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SOME THEORETICAL AND JUDICIAL PRACTICE ISSUES ON THE OFFENCE OF EMBEZZLEMENT

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Embezzlement is one of the most controversial issues in Romanian doctrine and jurisprudence. Gathering the results of research and criminal practice on the subject, this article is a synthesis intended to open the way to new research for our criminals. As such, we reproduce some of the controversial aspects and we expose our position with critical nuances towards the court that pronounced one solution or another. The importance of this is apparent not only from the novel elements that the legislator has inserted into the Criminal Code but also from comparative criminal law. Moreover, the importance of the issue also stems from the fact that the legal treatment of offenders differs according to the view taken.
Keywords: *embezzlement offence, theoretical and practical problems, connections, kinship.*

UNELE PROBLEME TEORETICE ȘI DE PRACTICĂ JUDICIARĂ PRIVIND INFRACȚIUNEA DE DELAPIDARE

Delapidarea se înscrie printre cele mai controversate problematici din doctrină și jurisprudență română. Adunând rezultatele cercetărilor şi a practicii penale în materia tratată, articolul de față reprezintă o sinteză destinată să deschidă drumul unor noi cercetări pentru penaliștii noştri. Ca atare, redăm unele aspectele controversate și expunem argumentat propria noastră poziție cu nuanțe critice la adresa instanței care a pronunțat o soluție sau alta. Importanța reiese nu numai din elementele de noutate ce au fost inserate de către legiuitor în Codul penal cât şi în legislația penală comparată. Mai mult, importanţa problemei reiese şi din faptul că tratamentul juridic al infractorilor este diferit, după cum se adoptă un punct sau altul de vedere.
Cuvinte-cheie: *infractiune, delapidare, probleme teoretice si practice, conexiuni, înrudiri.*

QUELQUES PROBLÈMES THÉORIQUES ET PRATIQUES JUDICIAIRES SUR LE CRIME DE DÉTOURNEMENT DE FONDS

Le détournement de fonds est l'une des questions les plus controversées de la doctrine et de la jurisprudence roumaines. Rassemblant les résultats de la recherche et de la pratique criminelle en la matière traitée, cet article est une synthèse destinée à ouvrir la voie à de nouvelles recherches pour nos pénalistes. En tant que tel, nous minimisons certains des aspects controversés et présentons notre propre position avec des nuances critiques par rapport au tribunal qui a prononcé une solution ou une autre. L'importance émerge non seulement des éléments de nouveauté qui ont été insérés par le législateur dans le Code pénal, mais aussi dans la législation pénale comparée. De plus, l'importance du problème découle également du fait que le traitement juridique des délinquants est différent, selon qu'un point de vue ou un autre est adopté.
Mots-clés: *crime, détournement de fonds, problèmes théoriques et pratiques, liens, parenté.*

НЕКОТОРЫЕ ПРОБЛЕМЫ ТЕОРЕТИЧЕСКОЙ И СУДЕБНОЙ ПРАКТИКИ ОТНОСИТЕЛЬНО ПРЕСТУПЛЕНИЯ О ХИЩЕНИЯХ

Хищение является одним из самых спорных вопросов в румынской доктрине и юриспруденции. Собрав результаты исследований и криминальной практики по рассматриваемому вопросу,

данная статья представляет собой синтез, призванный открыть путь к новым исследованиям для наших криминалистов. Таким образом, мы воспроизводим некоторые спорные моменты и аргументированно излагаем собственную позицию с критическими нюансами в адрес суда, вынесшего то или иное решение. значимость вытекает не только из новых элементов, внесенных законодателем в Уголовный кодекс, но и в сравнительное уголовное законодательство. Более того, значимость проблемы вытекает из того, что правовое обращение с преступниками различно в зависимости от той или иной точки зрения.

Ключевые слова: *преступление о хищениях, теоретические и практические проблемы, связи, родственники.*

Introduction

1. In this article we propose to present some of the solutions given by the court in relation to the objective and subjective conditions necessary for the existence of the crime of embezzlement, in its various forms and, after that, we deal with some aspects related to the sanctioning of this criminal act. We believe that a systematization of the material and some published examples from judicial practice can constitute a practical guide and a way to achieve that unity of views so important for the formation and consolidation of criminal science. Also, the importance and actuality of the researched theme results from the new elements that were inserted by the legislator both in the content of the new Penal Code, and which come to modify in a substantial way the legal text, as well as in the comparative criminal legislation.

2. In the criminal doctrine, it was said that the crime of embezzlement[1], due to its features, presents, within the first group of service crimes, the *highest degree of generic social danger*. In order to characterize the crime of embezzlement, it is necessary that, in addition to the *two* determining elements in establishing social dangerousness, namely, the *complex* legal object and *the quality of the subject* (that is, its legal position in relation to the stolen property), some adjacent elements should also be taken into account[2].

Key research insights

The text of this article, in the editorial which it received in Article 295 paragraph 1 of the Criminal Code, has the following content, in its first part: the use, appropriation or trafficking by an official, in his or her interest or for another, of money, values or other property which he or she manages or administers. Then, paragraph 1 of Article 272, letters b) and c) of Law no. 31/1990, republished, provides for *a special form of embezzlement*, but with subsidiary applicability to the main rule provided by the Criminal Code, consisting in the act of the founder, administrator, general director, director, member of the supervisory board or director or legal representative of the company: b) uses, in bad faith, the goods or credit enjoyed by society for a purpose contrary to his/her own interests or for his/her own benefit or to favor another society in which he/she has interests directly or indirectly: c) it is borrowed, in any form, directly or through an interposed person, from the company he/she manages, from a company controlled by him/her or from a company controlling the company he/she manages, the amount borrowed being above the limit set out in article 144^4 paragraph (3) letter(a), or make one of these companies give any guarantee for their own debts[3].

At the same time, according to article 295 of the Penal Code related to art. 308 Penal Code, constitutes *an attenuated variant* of the offense of embezzlement the commission of the act by the persons who exercise, permanently or temporarily, with or without

[1] Vintilă Dongoroz, *Drept penal,* 1939, p.194; Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Petrovici Simona, *Infracțiuni contra avutului obștesc*, Ed. Academiei Române, 1963, p.117.

[2] Vintilă Dongoroz, *Explicații teoretice ale codului penal român,* Partea specială, vol. III, Ed. Academiei Române, 1971, p. 176.

[3] Mihail Udroiu, *Sinteze de drept penal,* Editura, C.H.Beck, București, 2020, p. 750.

remuneration, an assignment of any nature in the service of a natural person among those provided for in article 175 paragraph (2) Penal Code or within any legal entity. It can be seen that embezzlement is *an aggravated variant* that has produced particularly serious consequences.

At the same time, unlike the previous criminal code (1969), which regulated the crime of embezzlement in Title VI, dedicated to crimes against patrimony[4], thus suggesting that the criminalization had in mind *the protection of the patrimony* of the person *first*, who gave in the management or administration to the author of the embezzlement of the assets, object of the execution act, and in *the subsidiary*, protected the service relations, the Criminal Code in force *included* the embezzlement within *the service crimes* considering its main legal object. We find the justification in the statement of reasons. Thus: "in the project, this deed was brought where it belonged, namely in the group of service crimes, because, by committing it, the social relationship at work is first harmed and, secondarily, the patrimony of a legal person is affected. The solution of including the crime of embezzlement in this category is traditional in our law, it being consecrated by the legislator of the Criminal Code from 1936 (art. 236). The situation is the same in other legislations, such as art. 432 Spanish Penal Code, art. 314 Italian Penal Code, art. 432-15 French Penal Code".

Moreover, in some textbooks[5] it has been mentioned that the text's movement *does not* only produce effects on a formal level, but it also brings more clarity regarding the conditions of typicality of the text. Thus, in the current normative framework, it is even more clear what is the ranking of social values protected by the norm: The first place is the protection of a fair and honest performance of the office by the public official or the private official (person from art. 308 of the Penal Code), in the second is the protection of the patrimony of the person who gave the property object of embezzlement into the administration or management of the author.[6] Therefore, in order to set up the act, it is no longer necessary to determine with maximum rigor the existence of damage to the victim's patrimony, especially concerning the abusive conduct of the public official proper or assimilated, from the perspective of its obligation to perform according to its function.

However, we notice that, in judicial practice, most of the time, the damage caused by the action of embezzlement is not so well outlined, especially when we discuss this type of crime.

Under this aspect, it was argued, in a certain view, that, in order for the facts that have been established by the court to be punished, for them to constitute the analyzed crime, it is required that they *perfectly* match all the conditions in the text of the law that punishes this crime[7]. This perfect match between the appearance of the material fact and the conditions in the text of the law must be observed with great care, because if this match does not exist *completely*, then it cannot be said that the given fact constitutes the crime of embezzlement[8]. The argument is found in the principle of legality of criminalization and sanctions of criminal law[9], that is, strict observance and application of the law, requires that when applying a certain text of law, the situations that the text provides,

[4] Tudorel Toader, *Drept penal roman*, Partea specială, vol. I, Ed.Universul Juridic, București, 2019, p. 255.

[5] Sergiu Bogdan, *Drept penal*. Partea specială, Ed. Universul juridic, 2020, p. 234; Vasile Dobrinoiu, Norel Neagu, *Drept penal,* Partea specială. *Teorie și practică judiciară*, Ed. Universul Juridic, 2011, p. 475.

[6] Ion Ristea, *Drept penal*, Partea specială, vol. II, București, 2020, p.48.

[7] Vintilă Dongoroz, *Tratat, Drept penal,* 1939, op. cit p.197.

[8] Petre Dungan,Tiberiu Medeanu, Viorel Pașca, *Drept penal,* Partea specială, vol. II, Ed. Universul Juridic, 2012, op.cit.p. 7.

[9] George Antoniu, *Noua legislație penală. Reflecții preliminare*, în Noua legislație penală tradiție, recodificare, reformă, progres juridic, vol.I Bucureşti, Ed. Universul Juridic, p. 24.

to fit (typicality) exactly with the situations contained in the material fact to which the text has been applied. It must be respected by both the citizens and the courts, and therefore *no* haste or ease is permitted when it comes to investigating whether or not an act constitutes a criminal offense. On the other hand, in order to find this match between text and fact, *every condition in the text must be examined*, and after it has been clearly understood what meaning that *condition* has, it must be verified whether it finds in the facts of the case a situation which is perfectly suited to it. This exam should be done for each condition, *thoroughly, seriously, carefully*.

