

котрі власники залишають у дворах своїх будинків або й навіть на необлаштованих територіях. Якщо такий автомобіль викрадуть? Який все-таки принцип треба буде брати за основу кваліфікації злочину? Недоторканності приватної власності чи наявності її охорони?

Тим паче що залишені в дворах транспортні засоби стають для злочинців не тільки об'єктом заволодіння, а й хуліганських дій-пошкоджень, підпалів тощо.

Тож, на мою думку, у законодавстві слід врахувати реалії життя автовласників і, зокрема у мегаполісах, створити умови правового поля для запобігання злочинному посяганню на транспортні засоби, виокремити цю категорію злочинів і розширити їхню криміналістичну класифікацію, передбачену ст. 289 КК України («Незаконне заволодіння транспортним засобом»).

Можна зазначити, що спосіб незаконного заволодіння транспортним засобом являє собою комплекс взаємопов'язаних дій злочинців з підготовки, вчинення та приховування злочину і предмета посягання, об'єднаних єдиним злочинним умислом.

Спосіб вчинення злочину характеризується такими діями: доступ до транспортного засобу – проникнення на стоянку, в гараж, автотранспортний бокс чи інше приміщення для зберігання; проникнення у салон транспортного засобу; запуск його двигуна; переміщення транспорту з місця його стоянки. Це кримінальне діяння пов'язане не тільки з кримінальним правом, а й із низкою інших юридичних наук: криміналістикою, цивільним та адміністративним правом.

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# Which Principle Is More Important – the Principle of Inviolability of Private Property or the Principle of Availability of Its Protection?

## *Some Aspects of Misappropriation of Vehicles*

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**The main aspects concerning the misappropriation of vehicles are briefly summarized. The contents of the basic Article of the Criminal Code of Ukraine regarding this issue (Article 289) are analyzed. The views of different scientists regarding the issue concerned are explored. The problematics of this phenomenon are touched upon and recommendations for future research are provided.**

**Keywords:** misappropriation of a vehicle, theft, way of committing a crime

The issue of the prevention and investigation of crimes related to the misappropriation of vehicles (mostly cars) is acute due to the following reasons: the number of automobiles in Ukraine is steadily growing; private vehicles have moved from the category of luxurious goods to that of everyday use; increase in vehicles' prices have transformed them into attractive objects to be encroached.

According to official statistics of the Ministry of Internal Affairs of Ukraine, in 2013, the number of reported crimes under Article 289 of the Criminal Code of Ukraine (hereinafter, the CCU) 'Misappropriation of a vehicle'

decreased by 10.5 per cent compared to 2012. However, detection indices regarding cases of the above-mentioned category also decreased from 62.4 per cent in 2012 to 61.3 per cent in 2013 [9, 2014: 14].

Although, most criminologists do not pay proper attention to the investigation of the relevant crimes: current textbooks either do not contain descriptions of the appropriate criminalistic methods or explore them superficially and only in cases when the identity of a person suspected of committing a crime has already been proved. In typical investigative situations arising during an investigation



of the misappropriation of a vehicle, common traces of this type of crimes and methods used while committing it are not considered.

Researches and criminalistic assessment of such crimes drew a lot of attention from different scientists, e.g., R. Belkin, V. Bakhin, A. Vasyliiev, I. Vozgrin, V. Shepitko, G. Zuikov, G. Tanasevych, O. Chelysheva, M. Skrygoniuk, etc. The examination of methods to misappropriate vehicles was made by A. Myshutochkin, V. Zhuliev, V. Korneliuk, F. Kulmashev, and other scientists.

Misappropriation of a vehicle (Article 289 of the CCU) shall mean its intentional, illicit seizure (from a parking place or while it is driven) carried out for any purpose and against the will of its owner or lawful user by running the engine, towing, loading on the other vehicle, involuntary removing the people concerned from driving, and forcing them to start or continue the motion [7]. Such appropriation may be committed secretly or openly, by the means of deception or abuse of trust, with the usage of violence or threats.

System analysis of the provisions of the Special Part of the CCU allows for identification of the following essential elements of this type of crimes:

- 1) it involves active behaviour, i.e. the action, only;
- 2) the action is shown by obtaining the ability to drive such a vehicle;
- 3) the behaviour of a guilty person is illegal, he/she does not have either actual or conditional right to the vehicle which is being appropriated;
- 4) the appropriation of a vehicle is carried out without the clearly expressed and real will of its owner or lawful user. Thereupon, the will of the victim is ignored (during the secret appropriation), suppressed (by using violence or threatening to use it) or falsified (while the seizure is carried out by means of deception).

