TITU MAIORESCU UNIVERSITY

DOCTORAL SCHOOL - LAW

PhD THESIS

EMBEZZLEMENT

ABSTRACT

Scientific coordinator:
Prof. Univ. Alexandru Boroi, PhD

PhD Candidate:
Adina Maria Alexandra Popescu

Bucharest
2025

1. Actuality, importance and justification of research

The offences committed during some activities are characterized by the establishment of some legal relationships during which the perpetrator exercises duties and responsibilities provided by law and which concern public authorities, public institutions or other legal entities that manage or exploit public property. Embezzlement is included among these offences because it is important to ensure the proper conduct of activities that regulate the proper performance of duties by persons who have the status of public officials from the perspective of protecting the managed or administered assets. The stability and permanence of public authorities and institutions, of all legal entities or individuals referred to in the provisions of Article 175, paragraphs (1) and (2) of the Criminal Code is based on compliance with the law. The protected social value consists in the compliance and proper performance of duties by the public official (as provided by the criminal law) in terms of prohibiting them from obtaining, by embezzlement, use or trafficking, any kind of managed or administered property.

Embezzlement is dangerous because it directly harms the social relationship of service and secondarily affects the managed or administered patrimony. The corresponding acts have traditionally been incriminated as a crime because, first and foremost, the aim was to sanction the behaviour of the person performing the public service. In this regard, the current Criminal Code included the crime among those of service and nuanced the quality of the perpetrator as a public official through current mentions, as well as by expanding the scope of exercise of the duties that define the performed activity.

The research is supported by the in-depth knowledge of the constitutive elements of the crime. In relation to the new adopted regulation, we considered it useful to analyse the legislative amendments and examine the judicial practice generated by the current evolution and approaches.

II. Research objectives

The paper aims to present the regulation and its evolution, identify the aspects resulting from the adoption of new amendments from the point of view of the judicial doctrine and practice. For a good understanding of the crime, a presentation of the emergence and development over time of its constituent elements is required, giving due attention and the analysis necessary to evaluate the provisions of the new Criminal Code. The features of the crime of embezzlement will be presented in detail, according to the current regulation, and mentions will be made regarding the special quality of the active subject justified by the changes that occurred in regard to the assimilated officials. At the same time, the procedural conditions for establishing the manner of investigating and judging the embezzlement acts, dependant on the perpetrator, the amount of damage and the general, material, territorial jurisdiction to resolve such cases, will be presented.

Also, the paper aims to present the issues that have constituted aspects or themes examined by decisions of the Constitutional Court and forms of embezzlement in the law of other states. The final part of the work will be marked by discussing some aspects related to the opinion of some legislative amendments.

III. Research methodology

In order to achieve the study result, the doctrine of the Romanian law was analysed in accordance with the legislative changes and the criticism of the judicial practice solutions. The examination was completed by researching the arguments from the decisions of the

Constitutional Court and the comparative review of the legislation relating to the crime of embezzlement in other states.

The emphasis was placed on the critical analysis of national jurisprudence, accompanied by the presentation of some cases and legal situations specific to official offenses that have embezzlement as their object.

The research was based on the experience and direct observation of the characteristics of the public office and the acts of theft, use or trafficking, taking as a starting point the theoretical concepts, and through the conclusions formulated, the intention was to draw attention to some current issues that may be the basis for legislative amendments.

IV. Structure of the doctoral thesis

The study was designed to follow seven chapters that, on their turn, are divided into specific problems with references to theoretical and practical aspects.

Chapter I – The generalities regarding the protection of service relationships include the presentation of the justification for the incrimination and the protected social value, the causes and the criminological conditions that determine the crime of embezzlement, as well as the objectives of the general and special prevention action.

As a work-related crime, embezzlement is individualized by the quality of an official (in the meaning of criminal law) as the perpetrator who appropriates, uses or traffics goods with patrimonial value, so that the act is defining for the group to which it belongs and leads to the damage of specific social relations and those in the patrimonial sphere. Knowledge of the causes and conditions that determine or favour the commission of the analysed crime, offers the possibility of a precise and clear understanding that criminal law means can have for the protection of protected social values. Therefore, the legal regulation of the crime aims to protect

both work relations at the level of authorities, public institutions, legal persons, and to defend or prevent the occurrence of patrimonial damages.