3. Then, by knowing *the causes and conditions that determine or favor* the commission of the analyzed crime, it gives us the opportunity to understand more precisely and clearly the role that the means of criminal law can have in the fight against this service crime and in protecting service relationships[10]. However, there are still cases when some civil servants violate their duties and by their behavior create dissatisfaction within the institution. For example, by abusing their position or the actual possibilities offered by this position, they violate their main duty, to ensure the respect of service relations, and by disturbing the good running of the units, they harm the legal interests of citizens or damage the patrimony, as a consequence of the committed acts. They cunningly use any weaknesses and mistakes in the work, they seek whenever lack of vigilance gives them the opportunity to push for abuse or misrepresentation to strike in the relationships of service. The persistence of these dispositions, habits, conceptions, attitudes, mentalities, characteristic of our society, is explained by the lagging behind of consciousness in relation to social reality, they constitute the cause of several crimes at work. A similar conclusion was drawn by French authors regarding the causes and conditions that favor the commission of the crime of embezzlement[11]. In this sense, they should be educated to cultivate respect and care for people's needs, to fulfill their duties conscientiously and with a sense of responsibility, to respect service discipline.

But in the present article, the causes of the crime of embezzlement, we must also consider conditions that often contribute to the Commission of this crime, making it possible to commit it. Among these conditions, we mention the lack of vigilance, the superficiality or the ease of choosing officials, the disregard of the duty of fidelity, especially those who administer or manage. This largely explains the consistent fight against service crimes in general and *embezzlemen*t in particular[12].

4. Under these conditions, our criminal law, through its rules, permanently fulfills *a double action*[13]. First, an action to prevent crimes, action resulting from the criminal law's determination of dangerous acts considered crimes and from the threat of punishment to those who will commit crimes. The preventive action carried out by the criminal law is of particular importance in the field of protecting work relationships.

The norms of criminal law that serve to protect employment relationships, like all other norms of criminal law (as well as in the theory of comparative criminal law[14]), carry

[10] Valerian Cioclei, *Manual de criminologie*, Ed. All Beck, 1998, p. 6.

[11] Michel Véron, *Droit pénal spécial,* Ed. Colin, Paris, 1999, p. 110.. Patrice Gattego, Droit pénal spécial, Dalloz, Paris, 1995, p. 185.

[12] George Antoniu, Tudorel Toader (coordonatori), Versavia Brutaru, Ștefan Daneș, Constantin Duvac, Ioan Griga, Ion Ifrim, Gheorghe Ivan, Gavril Paraschiv, Ilie Pascu, Ion Rusu, Marieta Safta, Iancu Tănăsescu, Tudorel Toader, Ioana Vasiu, Ed. Universul Juridic, București, 2016, p. 298.

[13] Vintilă Dongoroz, în I. Tanoviceanu, V. Dongoroz, *Tratat de drept şi procedură penală*, vol. I, Bucureşti, p. 30–32; vol. III, p. 197–220; Traian Pop, Drept penal, vol. I, 1921, p. 60–81; Eugenio Florian, Trattato di diritto penale, vol. I, 1921, p. 47–80 etc.

[14] Thorsten Sellin, *L'effet intimidant de la peine*, în Revue de science criminelle et de droit pénal comparé, nr. 4/1960, p. 579–596; Jean Pinatel, *La prévention générale d'ordre pénal,* în Revue de sciences criminelle et de droit pénal comparé, nr. 3/1955, p. 554–561 şi urm.

out their preventive action in *two directions*[15]: in the direction of *general prevention* and in that of *special prevention*, so that in the field of preventing the commission of the act incriminated as embezzlement crimes, we encounter a general prevention action and a special prevention action[16].

By the function of *general prevention* is meant the anti-criminal inhibitory influence that the fact that the criminal law prohibits, under penalty of punishment, certain acts of conduct and that, through the coercive force of the state, the punishments established by the courts will be brought to bear on the members of society upon fulfillment.

The function of *special prevention* consists in the influence exerted on the criminal through criminal reaction measures, such as to exclude the commission of a new crime by him/her.

The *general prevention* function of the criminal law manifests itself, in our opinion, under a threefold aspect: 1) through the general warning about the socially dangerous and criminally illegal character of the incriminated acts of conduct; 2) by strengthening the legal awareness[17] of the recipients of the criminal law and by mobilizing public opinion against the criminal acts and those who commit them; 3) by curbing the tendencies of the returned elements to commit embezzlement crimes, using for this purpose the threat of punishment provided for committing the criminal act.

In relation to the preventive effectiveness of the criminal law through intimidation with the help of punishment, it should also be mentioned its *double conditioning* on the one hand by the justice of the punishment, i.e., its *proportionality* in relation to the generic social danger of the act for which it is provided, and on the other hand, by the *inevitability* of the punishment in the case of committing the crime, for which it is provided, in other words, by the *certainty* of the punishment.

It is necessary to mention that the general preventive action of the criminal law concerns the criminal sanction established in relation to the degree of generic social danger, so that the preventive efficiency of the law actually depends on the individualization of the sanctions in relation to the criminal act. But when it comes to general prevention as an effect of the application of punishment, it finds its effectiveness in the punishment applied to the criminal in relation to the committed act. The preventive action of the criminal law is therefore carried out under different conditions in the two situations.

In another aspect, we note that the norms of our criminal law devoted to the protection of work relationships and the punishments provided by these norms also exercise a special prevention action, an action that results from the effective application of the punishment to the persons who have committed any crime that has caused harm service relations.

5. In the Criminal Code, the crime of embezzlement is included in Chapter II, Title V, entitled "*Malfeasance in office"*. It seems to us that the name of Title V is objectionable. Each of these groups of crimes has a distinct legal object. It could coexist under a common name (as a common group legal object) such as "*crimes against public interests*", which systematizes under this title both corruption and service crimes, as well as other crimes that subscribe to this common legal object. The name of the title cannot consist of a simple association of the name of the component crimes, but must express the common features of the groups of component crimes.

Then, the inclusion of the crime of embezzlement in the Criminal Code among service crimes has the following justification,

[15] Vintilă Dongoroz, *Principalele transformări ale dreptului penal* în „Studii juridice", Edititura Academiei Române, 1960, p. 399 şi urm.

[16] Vintilă Dongoroz, *Sinteza asupra noului Cod penal al României*, în S.C.J., nr. 1/1969, p. 4–35.

[17] Anita M. Naschitz, *Conştiinţa juridică,* Ed. Ştiinţifică, Bucureşti, 1964, p. 217; „…dreptul , odată format, constituie, la rândul lui, un puternic factor de dezvoltare a conştiinţei juridice şi de asigurare, pe această cale, a propriei sale realizări".

the crime of embezzlement is organically linked to the group of service crimes in that the *active subject* (the actual public official or assimilated[18]) of embezzlement crimes is active within state units, so that committing the crime of embezzlement implicitly seriously affects the normal development of work relationships. These considerations, in addition to the stated reasons, determined the maintenance of this crime among the service crimes (following primarily the defense of the state apparatus and secondarily as a crime against patrimony[19]).

In the light of these considerations, bringing the crime of embezzlement into the group of service crimes appears completely justified[20].

Let us now see how to proceed in order to clarify whether or not a certain fact constitutes the crime of embezzlement[21]. It is advisable that before applying a text, and therefore the one concerning embezzlement, the judges should read it carefully, deepen its meaning, seek to grasp its entire application and understand what was meant to be punished by that text.

In relation to the legal description of the crime, the judicial body seeks to identify in the concrete situation the specific features of the content of the crime regarding the premise, object, objective side, subjective side and its subject (the Dongorozian structure).

The generic legal object of the crime of embezzlement, as with all other service crimes, is formed by the social relations of a service nature, therefore, with the conscientiousness, correctness and honor that civil servants and other employed persons must show, in the management and in the administration of money, values or other assets that they manage[22].

The special legal object of this offense is specified by its very notion; it consists in the social relations related to the smooth development of service relations. Due to the socio-political value represented by patrimonial social relations, their protection, by criminalizing the crime of embezzlement, constitutes the secondary special legal object, adjacent to this crime, the protection of social relations related to the smooth running of the service constituting the main special legal object. It does not always provide us with a sufficient criterion to distinguish this crime from other crimes with a similar content. We showed, when we characterized the crime of embezzlement, that it is seen as a service crime, but at the same time as a crime against patrimony. So, the object of the crime must be analyzed from this point of view. Therefore, in order to give a just qualification to the facts, the other elements of the content of the offense provided for by art. 295 Penal Code must also be used.

The establishment of the main special legal object of the crime of embezzlement is also determined by the material side of the criminal activity, which gives the deed the character of a crime against service relations, the criminalized action (in the ways of committing the embezzlement) being that of embezzlement of “goods, money, values...”

Establishing the order *of priority* regarding the two special legal objects of the crime of embezzlement serves to accurately determine and evaluate the social dangerousness of embezzlement and to fix the place of this crime in the system of the special part of the Criminal Code, as well as to differentiate the crime of embezzlement from other crimes, either crimes against patrimony or service crimes.

[18] Ion Ifrim, https://www.universuljuridic.ro/clarificarea-unor-probleme-teoretice-ale-legislatiei-penale-legate-de-notiunea-de-functionar-public/, 12 august 2022.

[19] Philippe Conte, *Droit penal special*, Ed.Litec, 2003, p. 295.

[20] Giovani Fiandaca, Enzo Musco, *Diritto penale*, *parte speciale,. I delitti contro il patrimonio.* Ed. Zanichelli, Bologna, 1996, p.14. Ferrando Mantovani, *Diritto penale, parte speciale,* Cedam, Padova, 1989, p.1

[21] Under this aspect, we reproduce from Doru Pavel, *Delapidarea*, 1959.

[22] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 306.

The material, direct object of the crime is the money, valuables or other tangible movable property with an economic value, which the perpetrator effectively manages or administers (even if they were not actually recorded in the accounting of the injured person).

