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SIMILARITIES AND DIFFERENCES BETWEEN THE OFFENCE OF EMBEZZLEMENT AND THE OFFENCE OF ABUSE OF OFFICE WITH RELEVANT JURISPRUDENTIAL ASPECTS

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Abstract: *This paper aims to provide a detailed analysis of the differences between the offence of embezzlement provided for in Article 295 of the Criminal Code and the offence of abuse of office provided for in Article 297 of the Criminal Code in terms of relevant doctrine and jurisprudence. The frequency of committing misfeasance in office, in particular, the two offences under consideration, gives rise to constant debate on the subject of the article. We have also set out to analyse how the judicial authorities have changed their view in some cases after the Constitutional Court's decision no. 405/2016, which brought some divergences concerning acknowledging the offence of embezzlement instead of the offence of abuse of office.*

Key words: *embezzlement, abuse of office.*

1. Introduction

This paper aims to firstly analyze the main differences between the offence of embezzlement provided for in Article 295 of the Criminal Code and the offence of abuse of office provided for in Article 297 of the Criminal Code, and secondly some situations that have arisen in jurisprudence concerning the classification of the two offences under analysis.

2. The offence of embezzlement vs. the offence of abuse of office

To begin with, it should be noted that both offences are misfeasance in office and are found in Chapter II of Title V of the Criminal Code, their common legal scope being the disruption of the normal functioning of the public body with significant consequences to the detriment of public-interest entities.

A particularly important aspect is that the relationship between the two offences is one of subsidiarity. Thus, the offence of abuse of office is often used by the judicial

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authorities because of its subsidiary nature to classify unlawful acts committed by public servants when, for example, the typical conditions of the offence of embezzlement or other misfeasance in office or corruption offences are not met.

The former Supreme Court has ruled that the offence of abuse of office is subsidiary only to other offences to which an official is the subject and not to any offence (Supreme Court, decision no. 3384/1971, apud Ciolei, Rotaru & Trandafir, 2019, p.292)

Concerning the subsidiary nature of the offence of abuse of office, it has been pointed out in the literature that due to the general nature of the offence of abuse of office, if the act actually committed also fulfils the elements of a special offence - with a narrower scope due to the additional conditions included in the constituent elements - the latter offence shall be acknowledged, applying the rule that the general is subsidiary to the special (Antoniu, G. et.al., 2016 p.303)

Per a contrario, where not all the additional conditions of the special rule are met, the general rule shall be acknowledged. In the case of the offences covered by this paper, if some of the special conditions of embezzlement are not met, the offence of abuse of office shall be acknowledged, provided, of course, that all the typical conditions of the rule in art. 297 of the Criminal Code are met.

Given the effects of the Constitutional Court's decision no. 405 of 2016 and the partial decriminalisation of the offence of abuse of office, if the act not carried out or carried out defectively is provided for only in secondary legislation, the acquittal for the offence of abuse of office shall be ordered, possibly acknowledging a disciplinary sanction, a misdemeanour or a tort.

It has been pointed out in the literature that “judicial bodies perceive this rule as extremely “useful” ... “this incriminating rule is a jolly-joker text, i.e., it can fill in all the 'factual' gaps of the other incriminating texts in terms of the unlawful conduct of an official” (Bogdan, S., Șerban, D.A., 2020, p.367)

The judicial practice has established that “in essence, an embezzlement is a special form of abuse of office which is criminalised in a special way because of the special status of the perpetrator – an official with management powers who acts on assets under his/her management or administration, using one of the alternative variants criminalised by the legislator, namely “appropriation”, “use” or “trafficking” to obtain a material benefit for himself/herself or another person” (Craiova Court of Appeal, Criminal and Juvenile Division, decision no. 1397 of 20 June 2013)

As misfeasance in office, they both have the same main legal scope and the first difference between the two offences is the special legal scope. In the case of the offence of embezzlement, several social values are affected, the main one being the proper conduct of the employment relationship and the other being the aggrieved party’s assets.

The special legal scope of the offence of embezzlement is made up of social patrimonial relations, the creation, existence and extension of which require the respect and protection of the issue in fact of the property belonging to a legal entity of public or private interest against acts of appropriation, use or trafficking by the person in charge of managing or administering the property.