The contributing causes and risk factors require adequate knowledge through which the result of effective preventive actions can be achieved.

The identification of the causes, circumstances and conditions conducive to committing the crime of embezzlement represents an essential element and a determining factor for the adoption of effective combat and prevention measures.

Chapter II – The historical and jurisprudential landmarks aim to develop the crime of embezzlement by presenting the regulations included in the Criminal Code of 1865 (Cuza Code), the Criminal Code of 1936, the Criminal Code of 1968 and the current provisions of the Criminal Code (Law no. 286/2009).

In the Criminal Code of 1865, the embezzlement crime was provided in the section "Abductions committed by public depositories", which leads to the claim that it had as its objective the acts committed during the performance of official duties. The legal content consisted of the misappropriation or embezzlement by any collector, any depository or public accountant of public or private money or equivalent or substituted effects thereof, titles and other movable things in the power of the perpetrator's assignment. The penalties consisted of correctional imprisonment, and the convicted person lost the right to a pension and was declared incapable of holding any public office, for life. The Criminal Code of 1936 included embezzlement in relation to service by making reference to "The crimes and offenses against public administration" and "The offenses committed by public officials." The crime referred to social relations of public order and consisted of the act of a public official who, by virtue of his official responsibilities, appropriates or misappropriates money or other movable property held under its administration or custody. The sanctioning regime consisted of imprisonment, a fine and a correctional ban.

After 1948, the criminal law underwent successive changes, so that the criminalization of embezzlement acquired a more precise content and a more rigorous legal individuality. The act was individualized by the exclusive reference to "public/community property", and as an author it was recorded that it could be committed by both a public official by law and a person who actually performs management duties. In the new regulation (motivated by social and political relations of a different nature and with exclusive reference to public property), the sanction underwent substantial changes over the years. The limits of the prison sentence were extended, being also established depending on the value of the damage, and in connection with certain circumstances and consequences considered particularly serious, the death penalty was provided. There was also a legal provision that allowed for the partial or total confiscation of the property of the author of the crime.

The 1968 Criminal Code included embezzlement among the crimes that affect the patrimony, and the perpetrator was individualized by the quality of an official or employee who manages or administers money, valuables or other goods belonging to the public property. The notions of official and employee were defined by the provisions of the criminal law, and the passive subject was identified by everything that interests the state organizations, public organizations or organizations that carry out socially useful activities and that operate according to law. The penalties were established depending on the value of the damage, the provisions on the possibility of applying the death penalty and on the partial confiscation of property were maintained. After 1990, the Romanian legislator expressly prohibited the death penalty, and as for embezzlement, this was provided for in the same provisions regarding service crimes. The references to the active subject did not undergo changes, the term common property was replaced by public property and the limits of the prison sentence were reduced. In this regard, it was specified that the term public means everything that concerns public authorities, public institutions, institutions or other legal entities of public interest, the

administration, use or exploitation of public property, services of public interest, as well as goods of any kind that, according to the law, are of public interest.

The current Criminal Code included embezzlement among the official offenses (art. 295 para. (1) and (2), art. 308 para. (1) and (2), art. 309) and the active subject was individualized by a public official from the point of view of criminal law through the place of exercise of management or administration duties. The prison sentences were reduced, considering that they offer sufficient protection both to official relations and, in the alternative, to patrimonial rights over appropriated, used, trafficked goods. At the same time, the complementary penalty of the prohibition of the right to hold a public office was provided.

Chapter III - The structure and content of the offense of embezzlement includes references to the object of the offense, active and passive subjects, the material side, the subjective side, forms, modalities and sanctions through a theoretical (doctrinal) examination with examples of judicial practice.

The generic legal object is formed by social relations of a service nature or specific to the service, individualized by honesty, fairness, responsibility in the management and administration of public resources or those entrusted by virtue of other legal relationships.