Also, money, valuables or other goods which, although they are not part of the injured person's patrimony, are in fact administered or managed by the perpetrator, or fraudulently created extras in management, can constitute a material object of embezzlement.

According to the provision of art. 295 Penal Code, for the existence of the material object of the crime, *two* conditions must be met, namely: a) the asset must belong to or interest the public unit, as a rule, and b) the asset must be in the administration or management of the subject (*intraneus*).

These conditions regarding the material object are *essential requirements* for the existence of the dilapidation offense.

In determining the material object of the crime of embezzlement subject to the action of appropriation, use or trafficking, the text of art. 295 Penal Code uses *three* terms: "*money, securities, or some other good*".

The essential condition of the *material object* is that it has a *patrimonial value* embedded in the asset of the passive subject, the legal entity.

Money has a permanent and undeniable patrimonial value, therefore, it can always be the material object of the crime of embezzlement[23].

By values are understood the documents that include receivables to the bearer, i.e., receivables that can be realized by the holder of the document. Thus, it is the state bonds that participate in the draws, the C.E.C. to bearer, etc. The manager of such values, if he/she appropriates them, commits the crime of embezzlement, because they have a patrimonial value, being always convertible into money.

The notion of "any other asset" includes all assets with economic value that constitute property or, as we have shown, are only temporarily and provisionally in the possession of a public or private entity.

In addition to these, the question arose whether waste can be considered goods and whether, therefore, they can constitute a material object of the crime of embezzlement. The answer to this question depends on the destination of the respective waste. If, in the permanent process of production or through a special provision, the respective waste was intended either for use within the unit, or for some form of recovery, in this case they may constitute a material object of the crime of embezzlement. If it is established that the waste is devoid of any value and that it was to be thrown away with no further use, in this case, it is obvious that their appropriation cannot constitute a crime.

Analyzing the amount of the value of the material object, the question arose whether the crime of embezzlement exists, in the hypothesis when this value is completely insignificant[24].

In specialized literature, the notion of money means: banknotes, paper currency, regardless of whether it is found in cash or at the disposal of the unit, as well as the metallic currency.

Values are the documents that carry the receivables that can be realized in money (bonds, checks, bank transfer).

By other asset is meant any material thing that belongs to or interests the state (industrial and agricultural products, machines, furniture, etc.).

The goods that constitute the direct object of the crime of embezzlement must represent an *economic value*[25]. When determining the

[23] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal*, op.cit.p. 307.

[24] Vintilă Dongoroz și colaboratorii, op.cit.p. vol. III, 596; Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială, Teorie și practică judiciară,* Ed. Wolter Kluwer, București, 2008, p. 339.

[25] Ilie Pascu, în Vasile Dobrinoiu, și colaboratorii, *Noul*

value of the object, it is not the subjective assessment that the criminal has of the stolen property, but the objective value of the property that must be taken into account. The existence and size of the economic value of the asset is assessed in relation to objective data (nature, destination, etc.).

In principle, only movable goods can be the material object of the crime[26]. What can form the direct object of the crime of embezzlement in the case of immovable property is only the equivalent of the use of an immovable property or, in general, the fruits acquired from the immovable property, which are therefore in reality movable property. An exception to some extent is immovable property by destination on the date of the crime, which can form the material object of embezzlement and which by their nature are also movable property, which the law fictitiously considers immovable, based on their connection with the immovable property which are attached, constituting an accessory thereof.

Finally, the material object of the crime can only be physical goods that are or can be in the possession of the person. Even if the evasion is carried out on an asset belonging to the "values" category, we are still in the situation of a tangible movable asset, since, in order to be relevant from the point of view of criminal law, the right of claim must be incorporated into a title that offers the offender the opportunity to realize the claim.

In addition to the aspects regarding the material object of the crime, it is necessary to make some clarifications regarding the legal situation of the asset and the position of the subject of the crime in relation to it.

The goods on which the action of evasion is carried out must, as already shown, administer or manage them.

It can happen that goods belonging to other people end up in the scope of goods in the possession of the unit, without there being any legal relationship between those to whom they belong and the respective unit (for example goods stolen and placed in the warehouse of a public unit to be sheltered or sums of money belonging to the cashier kept in the unit's house). These goods do not belong to and are not of interest, so in case of their theft, the civil liability of the unit is not engaged. The theft of these goods *does not* constitute embezzlement, but another crime, qualified in relation to the data provided by the objective reality.

The formation of extras in management, due to error or incorrect manipulations, according to the normative acts in force, belong to the public or private person. The person who steals from these assets if he/she manages or administers them, commits the crime of embezzlement[27].

The property that constitutes the material object of the crime must be under the management or administration of the subject based on the duties arising from the service report. The subject must therefore have the position of manager or administrator in relation to the stolen asset.

If the criminal activity carries on a good of the unit that at the time of theft was not part of the mass of goods managed or administered by the subject, the crime committed constitutes theft and not dilapidation[28].

The establishment of the legal situation of the asset must, therefore, be done in relation to the *moment of the act*, verifying whether or not at that moment the asset was in the possession of a unit, the fair qualification of the criminal activity committed on the respective asset depends on this finding. Establishing the legal situation of the asset therefore involves knowing the dates when the asset entered or left the unit's patrimony.

cod penal, comentat, vol. II, Ed. Universul Juridic, București, 2012, p. 571.

[26] Victor Nicolcescu, *Delapidarea și gestiunea frauduloasă. Asemănări și deosebiri,* R.D.P. nr.4/2000, p. 98. București, Ed." Monitorul Oficial" .

[27] The present paragraph takes up the text published by Doru Pavel, Delapidarea, 1959.

[28] Mihail Udroiu, *Sinteze de drept penal,* op.cit, p. 751

The cumulative fulfillment of the two conditions bearing on the situation of the asset and the position of the active subject in relation to this asset being an essential requirement for the existence of the crime of embezzlement, the achievement of this requirement must be checked carefully, in relation to the particularities of each concrete case.

In the legal literature[29], the discussions are limited only to the controversy whether the assets in the cases shown above belong to or interest the state, or, on the contrary, do not belong to or interest the public unit, in the affirmative case the crime is embezzlement, the subject having the management of the assets, in the negative case the crime is an abuse of trust. For example, the embezzlement by the employee, through a service contract, of the money received from the employer for the purchase of goods constitutes the crime of breach of trust, and not that of embezzlement, the perpetrator not having the capacity of an official. Also, the defendant, a postal factor, by falsifying some documents, appropriated sums of money which, temporarily under the management of some officials from the county postal departments, such as postal factors, belong to the state budget. From here, it should be noted that the defendant's misappropriation of the money he/she had under his/her control constitutes the crime of embezzlement, and not of fraudulent management, as the court wrongly held[30].

In the criminal doctrine[31], it was emphasized that, in the case of so-called crimes with a *qualified subject*, i.e., those that can only be committed by a person who has the special capacity required by the law, the issue of the correct legal classification of the respective act as a crime is conditioned, on among others, and the existence of the quality required by law for the subject of the crime. In these cases, that quality of the person constitutes *an essential specific feature* of the content of the crime.

Embezzlement is one of the most well-known crimes with *a qualified subject*, which, apart from the problems it poses in relation to the other specific features of its content, calls for a careful examination and raises interesting issues regarding the delimitation of the subject of the crime. Therefore, the crime of embezzlement is the crime with a qualified active subject (*intraneus*).

If we carefully read the text that punishes the crime of embezzlement, we find first of all that the person who committed the crime must be *a civil servant*. The one who committed the crime, is called *the subject* of the crime, in the science of law[32].

So, for the crime of embezzlement, the subject of the crime, i.e., the person who commits the crime, must fulfill a special condition: *to be a public servant[33].* This is a characteristic feature of this side of the crime, a feature without which the content of the crime is not realized.

In the text of art. 295 Penal Code this feature of the offense finds its expression in the words: "*by a public official*". If he/she is not a civil servant, he/she *cannot* be charged with the crime of embezzlement. But what does civil servant mean? The law explains what we must understand by civil servant.

The concept of civil servant is defined from the point of view of the criminal law in art. 175 and whose content is as follows[34]:

"Civil servant, in the sense of the criminal law, is the person who, on a permanent or temporary basis, with or without remuneration:

[29] *C.S.J., secţia penală, decizia nr. 3502/2002, www. legalis.ro.*

[30] *C.S.J., secţia penală, decizia nr. 2762/2000, www. legalis.ro.*

[31] Vintilă Dongoroz, *Tratat*, 1939, op.cit.p. 204.

[32] Idem, op.cit.p. 215.

[33] Teodor Vasiliu și colab., *Codul penal, Comentat și adnotat,* Partea specială, vol. I, Ed. Științifică și Enciclopedică, București, 1975, p. 364.

[34] The present section reproduces the text published by the undersigned: Ion Ifrim, https://www.universuljuridic.ro/clarificarea-unor-probleme-teoretice-ale-legislatiei-penale-legate-de-notiunea-de-functionar-public/12 August, 2022.

a) exercise duties and responsibilities, established under the law, in order to realize the prerogatives of the legislative, executive or judicial power;

b) exercise a position of public dignity or a public position of any nature;

c) exercises, alone or together with other persons, within an autonomous government, another economic operator or a legal person with full or majority state capital, duties related to the achievement of its object of activity.

(2) Likewise, a public servant, within the meaning of the criminal law, is considered a person who performs a service of public interest for which he/she was vested by the public authorities or who is subject to their control or supervision regarding the performance of that public service”.

Therefore, what characterizes the quality of civil servant from a criminal point of view, is primarily the fact of exercising *a function* or *a task* in the service of public interest.

This function or task can be of any kind. It does not matter if it is for a shorter or longer time, if it is permanent or random, it does not matter if the official was appointed with legal forms or without such legal forms. It is enough that he/she has fulfilled a task in the service of public interest, in order to be considered a public servant, that is, so that the article of the law regarding the crime of embezzlement can be applied to him/her, this of course if the other conditions of this text are fulfilled.

We have shown above that the civil servant must exercise a public function or public dignity or in the service of public interest.

In the specialized literature[35], the problem arises of knowing what is the meaning and extent of the notion of public servant from the point of view of criminal law, in order to be able to delimit the sphere of persons who have this quality required by art. 175 Penal Code.