The offence of abuse of office also affects a plurality of social values, mainly aimed at the proper conduct of the employment relationship and the related legal scope, as

stated in the literature, refers to "relationships involving the protection of the legitimate interests of natural or legal persons who apply to certain services, so that they can exercise their rights and not be harmed by persons employed in the requested units through the improper exercise of the duties" (Antoniu, G. et al., 2016 p.323).

In terms of the material object, if in the case of the offence of embezzlement we always find the material object, i.e., an object on which the illegal activity of the official is directly and directly directed, in the case of the offence of abuse of office, the rule is that the material object is missing.

By way of exception, we can have a material object in the case of the offence of abuse of office. In this respect, the literature has shown that "if however the action constituting the material element was carried out on something (e.g., wrongful seizure of something, defective drafting of a document), there is a material object of the offence" (Dongoroz, V. et al., 1971, p.80).

In the case of both offences, the capacity of the direct active subject is qualified. Thus, the active subject can only be a public official within the meaning of Article 175 of the Criminal Code or, possibly, a "private official" within the meaning of Article 308 of the Criminal Code. However, the difference between the two offences in terms of the active subject is that in the case of the offence of embezzlement, the legislator has imposed a double qualification of the active subject. Thus, in addition to being a public official, the perpetrator must also be the administrator or manager of the money, assets or other property for the offence to be typical.

These requirements affecting the capacity of the active subject are cumulative and the lack of manager or administrator capacity could activate the subsidiary nature of the offence of abuse of office.

Thus, the doctrine under the old Criminal Code stated that "the offence of abuse of office against public interests is committed by the driver of a motor vehicle who, being part of the staff of a legal entity, uses this motor vehicle improperly, without the necessary authorisation, for personal purposes if his/her act also meets the other constituent elements of this offence" (Diaconescu, G., Duvac, C., 2009, p.411).

A few comments are required concerning the above. Firstly, the offence of abuse of office can only be acknowledged if the property was not administered or managed by the perpetrator. In this regard, it has been decided in judicial practice (Cluj Court of Appeal, Criminal and juvenile division, Decision no. 1784/R/2012 of 12 December 2012) that

> "*in this case, the defendant committed the offence of aggravated abuse of office against public interests (concerning the particularly serious consequences) and on an ongoing basis, provided for by Article 248[1] of the Criminal Code and not the offences of fraud or embezzlement*". In so deciding, the Court held that *"it is clear from the job description that the defendant did not have the duties of a manager concerning the actual duties that she performed and concerning the fact that this employee, like the other employees of the Institute of Forensic Medicine, collects through the treasury the amounts representing the value of the work performed, i.e., salaries. Consequently, the defendant did not administer or manage the amounts of*

money which she had appropriated, not even in fact, and she drew up false documents in the exercise of her job duties, even though the court was not notified of any forgery offences. However, there is no doubt that the defendant was involved in forgery of all the payrolls, summaries and other documents which were then submitted to the treasury and that the defendant caused damage to the Institute of Forensic Medicine using the method described above".

As has been pointed out in the most widely accepted doctrine, both the de jure and the de facto manager are taken into account according to the provisions of Law no. 22/1969. It has also been pointed out in the doctrine that any person who manages in fact certain assets shall be considered to be a manager, thus "an official who accepts to perform management duties or assumes the role of manager, although he/she has no job duties in this respect, or a private individual who accepts to perform management duties (the case of the manager's wife) is a de facto manager and, if he/she appropriates the managed assets, he/she commits the offence of embezzlement (Dongoroz & collaborators, 2003, p. 564).

It has also been pointed out in the doctrine that "a minimum condition absolutely necessary for the existence of "de facto management", is that the public legal entity must know the de facto performance of the management activity" (Diaconescu, G., Duvac, C., 2009, p.289). Thus, if the legal entity was not aware of the de facto management activity performed and the public official was using or trafficking company property without right, the offence of abuse of office and not the offence of embezzlement could be acknowledged.

Secondly, we consider that the offence of abuse of office could be acknowledged only if the material element is achieved through the use or trafficking of the property, while the offence of theft would be applicable in the case of appropriation. To the same effect, it has been stated that "if the stolen property is not part of the property administered or managed, it shall constitute the material object of the offence of theft" (Udroiu, 2018, p. 510). Thus, when the perpetrator has the goods only for safekeeping and not for management and decides to steal them, he/she shall commit the offence of theft and not the offence of embezzlement or abuse of office.