The special legal object consists of social relations which, through service obligations and duties, involve respect for the legal and factual situation of the assets managed or administered. The main special legal object is the legal, correct, proper functioning and development of service relations, and the special legal object is identified by the protection of social relations of a patrimonial nature.

The material object is represented by the property against which the incriminated act was directed and consists of money, valuables or other goods with an economic value that belong to a legal person under public law or private law and that the perpetrator of the act manages or administers. The material object can be a movable asset or in certain situations an

immovable asset, it must have an economic value, belong to a patrimony, be of interest, be in the possession or custody of a legal person under public or private law.

The active subject of the crime of embezzlement is qualified because it is necessary to be part of the category of public officials or those assimilated, according to the criminal law (art. 175) and to fulfil permanently or temporarily duties and responsibilities that are the responsibility of public authorities, public institutions or other legal entities that manage or exploit public property. The provisions of art. 308 paragraph (1) of the Criminal Code include in the scope of public officials also persons who exercise a task of any nature in the service of a natural person from those provided for in art. 175 paragraph (2) or within any legal entity.

The quality of active subject of the crime of embezzlement is conditioned by the fulfilment of certain management or administration duties.

Management is understood as the totality of activities carried out by the public official with reference to the receipt, registration, preservation, handling, recording and release of goods. Administration is an operation carried out in order to ensure the role that the assets of an entity must fulfil in relation to the specific purpose and tasks. In a court decision issued by the Bucharest Court of Appeal, it was recorded that the administrator is the official whose duties include the conclusion of disposition acts that refer to planning, supply, disposal, payment distribution and general records of the assets.

Service relationships must be characterized by a consensus of parties when assuming tasks and obligations specific to a particular activity. In the judicial practice that had as its object the resolution of some criminal law issues, it was decided that the doctor employed based on an employment contract in a hospital unit within the public health system; the judicial technical expert; the teacher in state pre-university education; the employee of a private banking company; the judicial administrator; the judicial liquidator; the administrator of an association of owners/tenants have the quality of assimilated civil servants (within the meaning

of the provisions of art. 308 paragraph (1) and art. 175 paragraph (2) of the Criminal Code). The latter solutions are questionable because both activities involve duties and obligations in relation to the fiscal distribution of the collected amounts.

Regarding the provisions of art. 272 of Law no. 31/1990 on commercial companies, the active subject of the embezzlement offense may be the founder, administrator, general manager, director, a member of the supervisory board or the directorate, the legal representative of the company.

Participation in the commission of the offense (co-author, accomplice, instigator) requires knowledge of the components of public official, manager, administrator held by the author and an agreement or understanding between him and the participating person.

The passive subject is the authority, public institution, legal person or natural person under the conditions provided by art. 308 paragraph (1) in conjunction with art.175 paragraph (2) of the Criminal Code.

Regarding the elements and structure of the crime of embezzlement, the following conditions must be met: the money, valuables or other assets must belong to a legal entity or similar entity and must be in the management or administration of the perpetrator; the commission of an act of appropriation, use or trafficking of the material object; the production of damage or a harmful consequence; the commission of the act with intent and the provision of its result.

The objective side of the crime includes the material element, the immediate consequence and the causal link.

The material element of the objective side includes the action of stealing or bringing closer, definitively or temporarily, the material object from the patrimony of the passive subject through one of the following methods: appropriation, use, trafficking. The appropriation involves the removal and proximity of the material object, which signifies the existence of

damage; use means the use of money, valuables or other goods to obtain a benefit and results in a diminution of the patrimony through wear and tear; trafficking consists of removing the material object from the patrimony of the passive subject and performing an act of valorisation or speculation in order to achieve a gain.

The immediate follow-up includes the consequence (change or result) produced as a result of the commission of the criminal act and manifests itself concretely, in a real, economic, financial or monetary manner through a change in the patrimony situation of the injured party. This material characteristic of a concrete modification of a state of affairs gives embezzlement the classification of a result crime.