The issue is of particular interest, both theoretically and practically, because the requirements of criminal law determined by the necessity of criminal charges call for the establishment of a wider scope, the attribution of a more extensive meaning to the notion of “public official” than the one recognized, in principle, in the administrative law [36].

The difficulty of defining the concept of *public official* comes from the lack of coverage or, on the contrary, from the widening of the scope of the concept of *public official* and, as such, the variations of definitions given to this term can create great difficulties of interpretation in judicial practice.

We note that, art. 175 of the criminal law in force defines the notion of “public official”, limiting itself to defining the notion of “public official” in a broad sense [art. 175 para. (1)], as well as the concept of *civil servant* “de facto” or “by assimilation” [art. 175 para. (2)].

In addition to these, we also specify the fact that, within the scope of the notion of civil servant[37], this name also includes the person who *performs a service of public interest* for which he/she was vested by the public authorities or who is subject to their control or supervision with regard to the fulfillment of that public service, even if it is not paid from public funds, but privately.

In defining the public function and outlining the scope of the persons who have the capacity of civil servant, the provisions of Law no. 188/1999 regarding the Statute of civil servants[38]. According to this law, the public

[35] Gheorghe Voinea, The active subject of the crime of embezzlement, RDP no. 4/2000, Bucharest, Ed. R.A. “Monitorul Oficial”, p, 120-121.

[36] The present section reproduces the text published by the undersigned: Ion Ifrim, https://www.universuljuridic.ro/clarificarea-unor-probleme-teoretice-ale-legislatiei-penale-legate-de-notiunea-de-functionar-public/12 August, 2022.

[37] Vintilă Dongoroz, Gheorghe Dărângă, Siegfried Kahane, Dumitru Lucinescu, Aurel Nemeş, Mihai Popovici, Petre Sîrbulescu; Vasile Stoican, *Noul Cod penal şi Codul penal anterior. Prezentare comparativă*. Ed. Politică, Bucureşti, 1969, p. 92. In the opinion of the cited authors, the restriction of this term was determined by the difficulties encountered in judicial practice, because the term official had too broad a meaning.

[38] Republished in the Official Gazette. nr. 365 din 29 mai 2007.

function represents the set of attributions and responsibilities established under the law, in order to realize the prerogatives of public power by the central public administration, the local public administration and the autonomous administrative authorities.

The civil servant is the person appointed, according to the law, to a public position. The person who was released from public office and is in the reserve corps of public servants retains his/her status as a public servant. The totality of civil servants within the autonomous administrative authorities and within the public authorities and institutions of the central and local public administration constitutes the body of civil servants.

In this context, it should be emphasized that the exact determination of the scope of the notion of a public official is of particular importance, today more than ever, for the effective combating of this category of criminals. The criminalization and sanctioning of these offenses constitute the means of criminal law to ensure compliance and fulfillment of service duties by all those who perform a job in the mechanism of our state. However, the state and its entire mechanism are currently of special importance due to their increasingly comprehensive economic-organizational and cultural-educational functions, and the fulfillment of the tasks corresponding to these functions also requires criminal law means.

The problem is, we think, generated by the care not to give *too much expansion* to the notion of a public official, due to the wide scope of framing offered by the incriminating texts - no matter how limited these incriminations are, possibilities that are also related to the scope wide range of persons whom art. 175 Penal Code includes them under the name of civil servants.

We consider that this is the main problem, because, first of all, it is the most common in practice, and secondly, the solution to be reached is related to the most radical legal effects, to the existence or not of a criminal liability for some offenses by certain categories of persons.

Schematically, we are looking for theoretical solutions for the following aspects of the notion of a public official, what content does this concept have from the point of view of criminal law and under what conditions does a person acquire this quality, becoming an *intraneus* active subject of a certain category of crimes?

Under this aspect, the provisions contained in art. 175 Penal Code, although they do not refer to the Statute of Civil Servants, they nevertheless mention the phrase "the person who (...) exercises (...) a public function of *any nature*". In other words, public officials, within the meaning of the criminal law, will also be persons who exercise a public function in the service of a public authority, public institutions, or other legal entities under public law, which makes *the scope of the notion of "public official"* not be circumscribed only to persons who exercise public power prerogatives, because the notion of "public official" regulated by our Criminal Code has *a larger scope than that provided by the Statute of public officials*[39].

Art. 175 of the criminal code shows that whenever the criminal law uses the expressions of public dignity, public institution, public unit, or others that contain the term "*public*", it refers to everything that interests the central or local bodies of power or the state administration, institutions, enterprises or economic organizations of the state, companies in which the state has participation in any form, cooperative organizations of any kind, mass organizations or associations or institutions of

[39] Constantin Duvac, Funcţionarii publici bancari cu atribuţii de control şi obligaţiile care le incumbă potrivit noilor coduri: penal şi de procedură penală, communication held at the international conference with the theme "Current affairs in banking legal activity", organized by the Association of legal advisors in the banking financial system at Piatra Neamţ, in 2010.

a social or professional nature and in general everything that interests society, in totally or in part and the promotion of its interests within the legal order, regulated by the state.

The content of this article of the law clarifies the meaning of the expressions function of public dignity or a public function of any nature[40].

If the official is in the service of such a public unit, then the crime of embezzlement can be charged, of course, if the other conditions are also met, conditions that we examine below.

We have examined above the condition that must be fulfilled by the one who commits the crime - the subject of the crime - in order to be charged with the crime of embezzlement. We showed that he/she must be *a civil servant* and we explained what is meant by *civil servant*[41].

According to the provisions of art. 295 Penal Code, the active subject, in the author's sense, of the crime of embezzlement can only be the civil servant who administers or manages the assets on which the embezzlement action is carried out[42]. Therefore, the author of the crime of embezzlement can only be the civil servant who, based on the obligations arising from the employment relationship, has the authority to manage or administer the respective assets[43].

By management is understood the activity carried out in order to preserve (keep and making available) and the material circulation (inputs and outputs) of the goods that belong to or interest the unit. This activity is carried out through a complex of operations that find their reflection on the material level in the documents of receipt, storage and delivery (by counting, weighing, measuring), as well as in the preparation and keeping of the record documents of these goods. Thus, the material contact with certain goods, also exercised as a result of the service relationship, but for the purpose of using the entrusted goods, does not constitute management. The theft of these goods must be classified as theft or abuse of trust and not embezzlement (for example, employees who are entrusted with tools, raw materials, protective clothing, sports materials, etc.). The use by the civil servant of the assets entrusted to him/her for this purpose constitutes a purpose other than that of administration or management. The use of the asset entrusted to the employee can be carried out in his/her personal interest (clothes, gloves, protective glasses, etc.) or in the work process submitted by him/her for the production, transformation or repair of goods (raw materials, tools, fuel, fuels, etc.).

On the contrary, the manager does not have tasks that involve the performance of an action for the use of the good, his/her task being, as shown above, to preserve the good and to bring about the fulfillment of provisions regarding its circulation (receiving and handing over the good). These attributions fix the profile of the management activity and determine the specific obligation from the content of the work report in the case when the official is a manager[44].

As is known, the regularity or validity, from a formal point of view, of the employment relationship does not influence the existence of the quality of civil servant, being the actual exercise of the duties by a person within the unit in which he works is sufficient.

Against this wide acceptance of the notion of civil servant, the question arises whether a person who *actually, (de facto)* therefore

[40] George Antoniu (coord.), *Noul Cod penal. Comentariu pe articole,* Vol. II (art. 57 171), Ed. C.H. Beck, Bucureşti, 2008, pp. 566 567; Gianina Cudriţescu Pilă, *Noţiunea de funcţionar,* în RDP nr. 3 din 2001, pp. 90 92.

[41] Fr. Strauss, *Noţiunea de funcţionar în dreptul nostru penal*, în „Justiţia", 1956, nr. 3, p. 454; O. Stoica, *Despre subiectul infracţiunii de delapidare,* în „Legalitatea", 1959, nr. 9, p. 25.

[42] Participants in the crime of embezzlement who do not have the powers of administration or management of the assets required to be the author of the crime, even if they have directly committed acts of evasion, are considered accomplices. Decision of the Supreme Court no. 1 207 of June 11, 1959, in „Legalitatea", 1959, nr. 12, p. 72.

[43] Vintilă Dongoroz și colab., vol. III, 1971, p. 597.

[44] Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială. Teorie și practică judiciară*, op.cit., p. 478.

without a legal investiture, *performs* acts belonging to the management activity can have this quality and implicitly can be held accountable according to art. 295 Penal Code. The answer is affirmative, in our opinion, in the sense that the de facto manager can be subject to the crime of embezzlement, but not every actual exercise of an attribution that is indirectly contingent on the management of the unit constitutes de facto management[45].

The actual exercise of the management activity is considered to be a de facto management when the person without qualification performs acts specific to the performance of the management activity, regardless of whether this person is a civil servant of the respective unit or a private individual (for example an official who, exceeding the attributions, interfere in the management of the unit or a private individual who temporarily or permanently replaces the real manager (the case of relatives or friends of the manager who replace him/her and work for him/her[46]).

Therefore, the performance of the management activity attracts by itself the responsibility of management on those who, without having this quality, in fact performed acts of the management activity. For example, it was decided that the act of the defendant, a tax inspector within a financial administration, to appropriate sums of money from the receipts made in this capacity, constitutes the crime of embezzlement, and not the crime of fraudulent management. This, because the defendant has the capacity of a civil servant, and as part of his/her duties, he/she also had the obligation to manage the collected sums, while the fraudulent management is committed by any person who has assets under preservation or administration, not being required to have the capacity of office clerk[47].

Also, the court decided that the defendant had, at the time of committing the act, the capacity of an official who manages goods, in the sense of art. 295 para. (1) in conjunction with art. 308 para. (1) Penal Code. She was employed at the cashier of Theater E as a cashier and performed management duties, consisting of selling tickets for the performances held in the theater, collecting their value and depositing this money at the theater cashier. Therefore, the amount of money stolen was in her management. Regarding the lack of formalities for the employment of the defendant with an employment contract, the court considers that the apprehension of the crime of embezzlement is not conditioned by the existence of a valid employment contract at the time of the commission of the crime, because only the existing factual situation is relevant, as it is necessary that the person in question to fulfill an assignment in the service of the legal entity. This condition is fulfilled in the case, the accused carrying out his/her activity, during the trial period, with the consent and at the disposal of the management of Theater E[48].

