

The goal of the above study is to provide a short description of the Article 182 (appropriation or embezzlement) of the Criminal Code of Georgia and their separation with the analysis of the objective as well as subjective side of the action. Considering the recent events in the country, some regulatory aspects of the given Article have become controversial. The vagueness of the norm, with respect to the implementation of the action, rises variety of opinions. With the analysis of the circumstances, the

qualification of the action becomes controversial which, in turn, gives rise to the incorrect interpretation of the norm and mistakes in judicial practice.

The subject of the study is how to give the right qualification to the appropriation and embezzlement. We should evaluate what is meant in the elements of the norm disposition. We should separate the main structures, appropriation and embezzlement, of the Article 182 of the Criminal Code of Georgia. Regarding the issue, an action was brought in the Constitutional Court of Georgia because of the case of “Cables” about which the decision has not been made.

Materials and Research Methodology

While writing this article I analyzed the cases in my practice of law. I also studied judicial practice, got introduced to the Public Defender’s opinion as a friend of the court about the action brought in the Constitutional Court of Georgia with regard to the Article of appropriation and embezzlement. As for the research methodology, while working on the article, I used analysis, synthesis, comparison, generalization and concretization.

Pursuant to the Article 182 of the Criminal Code of Georgia, there is considered criminal responsibility for appropriation or embezzlement. The disposition of the Article, before the amendments were implemented on October 23, 2008, was as follows: “illegal appropriation or embezzlement of other’s movable property if this property was under the legal ownership or governance of the appropriator or embezzler”. After the implementation of the amendments, the disposition of the norm was read as follows: “illegal appropriation or embezzlement of other’s property or property rights if this property or property rights were under the legal ownership or governance of the appropriator or embezzler” i.e. the word “movable” was removed and were added the words “property right”. The necessity of making amendments, according to the explanatory note of the author of the Bill is provided in accordance with the Article 17 of the United Nations Convention “against corruption” in order to increase efficiency of use of the Article 182 of the Criminal Code of Georgia, the definition has been specified”.

The Article 182 of the Criminal Code of Georgia consists of 3 paragraphs. The first part of the Article 182 represents less serious crime. The second paragraph contains the following qualifying factors: a) by a group’s conspiracy; b) repeatedly; c) that has caused a substantial damage; d) by using one’s official position; 2nd part belongs to the category of serious crimes. The action referred to in Paragraph 1 or 2 of this Article, perpetrated: a) by an organized group; b) in large quantities; c) by the one who has been twice or more than twice convicted of illegal appropriation or embezzlement of other’s movable objects. Let us consider some of the qualifying

circumstances. In the Criminal Code of Georgia, in the Article 182, paragraph 2, the point “a” envisages the action committed by the prior agreement of a group. According to the paragraph 2 of the Article 27 of the Criminal Code of Georgia "The crime shall be committed by a group with aforethought if the participants therein previously came in cahoots to commit the crime." The group's prior agreement to commit the crime implies co-perpetration and in such cases complicity cannot establish illegal appropriation or embezzlement committed by a group with aforethought. Worth mentioning the definition given in the point “c” of the paragraph 3 of the Article 182: c) by the one who has been twice or more than twice convicted of illegal appropriation or embezzlement of other’s movable objects. First of all the definition which refers to illegal appropriation or embezzlement is noteworthy. This definition does not mention the "property rights", which was given in the Article 182 after the amendments and additions in the disposition of the article. On October 23, 2008 the change was argued by the Parliament on the grounds that the law specifies the definition of the composition and the following definitions and terminology are introduced in the Articles 180 (forgery) and 181 (extortion). In the point “c” the concept is vague: by the one who has been twice or more than twice convicted of illegal appropriation or embezzlement of other’s movable objects. Misappropriation is a crime against property of the subjective rating of "the goal of appropriation." For example, if a person twice or more times was convicted for fraudulently illegal appropriation of property rights (for forgery), if the norm of the point "c", paragraph 3 of the Article 182 should be extended "for illegal appropriation" is what I believe is the legislative shortcoming. I think the court cannot use the qualifying circumstances of this case. Definition of the law contrary to its literal meaning is forbidden in the criminal law, because it is against the principle of legality. The Court does not clarify the law so that regulations adopted by the Parliament to change according to private capacity. It violates the principle of separation of powers. It violates the principle of separation of powers. Since the change in the law or amendment right in the Constitution of Georgia is awarded to only the legislature body.

This action requires a special entity. In the legal literature there is indicated that the executor of the action considered by the Article 182 of the Criminal Code is special. “Misappropriation and embezzlement are characterized by the fact that the offender is entitled to own the property under legal ownership or governance” (1, 389); appropriation will be finished when the appropriator is allowed to manage the property or property rights.

Embezzlement is committed by a special subject and implies the sale, donation or otherwise, alienation of the property under the legal ownership

or governance of an embezzler during which the income will not be transferred to the owner and moves to the illegal use of the embezzler. Embezzlement is over from the moment of illegal disposal of other's property or property rights.

Legal ownership on the property will be created in the form of a Contract, duties or special assignment. Based on the specifics of the job, if a person has access to other's property and possesses the property secretly, this action will be qualified as theft. For example, a craftsman who does repairs in another person's flat and secretly possesses flat owner's personal property, this action will be qualified not as appropriation but as theft.

Appropriation or embezzlement are directly intended. The motive of the crime is mercenary. According to the opinion expressed in legal literature: a person "understands that due to his/her actions, he/she harms the property owner and even wants to harm them. This time he/she acts with a mercenary motive and aims to get illegal income at the expense of others" (1,390).

The part of the disposition of the Article 182 of the Criminal Code which refers to the issue of "governance" of the property or property rights is controversial because it is vague. Concept of "governance" gives the possibility of its broad definition. In practice there may be such a case that the property is under the governance of "A" but it can be disposed by other person who has the right of it. The question is: Should the disposal of the property or property right by other person be imputed to "A" as embezzlement or not for the legal governance of the property or property right? In this case, yes, "A" does not have the mercenary motive. I think that in the above case the action of "A" should not be classified as embezzlement.

The difference between appropriation and embezzlement lies in its objective side. For examples, the seller took the TV from the store and hid it in his house. The cashier took the amount of money from the cash box and deposited it to his personal bank account. And in the case of embezzlement the offender disposes of the property under his legal ownership. Professor Nona Todua believes that "embezzlement" cannot be further criminal activity of appropriation. For example, the warehouse manager misappropriated the property being in the warehouse and then sold it, this action should be qualified as appropriation not as embezzlement" (2,165).

Conclusion

Based on the analysis of these circumstances we can say that the presence of the given "property" and "property rights" in the disposition of the Article 182 of the Criminal Code of Georgia under legal ownership or governance creates vagueness with regard to the definition of the norm. Thus, ownership can be measured individually in every particular case and

“governance” is a general term which allows its broad interpretation and the attitude towards it is ambiguous. Normative content of the concept of “governance” is vague. We believe that the Parliament of Georgia should amend the part 1 of the Article 182 of the Criminal Code of Georgia and remove the words “or under governance” from the disposition of the norm. I also consider that the point "c" of the paragraph 3 of the Article 182 should be amended and supplemented by the words of another person's property "or property rights" of illegal appropriation.

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