The causal link represents the objective relationship that exists between the material element (appropriation, use, trafficking) and the immediate consequence that consists in taking possession of the asset. As a result, it is necessary to establish the lack of money, valuables or other assets from the injured party's assets, its reality and to show that it is determined by an act of appropriation, use, trafficking in personal interest or for another, by the manager or administrator.

For the crime of embezzlement, the subjective side is characterized by the fact that the criminal activity is carried out only with intent, by foreseeing the result and the will to pursue its production by committing the act of appropriation, use, trafficking. In the doctrine, there is an opinion according to which the act can be committed with both direct intent and indirect intent, but also another opinion that supports the commission of this crime only with direct intent. Direct intent is characterized by the fact that the perpetrator knows that the money, valuables or other goods are part of the passive subject's patrimony, and taking possession leads to the disruption of the proper conduct of work relations and the production of damage. In this regard, in a decision issued by the High Court of Cassation and Justice, it was specified that

the active subject acts with guilt in the modality of direct intent, having the representation of his act and its consequences, as well as of the socially dangerous result.

The forms of the crime represent the stage or phases of the development of the embezzlement activity committed by the active subject and are presented in the form of an attempt, a consummated act and an exhausted act. The attempt is individualized by the intention to commit the act, the enforcement of the criminal decision and the interruption of the activity or the absence of obtaining a result for reasons independent of the will of the active subject (the execution did not produce its effect). The consummation of the crime is carried out when the embezzlement has been completed by approaching the material object and passing it into the possession, permanent or temporary, of the perpetrator. Exhaustion signifies the completion of the activity and marks the final effect of the criminal activity.

The normative modalities of embezzlement consist of the possibility or manner of committing the act through appropriation, use, trafficking. The crime can be committed both by carrying out one of the modalities, but also by the occasional, successive, incidental development of any action of appropriation, use, trafficking. The factual modalities have been mentioned in the doctrine by introducing goods into management, creating surpluses and appropriating them, marketing products at a higher price followed by stealing the resulting value, falsifying documents in order to justify values resulting from the commission of embezzlement.

The aggravated normative modality results from the provisions of art. 309 paragraph (1) of the Criminal Code with reference to art. 295 paragraph (1) and art. 183 of the Criminal Code and is based on the provision that particularly serious consequences mean damage greater than 2,000,000 lei. The damage must have a certain value, with a clearly established extent and is not to be confused with the obligation to repair the damage which may also include other elements (interest, discount, replacement value).

The sanctions are those provided for in art.295 paragraph (1) and (2), art.308 paragraph (2) and art.309 of the Criminal Code. Attempt is punishable. The Criminal Code provides for imprisonment and the complementary penalty of the prohibition of exercising the right to hold a public office (the right to be elected to public authorities or to any other public office; the right to hold a position that involves the exercise of state authority).

The provisions included in art. 308 of the Criminal Code represent a mitigated version of the crime of embezzlement, according to a (binding) decision pronounced by the High Court of Cassation and Justice in the panel for solving criminal law issues. This legal text, with reference to art. 295 paragraph (1) of the Criminal Code, aims to extend the regulatory legal framework to persons who exercise, permanently or temporarily, with or without remuneration, a task of any nature in the service of a natural person among those provided for in art. 175 paragraph (2) of the Criminal Code or within any legal person. This regulation operates on the structure of the (main) incrimination norm that it extends in terms of the quality of the active subject, but with respect to which it establishes a reduced penalty (the special limits are reduced by one third).

Chapter IV – The effects of the decisions of the Constitutional Court regarding the crime of embezzlement deal with the issue relating to the notions of public officials and public interest, as provided for in art. 308 paragraph (1) of the Criminal Code.

In connection with the provisions of art. 175 paragraph (2) of the Criminal Code, it was shown that this category of persons assimilated to public officials exercise public authority attributes that have been delegated to them by an act of the competent state authority and are subject to a form of state control. With regard to this category of public officials, referred to as assimilated public officials, references were made to the notary public, the bailiff, authorized mediators and doctors with the right to a private practitioner who carry out their activity on their own account in private medical offices. The civil servant, within the meaning of the

provisions of art. 175 paragraph (2) of the Criminal Code, has a different status from that of the civil servant regulated in paragraph (1) of the same article, but nevertheless, the entrusted public function is characterized by the fact that the persons who holds it exercises a service of public interest. There is an investment or an act of control or supervision of the public authorities regarding the performance of that service. Even in the absence of specific prerogatives for the civil servant, the activities of the assimilated person present a major social interest since these functions involve the exercise of a service of public interest.