By administration is understood the activity that is carried out in order to ensure the role that the patrimony of a unit must fulfill in relation to the purpose and tasks of that unit[49]. This activity is carried out through a complex of operations that find their concretization in the acts by which provisions are issued or taken regarding the economic and legal situation and the circulation of goods (for example, the conclusion of economic contracts for, supply,

[45] Gheorghe Voinea, *Subiectul activ al infracțiunii de delapidare*, op.cit..p. 120.

[46] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit. 308; S.Proca, *Încadrarea juridical a faptei gestionarului de a folosi fără știrea conducerii unității personae pentru a-l ajuta în muncă și care prejudiciază avutul obștesc,* R.R.D. nr.6/1977, p.32.

[47] *C.S.J., secția penală, decizia nr. 1005/1998, în CP. Ad, p. 793.*

[48] Andrei Viorel Iugan, *Codul penal, Parte specială. Include jurisprudența națională 2014-2020,* Ed. Universul Juridic, București, 2020, p.359-364.

[49] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,*

distribution or sale of goods, payment order, etc.).

The activity of administration is, therefore, an activity of disposition, while the activity of management is an activity of execution, of fulfilling acts of disposition.

The administrative activity is carried out by those who, according to the service report, have the authority to dispose of the patrimony of the respective unit: administrators, heads of units, accountants[50], etc.

Administrators have virtual contact with the assets they manage, unlike managers, who have physical contact; therefore, the action of evasion, in the case of the managers, is carried out directly, through the material act of taking the asset, while in the case of the administrators, through an act of disposition, which has the effect of removing the asset from the unit's patrimony.

From the point of view of the situation of the subject in relation to the stolen asset, as shown above, both in the case of management and administration, the unit's representatives always come, materially or virtually, in contact with the assets managed or administered by virtue of the attributions that they matched their employment relationship. Therefore, the search for an explanation along the lines of civil law of the difference between the position of the subject in relation to the asset in the case of management and the same position in the case of the administration of the asset is not necessary, especially since it only leads to confusion and questionable solutions (for example, the manager would have, and the administrator would have a legal possession, or the manager has material possession, and the administrator a legal possession, etc.).

The administrator is the official who, among his/her duties, also has those regarding the conclusion of disposition documents regarding the goods of the injured person or to administer these goods (for example, the director of a legal entity)[51].

Also, the administrator within the meaning of the criminal law is also the judicial administrator or the liquidator of the insolvent debtor's assets, as well as any of their representatives or subordinates. The administrator of the association of owners or tenants is also a direct active subject of the crime of embezzlement. For example, the administrator of the owners' or tenants' association has the capacity of an official. His act of appropriation, use or trafficking, in his own interest or for another, of money, valuables or other assets that he manages or administers constitutes the crime of embezzlement[52].

Criminal participation is possible in all forms: coauthor, instigation, complicity; however, all co-authors must have the special capacity required by law, otherwise complicity in the commission of the crime of embezzlement will be held for unqualified active subjects who directly contribute to it.

In the case of co-authorship, the special quality required by law for the author is required. For example, the perpetrators are two managers of the same warehouse or a manager and an administrator at the same store[53].

The duties of manager or administrator are not necessarily required for *instigators* or *accomplices*. They can even be from outside the unit to which the goods belong. An accomplice, for example, is the accountant who agrees to enter the names of fictitious persons in the payroll in order to help the paying cashier of the unit to evade the amounts that would have been due to these persons[54], or the auditor who, finding, during the inventory, an addition in management, does not register it, accepting to

[50] Gr. Rîpeanu, *Unele probleme privind conținutul infractiunii de delapidare*, în „Analele Universității ”C. I. Parhon”, 1956, nr. 6, p. 164.

[51] Ilie Pascu, Mirela Gorunescu, *Drept penal, Partea specială*, ediția a 2-a, Ed. Hamangiu, 2009, p. 301.

[52] Decizia nr. 3/2002, publicată în M. Of. din 24 februarie 2003, www.*legalis.ro.*

[53] Trib. Suprem, Secţia penală, decision nr. 1207/1959, în L.P. nr. 12/1959, p. 72.

[54] Trib. Suprem, Secţia penală, decision nr. 6311/1970, în CD. 1970, p. 361.

be appropriated by the manager[55]. Acts specific to the material element of the deed committed by a person who does not meet the conditions for the active subject of the crime, but together with it, are acts of complicity, and not of co-authorship.

The immediate *passive subject* of the crime of embezzlement is the institution/unit where the civil servant works or another employee who also has the quality of manager or administrator damaged[56].

For the crime of embezzlement to exist, the following conditions (elements) must be met: a) the goods that form the material object of the crime must have been in the administration or management of the perpetrator, b) an act of embezzlement must be carried out on those goods, c) to produce a harmful consequence that causes or could cause damage to the public or private unit, d) the perpetrator has worked with intention.

These conditions on which the existence of the crime of embezzlement depends are accompanied by *certain requirements* that give a specific note to this crime. In particular, the requirement regarding *the subject of the crime* (the quality of a public official in charge of management or administration) is especially typical of embezzlement.

This requirement, like the condition regarding the belonging of the good that accompanies it, refers to realities that exist before the commission of the crime and is outside the material activity carried out by the perpetrator and his mental attitude and, as such, together form a situation premise in the content of the crime[57].

Therefore, the content of the crime of embezzlement can be divided into: *the situation-premise*; *the objective side and the subjective side, these parts depicting the structure of the content*.

The starting point in examining the content of the crime of embezzlement must be *the premise-situation*, i.e., the investigation of the conditions that make up this situation, namely the condition that the assets that form the material object of the crime belong to the state unit (public person/public institution) or the natural person (private person) and the condition that the perpetrator has the capacity of a civil servant with management or administration duties.

These conditions regarding the pre-existing situations constitute, therefore, the basic basis, the premise that must be established in order to be able to proceed to the analysis of the other conditions from the content of the crime. We remind you that what is included in the content of the crime are not the pre-existing realities themselves, but the condition that they pre-existed.

Examining the *objective side* of the crime of embezzlement, like any other crime, involves the analysis of the constituent parts of this side: a) *the material element* and b) *the immediate follow-up*. However, since there must be a *causal link* between the criminal activity committed and the result produced, this will be analyzed as a requirement belonging to the objective side of the crime[58].

The material element of the crime of embezzlement consists in the act of stealing the asset managed or administered by the active subject, committed in one of the ways provided by art. 295 Penal Code: appropriation, use, trafficking.

As it was also shown, the characteristic feature of the crime of embezzlement and,

[55] Tribe. Supreme Court, Criminal Division, decision no. 3082/1972, in RRD no. 1/1977, p. 166. Regarding complicity, see also Trib. Supreme Court, Criminal Division, decision no. 294/1981, in RRD no. 10/1981, p. 72.

[56] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal*, op.cit.p. 309.

[57] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 310.

[58] Constantin Mitrache, Cristian Mitrache, *Drept penal român, Partea generală,* Ed.Universul Juridic, ediția a III-a, revăzută și adăugită, Ed.Universul Juridic, București, 2019, p.164.

therefore, of each of the ways of achieving its objective element is *the act of evasion*, an action that is involved in each of these ways[59].

Appropriation consists in the act of effectively appropriating the stolen asset, which represents the final moment of the criminal activity of theft.

The literal meaning of the word is: *to make one's own*. So, the term "*appropriation*" from the content of the crime of embezzlement translates the idea of making one's owned an asset belonging to the unit's assets.

Appropriation does not carry out a transmission of the right of ownership. Like any illegal activity, it gives rise to a precarious detention, with an illegal character, but which, by the will of the criminal, creates for him/her or another person, for the benefit of whom the crime was committed, all the benefits that a real owner of the good would have.

Appropriation implies *a material* activity of taking possession of the good for oneself.

So, the simple possession of the good is not always relevant to characterize the crime, because the possession of the good can be the result of the subject's functional attributions. Having the goods in his administration or management, the subject has, or may have, the possession of those goods. However, this holding is not in his own name and for himself, but for the unit to which the respective assets belong.

The conversion of this detention for the unit into a detention in its interest or for another characterizes the objective side of embezzlement - in the form of appropriation - and it must be externalized in an *unequivocal* activity of taking personal possession of the asset.

Therefore, in the case of embezzlement carried out in the form of appropriation, the development of the criminal activity begins with the operation of taking and removing the asset from its previous position and ends with the transfer of the asset into the possession of the perpetrator in bad faith, a transfer that is also part of the action of evasion. Therefore, the reference to the appropriation of the property was used by the legislator to determine and express, *through its final moment, the criminalization of the act of evasion*.

What is necessary for the consummation of the criminal activity of misappropriation is that the subject has the power to behave towards the stolen good as towards his own good, being able to exercise acts of disposition on the good. Thus, the deed of a manager who appropriates an asset from those he/she manages, by consuming or disposing of it, constitutes appropriation.

We specify that the consummation of the crime *does not require* the modality of appropriation, that the subject dispose of the stolen property, but only that the act of appropriating the property is carried out in such a way as to have created the possibility for the perpetrator to dispose of the property, of course without the right, as a good of his own.

The problem more often encountered in practice in relation to this feature of the objective side - appropriation - is that of the ratio between *lack and appropriation*.

The ascertained lack of a quantity of the goods under the administration or management of the subject was often equated with the subject's appropriation of these goods.

In reality, these two notions: *lack* and *appropriation* are not in a relation of equivalence, but can be found in the relation from cause to effect. In this report, *appropriation* is characterized as a *cause*, and *lack* appears as an *effect*. If any appropriation produces a lack, not every lack is necessarily the effect of an appropriation by the subject who administers or manages the goods.

The lack can also come from other causes: fortuitous event, losses from handling, losses

[59] Vintilă Dongoroz, și colab., *Explicații teoretice ale Codului penal, Partea specială*, vol. III, op.cit.p.466.

due to storage conditions, mistakes in the administration or preservation of the goods, scriptural mistakes in the accounting of the respective operations or in the inventory (in this case the lack is only apparent), evasions committed by third parties and so on.