The misappropriation is recognized to be completed from the time when the vehicle began moving by starting the engine or towing. If the appropriation occurs while the vehicle is being driven, it is recognized to be completed from the moment when this vehicle is put under control.

It should be noted that breaking into a cabin, garage or other storage; efforts to start the engine or tow the vehicle with the aim of its seizure should be considered as an attempt to commit a crime.

It is not illegal to seize the vehicle in a state of emergency, for instance, in order to quickly deliver a seriously ill person to the hospital, to suppress a disaster, to remove another danger impending over people, interests of society or the state [Beschastnyi, 2013: 3].

Seizure of the vehicle carried out by a group of people having prior collusion thereof takes place in the case when two or more people had agreed to jointly committing the crime in advance, i.e. before the beginning of the activities that objectively constitute the elements of the crime, and it does not matter who of them drew that vehicle. However, under Article 289 of the CCU, the people who had not participated in seizure of the vehicle but travelled by it after its misappropriation by a guilty person are not subjects to criminal responsibility.

According to parts 2 and 3 of Article 289 of the Criminal Code of Ukraine and Item 3 of the Note to this Article, financial damage shall be recognized as significant in the case when actual damages equaled to the amount between 100 to 250 tax-exempt minima of the citizens' incomes, and be considered as great if such damages amounted to more than 250 such minima [7].

Resolving the issue concerning the fact whether damages were actual or not one should take into consideration the provisions of Item 1 of Part 2 of Article 22 of the Civil Code of Ukraine stating that such damages are the losses to be suffered by a person due to destruction or deterioration of the item, as well as the expenses that he/she has incurred or should incur in order to restore their violated rights [2].

If upon the misappropriation of the vehicle it was not deteriorated, its technical condition was not worsened and

requires no recovery or the amount of appropriate expenses is less than the sum referred to in Item 3 of the Note to Article 289 of the CCU, such constituent element of a crime as causing significant or great damages is absent.

In cases when a person destroyed the vehicle he/she had illegally seized before or brought it into such a state that it completely lost its value and can no longer be used for its intended purpose, the amount of actual damages shall be equal to the value of the car as of the date of the commission of the crime. This issue should be settled in the same way if the vehicle has not been found after its misappropriation.

In the case when the actions of a guilty person caused deterioration of individual parts, units or assemblies of the vehicle, the amount of actual damages should be determined considering the value of its spare parts and reviving repair.

One should agree with D. Patreliuk who states that the method of committing the misappropriation of a vehicle is one of the key elements of criminalistic characteristics of this crime. Determination of the method of misappropriation of a vehicle would allow solving several criminalistic tasks aimed at: ensuring the completeness, comprehensiveness and effectiveness of the investigation; searching and revealing traces and inter-relations of evidence; detecting individuals having committed a crime; preventing commission of the above-mentioned crimes, etc. [Patreliuk, 2010: 711].

S. Shkoda, for example, offers his own classifications of misappropriations of motor vehicles to be made as follows:

- due to the way of seizure of a vehicle, misappropriation can be carried out through its secret acquisition; open appropriation; or seizure by the means of deception and abuse of trust;
- due to the territorial features of activities of a criminal group committing misappropriations of vehicles, they are divided into crimes committed by an interstate criminal group; committed by a criminal group of the inter-regional level; or committed by a local criminal group;
- due to the number of misappropriations of vehicles, they can be divided into single and serial ones;
- due to the type of violence used while seizing a vehicle, the misappropriation could be accompanied with violence which is not dangerous to life and health of the victim; accompanied with the threat of violence which is not dangerous to life and health of the victim; accompanied with violence to be dangerous to life and health of the victim; accompanied with the threat of violence to be dangerous to life and health of the victim;
- due to the damages inflicted by misappropriations, they are those which caused significant financial damage; and those which caused great financial damage;
- due to the number of people who participated in the illicit seizure of a motor vehicle, the misappropriations could be carried out individually; by a group of people; or by an organized criminal group;
- due to characteristics of the scene of crime, the misappropriations of vehicles may be committed in the open country or through penetration into the premises or other storage;
- due to the level of professionalism of the crime's perpetrator, the misappropriations could be committed by 'a professional', 'an amateur', or 'a dilettante';
- due to the type of a vehicle, the misappropriation may be committed in respect of motor vehicles, rail vehicles (trams, trolleybuses), motorcycles and other two-wheelers [Shkoda, 2010: 2].