In order for a person to be considered a public official within the meaning of art. 175 paragraph (2) of the Criminal Code, it was considered sufficient that the person in question carries out their activity within a legal entity whose object of activity consists in providing a service of public interest and is subject to the control or supervision of a public authority. Correspondingly, art. 308 paragraph (1) of the Criminal Code criminalized acts of embezzlement committed in the private environment.

The Constitutional Court found that punishing acts of embezzlement in case there are committed within the private sector with a penalty whose special limits are reduced by one third, achieves a fair balance between the need to protect social values and relations, including through criminal law norms, and the severity of the applicable penalty. It is noted in this regard that for legal entities in the private sector, the correct conduct of service relations, those of a patrimonial nature and any activities of an economic nature constitutes an important premise of their very existence.

Chapter V - Elements of criminal procedure regarding the crime of embezzlement contains information and comments regarding the manner of notification to criminal investigation bodies, their competence and the courts.

Informing the judicial bodies in relation to the crime of embezzlement is done through a complaint or denunciation, acts concluded by the ascertaining bodies provided for by law or

ex officio notification. Following the notification, the criminal investigation is ordered to begin in terms of the fact brought to light and further, when there is evidence indicating the author of the criminal activity, the criminal investigation is carried out against this person. Any person with a management position within a public administration authority or within other public authorities, public institutions or other legal entities under public law, as well as any person with control powers, who, in the exercise of their powers, have become aware of the commission of a crime for which criminal proceedings are initiated ex officio, are obliged to immediately notify the criminal investigation body and to take measures so that the traces of the crime, the corpus delicti and any other means of evidence do not disappear. Also, a similar obligation rests with any person exercising a public interest service, invested by the public authorities, or which is subjected to their control or supervision regarding the performance of their public interest service. The injured party is the authority, public institution, legal entity or assimilated natural person within which the perpetrator carries out his management or administration activity.

The competence to carry out criminal prosecution lies with the prosecutor's office corresponding to the court which, according to the law, judges the case in the first instance. The jurisdiction of the crime of embezzlement lies with the court of first instance if the damage is below 2,000,000 lei, and if this amount is higher, the competence belongs to the tribunal.

The determination, establishment and recovery of damage involves a distinct investigation into the finding and fulfillment of the requirements imposed by criminal and criminal procedure provisions. The assessment of damage must be subject to a legal, fair, serious assessment based on the values of the cash or inventory, as well as the examination of the manner of committing the act through appropriation, use, trafficking. The recovery of damage constitutes an objective of the criminal process in all its phases, so that in all cases

precautionary measures are ordered regarding the return of the goods and the restoration of the situation prior to the commission of the crime of embezzlement.

The notification of the court is carried out by issuing the indictment, the debates include the administration and analysis of evidence, and finally a decision is pronounced after completing the procedural phases. In the event of a conviction, the court decision makes the appropriate mentions of the resolution of the civil side of the case.

Chapter VI - Elements of comparative law referred to the crime of embezzlement aims to present the crime of embezzlement in the legislative regulation of some European countries (France, Spain, Italy, Portugal, Czech Republic).

Except for the Czech Republic, in the other mentioned countries embezzlement is included among official crimes and consists of any act with the meaning of embezzlement that affects authorities, public institutions, legal entities that have administrative duties. In the Czech Republic, embezzlement is considered a patrimonial crime.