All these causes and others of the same kind can be at the origin of the lack, hypotheses in which appropriation is *excluded*. From here, we must draw the conclusion that *lack* is not equivalent to *appropriation*, which is otherwise a point of view consistently accepted in judicial practice.

The relationships between lack and appropriation have created in judicial practice problems of proof and problems of qualification. Although distinct from each other, judicial practice has often intertwined these issues, drawing conclusions regarding the qualification from the way of interpreting the *lack* as an evidential element.

The premise from which the discussions and the adopted solutions started was that if the lack is not equivalent to appropriation and therefore does not enter as a constitutive feature in the content of the crime of embezzlement, it can still constitute *evidence* of appropriation, not direct evidence, but an indirect proof, a presumption.

The use consists in the perpetrator's act of using the stolen good, use that completes the criminal activity of theft[60].

One of the problems raised by this form of the objective side is that of knowing if one can speak of embezzlement through use, when *no harm* has occurred to the person in question.

Therefore, in the case of embezzlement carried out in the form of use, the carrying out of the criminal activity also begins by taking and removing the asset from its previous position and ends with the use of that asset, use which is equivalent to the appropriation of its economic (monetary) equivalent and which thus completes the action of evasion. Therefore, also in the case of use, the legislator referred to one of its moments to criminalize the act of evasion. This method of embezzlement is therefore characterized by the facts that taking possession of the asset, which completes the act of theft, is not done for the appropriation of the asset itself, but for the appropriation of its use, of the equivalent that this use represented, the appropriation of the asset is only temporary, how long does the use last.

In order for the use of the stolen good to complete the objective side of the crime, it must have produced a harmful consequence for the unit (public person (state) or private unit), either by reducing the use value (wear and tear), or by not carrying out or delaying operations due to the absence at the necessary time of the respective good, so that a material damage has been caused.

The use represents a temporary manifestation[61], carried out either in the own interest of the subject of the crime, or in the interest of another. It thus constitutes a crime of embezzlement, the method of use, the act of a manager who steals garments from the store to be worn by himself or another person, and after use, returns them to the store.

The goods that are the object of the activity of use must be non-consumable goods, otherwise the use implies consumption, equals appropriation and therefore the act committed will constitute an appropriation, as it represents an action of effective possession of the good (has disposed of it) and not only simple appropriation of the equivalent of its use.

Trafficking consists in the speculation of the stolen good and the appropriation of the profit obtained, acts that represent moments of the criminal activity of theft. A characteristic example of committing the crime of embezzlement through trafficking is the act of a manager of materials and auto parts to give

[60] Mihail Udroiu, *Sinteze de drept penal*, op.cit, p. 751.

[61] The duration of the subject's use of an value that manages is devoid of consequence regarding the existence of the crime.

these goods for temporary use to other people, in exchange for benefits.

In the case of this modality of the crime of embezzlement, the operation of taking and removing the asset from its previous position is therefore followed by the performance of some speculative operations with a view to the appropriation by the perpetrator or by another person of the resulting profit.

Embezzlement through trafficking is not done, therefore, with a view to appropriating the asset, but *only for the purpose of appropriating the profit* derived from the speculation of that asset. The appropriation of the property is therefore only temporary for the duration of the trafficking operations, after their completion the property is returned to the property of the injured person. It turns out that even in the case of trafficking, taking possession of the property is temporary. As a result, the scope of specula operations of the stolen asset must be limited only to acts of using the asset as a means to obtain a profit.

What distinguishes the action of “trafficking” from the “use” is to obtain a profit in the first case and to satisfy one’s needs in the second case, both of which are achieved by using the good and its subsequent restoration in the unit’s patrimony, as opposed to by the action of “appropriation”, to which there is no reintegration in the previous position of the good[62].

In other words, the trafficking activity involves: 1) a temporary use (and not an effective appropriation of the asset, as in the case of appropriation), 2) the appropriation of the profit arising from the speculation operation (and not a simple use of the asset as in the case of the use).

Therefore, the sale of an asset under the management or administration of the perpetrator and the appropriation of the price constitutes embezzlement by appropriation, and not by trafficking, because in this case the sale implies the theft of the asset and its disposal.

In the same way, the sale of the stolen goods and the return to the management of the injured person of their value or other goods of the same kind constitute embezzlement committed by appropriation, followed by the covering of the damage caused[63], and not embezzlement committed by trafficking.

If the manager did not appropriate the price of the sold good, but made the sale in irregular conditions or obtained a profit on the occasion of the sale, the act does not constitute embezzlement[64], lacking the action of stealing the good, but it will constitute, as the case may be, another crime, as, for example, an abuse of office. For example, the court held that on February 19, 2011, being a driver in the S.C. T S.R.L., while making a race in the European area, the defendant appropriated the amount of 2,200 liters from the tank of the received Volvo brand truck, unjustifiably using the fuel card; he replaced the truck’s tires with older ones, appropriated his work mobile phone and the car GPS system, after which he abandoned the truck in Belgium, facts that caused damage in the amount of 40,750 lei. It was assessed that the defendant culpably committed the crime of embezzlement[65]. With regard to the misappropriation of the work mobile phone, we believe that the crime of breach of trust would have been imposed.

[62] The present section takes up the text published by Doru Pavel, Delapidarea.

[63] In the same sense, see the decision of the Supreme Court, col. pen no. 1456 of May 16, 1958, published in C.D., 1958, p. 350; on the contrary, the decision of the Supreme Court no. 1166/1955, published in “Popular Legality”, 1,955, no. 7, p. 759, which considers the act embezzlement through trafficking; decision of the Trib. Capital, II criminal college no. 1910/1955, published in “Legalitatea populara” 1956, no. 7, p. 832, which considers the act embezzlement through trafficking, and the annotator of the case abuse of office.

[64] In the opposite sense, judicial practice was pronounced; see criminal decision no. 2047 of May 3, 1956 of the Suceava Regional Court, published in “Justiţia nouva”, 1956, no. 5, p. 884 and 885, in which it is claimed that it constitutes trafficking within the meaning of art. 236 the giving of goods on credit by the managing seller, if it was sought by this to obtain a profit.

[65] C. Ap. Bucureşti, s. I pen., dec. nr. 1350/22.09.2016.

In judicial practice, it was decided that the facts of defendant I who, as a sales manager within S.C. A S.R.L., in the period January 01, 2007-January 15, 2010, trafficked in his interest (as a shareholder of S.C. K S.R.L.) and his associate, T (co-shareholder and administrator of S.C. K S.R.L. and, respectively, sole shareholder and administrator of S.C. C S.R.L.), electronic products from warehouse no. 1 belonging to S.C. A S.R.L. (intact products, both new and from returns), a fact achieved by establishing by defendant I for various electronic products belonging to the injured party S.C. A S.R.L. (intact - coming from the company's warehouse no. 1) of preferential sales prices for S.C. K S.R.L. and S.C. C S.R.L., below the average selling price of the same categories of products to other customers, causing this company a loss in the amount of 714,139.97 lei, established by the accounting expertise report, meeting the constitutive elements of the crime of embezzlement in continuous form[66].

We appreciate that the normative variant of the acquisition is incidence. In the case of trafficking the good is temporarily removed from the patrimony of the legal person, being subjected to speculative operations, the author acquiring his profit in this way[67].

The carrying out of the embezzlement action, which constitutes the material element of the crime of embezzlement in any of its forms, determines, as it was shown, a change in the previous situation of the stolen goods by taking possession of these goods permanently or temporarily by the perpetrator[68].

The harmful consequence caused by carrying out the act of evasion, which is the material expression of the impact brought to the relationships that form the legal object of protection in the criminalization of art. 295 Penal Code, consists in creating a factual situation contrary to the one that should result from respecting the factual position that the injured person had, in the sense that he can no longer in fact dispose of the asset that forms the material object of the theft. This factual situation causes or exposes the person against whom the evasion was committed to material damage.

In the production of this material damage that results from the immediate follow-up, the impact that the evasion action has brought to the protected social value, i.e., the possession that the injured person has over the asset that forms the material object of the crime, is materialized.

In the case of official crimes, therefore also the crime of embezzlement, the occurrence of the prosecution against which the criminal law acts also means the occurrence or the possibility of occurrence of the damage, the harm, the civil injury brought to the injured person. This organic connection between the criminal injury and the civil injury in the crime of embezzlement, the legislator took into account both when establishing the criminalization in art. 295 Penal Code, as well as the legal individualization of the sanction.

In order to consider the objective side of the crime to be realized, it is necessary that between the action of absconding and the consequence produced – the change in the factual situation of the good from which the damage results, *there must already be a cause to effect link*[69]. It is not sufficient, therefore, to observe only that any of the actions which constitute the material element of the offense of embezzlement have been committed and that damage has occurred to the private or public person, that there is therefore a civil consequence, but that, as we have shown above, there is a need for it. it should also be established that the evading action has caused

[66] C. Ap. Bucureşti, s. I pen., dec. nr. 363/05.03.2015.
[67] V. Dorinoiu, op.cit.p. 481.
[68] Constantin Mitrache, Cristian Mitrache, *Drept penal român,* Partea generală, Ed.Universul Juridic, ediția a III-a, op.cit, p.167.
[69] George Antoniu, *Raportul de cauzalitate în dreptul penal*, Ed. Științifică, București, 1968, p.94.

the change in the factual situation (immediate consequence) and that the damage caused is the consequence of the change in the factual situation of the good. Practically, any evading causes a damage, but not all damage is the result of an evading.

In order to establish the concrete existence of the content of the crime of embezzlement, the absence of one or some assets from the injured person's patrimony must be established and its reality must be verified.

The formal finding of a lack of writing is not sufficient, as it can sometimes come from errors in record keeping, just as the finding that there is no lack of writing does not necessarily imply the non-existence of a material lack, the regularity of the writings can often come from skillful manipulations of the criminals in in order to mislead the control and supervision bodies[70].

As we have shown above, if the act of embezzlement, in any of its forms, always causes a lack, on the other hand, not every lack within a patrimony is the result of an embezzlement. It can also come from other causes, such as, for example, another crime (negligence, theft, etc.), from losses, wastage[71], etc.