It should also be mentioned that, in accordance with the Ruling of the Plenum of the Supreme Court of Ukraine № 14 of 23 December 2005, the misappropriation of a vehicle shall be considered as "its intentional, illicit seizure (from a parking place or while it is driven) carried out for any purpose and against the will of its owner or lawful user by running the engine, towing, loading on another vehicle, involuntary removing the people concerned from driving, forcing them to start or continue the motion, etc. Such appropriation may be committed secretly or openly, by the

means of deception or abuse of trust, with the usage of violence or threats" [3].

The purpose of illegal actions is irrelevant to the qualification of the crime. The appropriation of a vehicle can be carried out for any purpose, including its theft. Thus, the way of appropriation of the vehicle is determinative for the nature of a crime.

A. Kandaurova mentions that such a crime is mostly committed by people belonging to the respective 18-25 age bracket. The majority of criminals have low level of education, do not study or work. Three quarters of all misappropriations of vehicles are perpetrated by people who are under the influence of alcohol, drugs or other intoxicants. More than half of all subjects of this crime commit it for the first time; a fifth of the criminals had previous convictions for identical or similar offenses [Kandaurova, 2010: 441].

If a person is unlawfully seizing a vehicle of the other person being in motion, the crime should be considered as completed at the time when its owner or lawful user starts violently moving the vehicle in the direction designated by a guilty person [Iemelianenko, 2009: 14].

As noted by D. Patreliuk, the method of committing the crime is characterized by the following actions: access to the vehicle, i.e. penetration to parking, into a garage, motor vehicle box or other premises for storage; penetration into the saloon of the vehicle; running of the vehicle's engine; moving of the vehicle from its parking place [Patreliuk, 2010: 716].

However, the legislation does not clearly regulate whether the seizure of the vehicle by the employees of the internal affairs agencies on the ground of presence of state symbols on a car or its deterioration may be considered as misappropriation of this vehicle. It is also unclear who, according to which law and in which Ukrainian court would accept the claim and reimburse the owner for the value of the damaged vehicle.

Such a phenomenon as 'Automaidan' appeared during the winter protests in 2013-2014 in Ukraine and the consequences of loss of property by its active members remain unexplored in Ukrainian legal science. And it is obvious that thus far the losses cannot be recompensed in practice due to many 'loopholes' in the legislation. It is controversial to assess such a phenomenon as the appropriation of a car, that was not left in an official parking place (in a garage, motor vehicle box or another room for storage), to be carried out through penetration into its saloon, running the engine or moving from a parking place. So, regulation of this type of appropriation can also be considered as one of the above-mentioned 'loopholes'. In the simplest terms, it concerns vehicles left by the owners in the yards of their houses or even in unsettled areas. What to do if this car is stolen? Which principle should be taken as the basis of determining the nature of the crime – the principle of inviolability of private property or the principle of availability of its protection?

The more especially as the vehicles left in the yards become not only subjects to appropriation, but also subjects to disorderly conduct of the criminals causing their deterioration, arson, etc.

So, in our opinion, lawmakers should take into account the realities of car owners. In particular, they should create a special legal framework in order to prevent criminal encroachments on vehicles in metropolitan cities; to distinguish this category of crimes and expand their criminalistic classification as foreseen by Article 289 of the Criminal Code of Ukraine ('Misappropriation of a vehicle').

One may note that the method of misappropriation of a vehicle is a set of interrelated actions of criminals to prepare, commit and conceal the crime and the subject of abuse that are connected by a common criminal intent.

The method of committing the crime is featured by the following actions: to gain access to the vehicle, i.e. to penetrate to the parking, into a garage, motor vehicle box or other premises for storage; to penetrate into the saloon of the vehicle; to run the engine of the vehicle; to move the vehicle from its parking place. Thus, this criminal act is connected not only with criminal law, but also with a number of other legal sciences, including criminology and civil and administrative law.

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