In France, the applicable legal regime has as its main purpose the guarantee of professional probity, the consideration and prestige enjoyed by the civil servant within the public administration, and in the secondary plan the protection of the state's patrimony is ensured. The material object of the crime is represented by acts or titles, public funds and their effects, documents or guarantees that take their place, any object (good) assigned or entrusted by virtue of the function or task/attributions fulfilled by the active subject who has the quality of a public official. The active subject is the person holding the public authority or who performs an activity in the public service, a public accountant, a public depository or any subordinate who receives the title, fund or any object that has been entrusted to him. The passive subject is the state identified by the public authority whose prestige and patrimony are damaged. The modalities of perpetration are the theft, misappropriation (appropriation, use) and destruction with the meaning of the transformation of the material object by the public

official who has management or administration powers. The penalty consists of imprisonment for up to 10 years and a fine that may be in the amount of double the damage caused by the crime. Calculating a criminal fine at the value of double the product of the damage constitutes a method and a prevention factor.

In Spain, the crime is characterized by the incorrect administration or appropriation of goods with economic value belonging to the public administration by authorities or civil servants during the exercise of specific duties during their service. The material object is only a movable asset, the subject active can be a public authority or a civil servant, and the objective side of the crime involves the theft and appropriation of the asset. Spanish criminal law provides that the active subject of the crime of embezzlement can also be a legal person. In this case, the sanction consists of a fine whose amount is established in relation to the value of the damage, and the legal person is subject to dissolution, suspension of activity, closure of premises, prohibition of activity and prohibition of obtaining a subsidy.

In Italy, the protected social value is the authority and integrity of public administration in all forms of organization and operation. The material object of the crime is money or a movable asset, the active subject is the civil servant or the one entrusted (temporarily) with a public function, but it can also be any natural/legal person beneficiary of public funding. The passive subject is the public administration. The objective side of embezzlement consists of the appropriation or embezzlement, the (temporary) use, storage and receipt of money or other assets.

In Portugal, being a service crime, embezzlement has as active subject a civil servant in public practice. The passive subject is the public administration. The material object consists of money or movable or immovable property, animals and vehicles on which acts of appropriation, use are committed or are subject to a loan or pledge. The penalties are imprisonment or a fine established according to the value of the damage.

In the Czech Republic, the crime of embezzlement is identified by the act of the person who appropriates an object or other valuable asset that has been entrusted to him and thus creates damage to the property of another. The regulation is completely different being close to the crime of breach of trust and is not conditioned by the fulfillment by the author of a certain function or by the damage to a public patrimony.

Chapter VII – The conclusions and proposals "de lege ferenda" include a synthesis of the protected social values, the material object, the constitutive elements, the classification, the sanctions and the justification of the legal regulation of the crime of embezzlement. Also, some opinions were presented regarding the modification or clarification of some aspects of legislative nature. In this regard, it was assessed that there is an inaccuracy in the content of art. 308 paragraph (1) of the Criminal Code which shows that the active subject of the crime can be the official who performs a task of any nature in the service of a natural person (provided for in art. 175 paragraph (2) of the Criminal Code) or within any legal person. In this regard, it was considered necessary to make a change in the sense of referring to the official who performs any task that signifies or involves acts of management or administration.

Another note refers to the need for a precise clarification through a legal text of the notion of administration because judicial practice can express different and contradictory opinions.

In relation to the active subject of the crime, it was considered that it is not without interest that this quality be given to a legal person who performs acts of management or administration that result in obtaining a profit (exclusively for the benefit of the legal person) through acts of appropriation, use, trafficking (an act existing in Spanish law). The following regulation could be included in the provisions of art.295 with reference to art.136 of the Criminal Code.

Regarding the sanctioning system, there is a proposal concerning the establishment of a penalty consisting of a fine that amounts to at least the double of the damage resulting from the commission of the offense (existing regulation in French law). In this regard, the fine that accompanies the prison sentence is provided for in art. 62 of the Criminal Code and has the characteristic of being applied optionally in case the committed offense was intended to obtain a patrimonial benefit (which is specific to embezzlement).

A current trend regarding crimes causing damages goes towards the application of reduced penalties or even exemption from criminal liability if the values representing the material object of the crime are restored in a certain proportion. As a result, the opinion was expressed of applying penalties depending on the full recovery of the damage (during criminal prosecution or trial) with a multiplication/increase percentage established by law. In this regard, there is a legislative precedent (the crime of tax evasion).