Lack of management can come from various causes; it is always necessary to establish its *real cause*.

The careful research of the cause that determined the lack is required even more, since often the discovery of the crime starts from the finding of a lack in the management of money or materials of the injured person.

The lack is indirect evidence that can sometimes create a strong presumption of a person's guilt, but which must be corroborated with other concrete circumstances in order to convince the court of the truth in question. By virtue of its active role, the court will have to investigate, with the help of the administered evidence, the concrete circumstances of the case and establish whether the observed absence is the result of an act of evasion committed by the accused.

The investigative and judicial bodies must, therefore, pay special attention to establishing the real cause that determined the occurrence of the consequences.

In order to establish the objective side of embezzlement, it is necessary to unequivocally establish the performance of the action, which constitutes the material element (the activity of, appropriation, use or trafficking)[72], and that this is definitely the cause of the lack in the patrimony of the public or private person.

In conclusion, therefore, since the causal link between the material element of the crime and the immediate consequence is an objective link, it requires the ascertainment of the objective reality of the cause and *not the simple* assumption of its existence, the establishment of the reality of the consequence and the objective causal link between the cause and the result, i.e., between the committed deed and the change in the external world.

The criminal activity of embezzlement is carried out *only with intention*. In the characterization of intention, generally, two elements are designated that are combined with each other, each of them representing a mental act: an act of knowledge or foresight, and an act of will.

Regarding the act of foresight or knowledge, it is generally stated that the criminal must realize the socially dangerous consequences of his/her act, in other words he/she must have the representation in advance of the entire

[70] On the contrary, a case in which this problem arose was wrongly resolved by the Huedin Court by sentence no. 829/1956, published in "Legalitatea", 1957, no. 2, p. 193.

[71] In this regard, see the decision of the Supreme Court no. 16/1955, published in the C.D., 1955, vol. III, p. 59, which shows that the court must establish all the factual elements in relation to the real causes that determined the deficiencies in management and, in relation to these causes, to determine whether the shortages are not due to other circumstances that would exclude evasion.

[72] The finding of the crime of embezzlement can take place at any time during the management period and not only when the management is handed over. Decision of the Supreme Court, criminal college, no. 594 of March 17, 1959, published in "Legalitatea", 1959, no. 9, p. 72.

chain of his/her acts, with all the objective attributes of these facts and the consequences they must produce[73].

In the criminal representation - characteristic of the subjective side of the crime - the facts must appear with all their attributes and the consequences of these facts in their objective materiality. In other words, the criminal must realize that by performing a certain material activity, designed by him, this activity will give rise to a certain result. If this result is the one that we find in the content of the crime with the socially dangerous attribute, we can conclude that the feature of the provision from the subjective side is achieved.

As such, we will only make some clarifications regarding the mental attitude that accompanies the material activity of embezzlement.

The mental process under which the embezzlement activity is carried out consists in the fact that the perpetrator, taking the decision to carry out the act of embezzlement, realized the nature and consequences of this action and accepted the realization of those consequences.

Regarding the act of will, it is stated in the criminal law manuals that the criminal must *want* - that is to say, follow - the production of the socially dangerous result of his/her actions, which assumes that he/she acted *with the aim* of this result being produced (*the direct intention*) or, although he did not want - so he did not follow - the occurrence of the socially dangerous result, he foresaw it and accepted it anyway (*indirect intention*[74]).

In the crime of embezzlement, the authors agree that *direct intent* is required[75].

The immediate consequences of the embezzlement action and the socially dangerous character of these consequences *do not vary* in the case of the methods of committing the crime of embezzlement. What differs from one modality to another is *the target (goal)* towards which the subject tends by committing the evasion action.

In principle, in the crime of embezzlement, this *target (purpose)* is to obtain a profit, to satisfy an interest by committing the act of embezzlement. This common goal, however, varies in content from one modality to another, as follows: in the case of appropriation, the goal is to dispose of the stolen property; in the case of use, the goal is to appropriate the equivalent of the use of the good, and in trafficking, the goal is to appropriate the profit derived from the speculation of the good.

Achieving the purpose for which the subject committed the crime is not necessary for the consummation of the crime of embezzlement.

As we have already shown, the crime is considered consummated from the moment when the subject created the *effective possibility to dispose of*, use or speculate on the stolen good, in other words, he had the possibility of achieving the intended goal.

Determining the purpose, however, is necessary for the fair characterization of the committed act and for establishing the legal treatment of the criminal.

Also, in order to specify the concrete degree of social danger of the committed deed and to individualize the criminal's punishment, an important role is played by *establishing the motive* that led the perpetrator to commit the crime.

According to article 295 of the Penal Code in force in relation to article 308 Penal Code the commission of the offense by an *administrator or a manager* who exercises, permanently or temporarily, with or without remuneration, is a *mitigated variant* of the offense of embezzlement, this capacity in the service of a natural person of those referred to in article 175 paragraph (2) of the Penal

[73] Constantin Mitrache, Cristian Mitrache, *Drept penal român, Partea generală,* ediția a III-a, op.cit, p.172.

[74] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 313.

[75] Alexandru Boroi, *Drept penal, partea specială,* ediția 4, op.cit.p. 493.

Code (the natural person who exercises a service of public interest for which he/she has been invested by public authorities or who is subject to their control or supervision in relation to the performance of that public service) or within any legal entity.

The aggravated version, according to art. 295 Penal Code related to art. 309 Penal Code it is retained if the act caused material damage greater than 2,000,000 lei. This aggravated variant will be retained including in the hypothesis of committing the act by direct active subjects provided for by art. 308 Penal Code in force.

The cause of aggravation of the crime of embezzlement as provided for consists in the particular social dangerousness of the act, due to the existence of two objective circumstances: the frequency of acts of the same nature or the seriousness of the consequences caused.

The social significance of a deed results not only from the circumstances relating exclusively to that deed, but also from those circumstances external to the deed, which reflect on it and influence its concrete degree of social danger.

The frequent commission of acts of embezzlement is a circumstance likely to create, for the act that is included in the series of such crimes, a more accentuated social danger. The application of this circumstance, however, requires that the criminal has known the increased gravity of the committed deed arising from the frequent commission of the crime of embezzlement. The social climate in which a deed is committed is always an objective circumstance that enters as a component in determining and evaluating the degree of social danger of that deed. Then the aggravation of responsibility is not applied for the deeds of others, but because the deed of the accused is inserted in the chain of crimes of the same nature, which increases the guilt of the perpetrator and, implicitly, also increases the social resonance of his deed. Regarding the nature of this circumstance, it constitutes a special legal aggravating circumstance.

If the frequent acts were committed by the same author, the application of competition or recidivism will not remove the application of art. 295 Penal Code (in this case there *will be a contest).*

The second aggravating circumstance that makes the deed present a particular social danger is the seriousness of the consequences caused, greater than 2,000,000 lei. These consequences are different from the damage created by the crime and whose value constitutes the criterion for establishing the ordinary punishment.[76]

As the text of the provision emphasizes, the serious consequences must be of a nature to particularly increase the social dangerousness of the deed.

In the provisions of art. 295 paragraph 2 Penal Code the sanctioning regime for attempted embezzlement is provided[77]. In order for the crime of embezzlement to be *consummated*[78], it is necessary to carry out the act of taking possession of the asset, that is, establishing the possession in bad faith in the criminal's profit, and through this, at the same time, the immediate follow-up takes place, the change in the factual situation of the asset, which causes material damage to the injured party. It is sufficient for the consummation of the deed that, through the position in which the asset was placed by committing the act of evasion, the possibility of achieving the goal pursued by him/her is created for the subject of the crime.

Any cause, independent of the will of the subject, which intervenes and terminates the execution or prevents the prosecution from occurring constitutes the upper limit

[76] George Antoniu, Tudorel Toader, (coordonatori), și colab., vol. IV, articolele 257-366, *Explicațiile noului cod penal,* op.cit.p. 313.

[77] Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială. Teorie și practică judiciară,* op.cit., p. 482.

[78] Gheorghe Ivan, Mari-Claudia Ivan, *Drept penal. Partea specială conform noului Cod penal,* Editia 4, Editura C.H. Beck, București 2019, p. 408.

of attempted embezzlement (for example, catching the criminal at the moment when he separates the goods he/she wanted to steal, the start of rain that makes it impossible to remove the bale of goods; however, it does not constitute an attempt, but a consummated fact, the act of a manager hiding some things in a warehouse that he/she was going to remove later from the premises of the unit, or the act of putting money or other goods in a briefcase in order to achieve a personal interest, etc.

Another issue worth emphasizing concerns the nature of repeated material acts committed in the case of the crime of embezzlement. In order to retain the character of a *continued crime* of embezzlement, it is not necessary that the repeated material acts committed in the implementation of the same resolution be of the same nature[79]. That is, a material act can take the form of appropriation, another under that of use or trafficking. The requirement of the law is satisfied since each separate act constitutes a way of committing one and the same crime, respectively, the crime of embezzlement[80]. For example, in judicial practice it was decided that the defendant was convicted for committing the crime of embezzlement in a continuous form consisting in the fact that, as a parish priest, in the period August 1, 1999-December 17, 2005, at Parish A, he appropriated at different time intervals the total amount of 93,926 lei, to the detriment of parish A and Protoyery A CC[81].

In art. 295 paragraph 1 Penal Code it is stipulated that the punishment consists of imprisonment from 2 to 7 years and the prohibition of exercising the right to hold a public office. The limits of the prescribed punishments are not rigid, since, by applying mitigating circumstances or aggravating circumstances, the limits of each group can be changed from case to case. In the operations of individualizing the punishment, all the criteria for individualizing the punishment will be taken into account.

The main criterion for establishing and individualizing the punishment is the value of the damage caused by the crime.

The amount of the damage must be determined in relation to the amount of stolen goods (amounts or things) and not to the difference remaining after the restitution of some of them.

If the crime of embezzlement took the form of a continued crime[82], the value of the damage caused is given by summing up the damages caused by the repeated acts, and the establishment of the sanctioning treatment of the participants in this crime takes place according to the ordinary rules in this matter.

For the mitigated variant: the special penalty limits for the base form are reduced by one third[83]. For *the aggravated version*: the special limits of the punishment provided by the law (including in the case of committing the act by direct active subjects provided for by art. 308 of the Penal Code) are increased by half[84].

5. The crime of embezzlement is *related* to the other crimes in the group of crimes committed by evasion, due to the similarity between them regarding the content of the special legal object, the nature of the material object, the material element whose characteristic feature - in the case of all crimes in this subgroup.

The crime of embezzlement is, however, *different* from other service crimes. The first difference is given by the situation-premise, which in the case of the crime of embezzlement consists in the fact that the active subject manages or administers the

[79] Florin Steteanu, D.Nițu, Drept penal. Partea generală, vol. II, Ed. Universul Juridic, București, 2018, p. 31.

[80] Decizia nr.798/1970 a Tribunalului Suprem, secția penală, în Revista Română de Drept, nr.9/1970, p.166.

[81] C.Ap. Constanţa, s. pen., dec. nr. 1076/27.10.2016, www.rolii.ro.

[82] Decision of the Supreme Court, criminal college, no. 2433/1955, published in "Justiţia nouva", 1956, no. 5, p. 883, considers successive misappropriations of money from the same management as continuous embezzlement.

[83] Mihail Udroiu, *Sinteze de drept penal,* op.cit, p. 760.

[84] Vasile Dobrinoiu, Norel Neagu, *Drept penal, Partea specială. Teorie și practică judiciară,* op.cit., p. 478.

asset in the possession of the public or private person, while in the case of the other crimes the situation-premise is limited, among others, to the position the active subject to perform or not an act of service.

A second difference is given by the way in which the evasion action is carried out, in the realization of the objective side of the crimes in this category. The different forms in which this action is carried out mark the *difference* both in terms of the content of the objective element and the establishment of the consummatory moment of these crimes.

In relation to the other crimes, which are also carried out through an act of evasion, the crime of embezzlement differs from them (theft, robbery, etc.) by the quality and special position of the *active subject of the crime*, which, according to the law, must *have the capacity of an official* and to be in charge of the administration or management of the assets of an institution, assets of which the material object of the embezzlement is a part[85]. This particularity affects the legal object of this crime in the sense that it gives this object a complex content, the act constituting not only an official crime but also a crime against patrimony.

Between the offense of misappropriation and the offense of hijacking funds there are similarities regarding the special legal object, the nature of the material object and the premised situation (these being identical to the incriminations in art. 295 and 307 Penal Code).

The essential difference between these two offenses is given by the content of their material element. Although, in the case of both crimes, the incriminated action consists in the illegal movement of the asset from the position it had in the possession of the unit, in the case of embezzlement, this action is carried out by taking possession of the asset, i.e., by removing it from its place, and in embezzlement it is carried out it is achieved by illegally changing the predetermined destination of the asset, thus by evading its destination. The movement of the asset in the case of embezzlement is usually carried out within the same patrimonial sphere, while in dilapidation the asset passes from one patrimonial sphere (injured person) to another.

In practice, there may be cases where the crime of misappropriation of funds is committed in order to facilitate the commission of an embezzlement. In this case, the two criminal activities will constitute *a series of crimes*.

The crime of embezzlement differs from crimes against patrimony (committed by abuse of trust or deception), both by their characteristic feature (evasion in the case of embezzlement), and by the different content of the premise-situation, which marks a substantial difference between the mentioned crimes[86] (in the case of embezzlement, the

[85] Vintilă Dongoroz, I*ntroducere la explicaţiile teoretice ale Părţii speciale, în Explicaţii teoretice ale Codului penal roman*, vol. III de Vintilă Dongoroz, Siegfried Kahane, Ion Oancea, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Rodica Stănoiu, Victor Roşca, Editura Academiei Române, Bucureşti, 1971, p. 7.

[86] Thus, a just solution is given when it is shown that the appropriation of a cart that the defendant, a member of the G.A.C., had obtained from the G.A.C. with the title of loan constitutes an abuse of trust and not embezzlement. In this case, there is no relationship between the defendant and G.A.C. a prior report of a patrimonial nature, but a legal work report that attributed to him the management of the property he appropriated (criminal sentence of the Braşov City Court no. 443/1952, published in “Justiţia”, 1952, no. 5, p. 785); by decisions no. 554/1955 (published in C.D., vol. III, p. 67, and no. 1 140/1955, published in C.D., vol. III, p. 70, the Supreme Court justly changes the classification of the facts of appropriation of the sums entrusted to a salaried employee to hire workers for breach of trust to the detriment of the state’s property (first case) and fraud (second case) in embezzlement, as he appreciates that the defendants had the management of these amounts. Or, in the case of the crimes of breach of trust and fraud, the subject, active, as is known, can be an employee of the respective public unit, but he must not be a manager or administrator of the assets he appropriates. person who had the management of these amounts and was obliged to make the payments on behalf of the reception base, the Supreme Court established that the act constitutes embezzlement and not a fraud against the private patrimony and that compensation civil rights are not granted to the producer, but to the state, which remains obligated to them. Decision no. 1 079/1955, published in “Legalitatea”, 1955, no. 6, p. 622. In the same way, the Timişoara Court judged that the appropriation of the sums resulting from the difference between the purchase price for some products and the lower price with which the defendant bought those products constitutes embezzlement and not fraud to the detriment of the producers, the appropriated amount belonging to the state’s assets, and the defendant having the management of this amount. The decision. Timisoara Court

pre-existing condition consists in the pre-existence of the legal service relationship under which the active subject has management or administration duties, which will constitute the direct object of the crime).

The crime of embezzlement can be found in a *correlation report* or in a report of *connection* with other crimes, according to the nature and intensity of the link that unites these other crimes with the crime of embezzlement.

When the prior commission of the crime of embezzlement (preceding crime) *conditions the existence* of another crime (subsequent crime), there is a correlation between them, and the crimes are correlative. For example, the crimes of *favoritism, concealment, omission of reporting* are subsequent crimes to the crime of embezzlement and conditioned by its commission. Without the existence of the crime of embezzlement, these crimes cannot exist.

If there is only a link between the crime of embezzlement and other crimes that derives from *the way the crime was committed* or from the circumstances of time, place, etc., the existence of one crime not depending on the existence of the other, these crimes are related and the relationship between they are a relationship of connection, and if the acts are committed by the same perpetrator, there is competition with connection[87]. For example, the crime of embezzlement is committed for the purpose of committing another crime; crimes of bribery[88], etc., or a crime of forgery in documents or destruction of documents or documents is committed in order to facilitate the commission of an embezzlement, or a crime (arson, destruction) is committed to hide the commission of an embezzlement.

The cases shown often appear in the form of the contest with connection; the same criminal, alone or in partnership, commits the crime of embezzlement through the mediation of another crime, or to conceal the crime of embezzlement; commits another crime.

A problem that has given rise to countless discussions in specialized legal literature, and varied and contradictory solutions in legal practice, was that of establishing whether embezzlement committed by forgery constitutes a unit or a plurality of crimes. The importance of the problem emerges not only from the need for theoretical clarification, but also from the fact that the legal treatment of criminals is different, according to one point of view or another.

In support of the thesis that embezzlement committed by forgery constitutes a unique complex crime[89], it was argued that the act of forgery "is devoid of its own meaning in relation to the social danger and any other; socially dangerous pursuits" and therefore, in conclusion, that we cannot speak of a criminal autonomy of the forgery activity, but only of "a material act of committing the crime of embezzlement". Supporters of this thesis also invoke the argument based on the unity of purpose in the execution of the criminal act and the unity of the criminal resolution of the criminal.

Embezzlement by forgery is also considered a complex crime by lawyers who believe that

no. 3 663 of July 22, 1958, published in "Legalitatea", 1959, no. 1, p. 76). In the opposite sense, the Arad Court wrongly qualifies as fraud that brings damage to the unit's assets and not embezzlement by false appropriation of a part of the minium collected from citizens by registering smaller quantities of grain than those that actually resulted in threshing. Decision of the Arad Court no. 352 of September 9, 1958, published in "Legalitatea", 1959, no. 4, p. 75.

[87] See, decision of the Supreme Court, criminal college, no. 1889, published in "Legalitatea populară", 1957, no.5, p. 563, regarding the situation when the defendant has two distinct separate and independent businesses and committed embezzlement in each of them separately. The act is not embezzlement in a continuous form, but two related embezzlement offenses in competition.

[88] Braşov Court, by sentence no. 852 of March 29, 1958 (published in "Legalitatea", 1959, no. 9, p. 73), wrongly settled a case regarding embezzlement and speculation, deciding that only one crime, the crime of embezzlement, had been committed, and not two crimes in competition embezzlement and speculation.

[89] See also Gr. Rîpeanu, *Câteva observaţii pe mărginea unor hotărâri judecătoreşti în legătură cu problema pluralităţii şi unităţii de infracţiune*, publicată în „Legalitatea populară", 1956, nr: 1, p.25; I. Tarhon, adnotare publicată în „Legalitatea", 1958; nr. 1, p. 70.

the activity of embezzlement (crime-purpose) absorbs the activity of forgery (crime-means), recognizing the court's right to assess that this activity constitutes a complex crime.

It was also argued that embezzlement by forgery constitutes an ideal[90] contest of crimes, there being only one fact (embezzlement by means of forgery), unit of criminal resolution and prosecution, and the defeat of two legal provisions.

The crime of embezzlement accompanied by forgery represents in reality, as the supreme court[91] also points out, *a real contest*, the two facts each constituting a crime. These activities have a different legal object, distinct content and social danger of their own, and by committing them special legal provisions are defeated. This autonomy in fact must correspond to a juridical autonomy.

Conclusions

As it follows from the previous developments, the need to analyze the crime of embezzlement is imposed as a topic not only of topicality compared to the frequency with which it appears in judicial practice, but also because it raises a complex issue likely to influence the regulation of criminal repression, a regulation whose improvement concern all the criminal laws of the world. Of course, we cannot consider that we have exhausted the entire problematic of the analyzed subject. On the contrary, the cases, notes and studies, published open new perspectives and highlight the importance and scope of the researched matter.

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[90] In this sense, see the solution from decision no. 12/1954. a Tribunalului, regional Suceava, publicată în „Justiţia nouă”, 1955, nr. 5, p. 734.

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