Another difference between the two offences is the material element of the objective aspect. In the case of embezzlement, the material element is achieved through the appropriation, use or trafficking of money, valuables or other property for oneself or another. In the case of the offence of abuse of office in its typical form, the legislator has provided that it may be committed by an omission (failure to perform an act) or by an action (defective performance of an act).

The doctrine has pointed out that the actions or inactions which form the material element of the offence are general, encompassing the violation of a wide variety of job duties (Ciolei, V., Rotaru, C., Trandafir, A.R., 2019, p.289). As stated above, given the subsidiary nature of the offence of abuse of office, this offence is often acknowledged to be committed when the conditions for the typicality of other misfeasances in office or corruption offences are not met.

Until the Constitutional Court's Decision no. 405 of 2016 and the partial decriminalisation of the offence of abuse of office, any abusive conduct by an official was covered by this offence, regardless of the regulatory document governing his/her activity. Thus, as a result of this Decision, failure to perform or defective performance of an act must be analysed only by reference to job duties expressly regulated by primary legislation.

Concerning how the material element of the offence of embezzlement is achieved, the legislator has provided that money, valuables or other property may be appropriated, used or trafficked for the benefit of the official or another person. While in the case of use and trafficking it is unanimously accepted that they can also be carried out for the benefit of others, things are a little different in the case of appropriation.

Appropriation "for another" exists when the property is "transferred" directly to the third person's assets "with the help" of the manager or administrator of the property, but in fact, this activity is nothing more than an abuse of office, provided that the obligation breached by which the property left the aggrieved party's assets is provided for in the primary legislation.

Since the property goes directly into the beneficiary's assets, "appropriation for another" can only be regarded as an aid to the person who gains wealth from the property, which involves either failure to perform an act or defective performance of the act. Thus, this aid could be classified as an offence of abuse of office and not as an offence of embezzlement.

In essence, appropriation means a concrete activity of taking possession of the property by the perpetrator and creating the ability to behave as if it were his/her property. To be in the presence of embezzlement by appropriation, it is essential that the property actually becomes his/her property. In practice, it has been stated that "to establish that the perpetrator has appropriated the property under his/her management based on his/her job duties, there must be evidence that he/she is acting as a good owner of the property which has definitively passed into his/her possession" (Timișoara Court of Appeal, Criminal division, Decision no. 1423/A/2021 of 16 December 2021).

In practice, the High Court of Cassation and Justice has ruled in a decision issued in a cassation appeal that

> "*appropriation involves an unlawful act of removing from the possession or custody of the establishment in which the perpetrator works amounts of money, valuables or other property managed or administered by him/her and transferring them to his/her possession so that he/she* ***can dispose of them as his/her property***. *The removal of money, valuables or property from the legal entity's assets may be effected either by direct, material acts or indirect acts of disposition. In the case herein, as resulting from the grounds of the appealed decision, it was acknowledged that the appropriation of the money was carried out indirectly by recording unreal payment obligations in 2 payment orders and 16 bank transfer statements and by the defendant's settlement of hotel and transport services unrelated to her job duties, which were provided* ***in her interest****, actions which correspond to the material element of the offence of embezzlement"*

(High Court of Cassation and Justice, Decision no.266/RC/2018 of 11 September 2018).

Relevant in this respect is also a recent decision of the High Court of Cassation and Justice in a cassation appeal (High Court of Cassation and Justice, Decision no. 437/2022 of 04 October 2022) whereby the High Court admitted the cassation appeals lodged by the defendants, reversed the decision of the court of appeal and ordered acquittal based on Article 438, para.1, point 7 of the Criminal Procedure Code concerning the provisions of Article 16, para. (1), letter b),the thesis I of the Criminal Procedure Code, having as grounds for reversal the fact that the defendant was convicted of an act not provided for by criminal law. In the case herein, the Brasov Court of Appeal (Brașov Court of Appeal, Criminal division, Decision no. 63/Ap/2022 of 21.01.2022) sentenced the defendant for the offence of embezzlement with particularly serious consequences, on an ongoing basis (40 material acts).

In the grounds of the decision, the Brasov Court of Appeal pointed out that the offence of abuse of office is subsidiary to the offence of embezzlement, and that the acts of the defendants meet the typical elements of the offence of embezzlement, this offence to be prevalently acknowledged to the offence of abuse of office. Concerning the fulfilment of the typical elements of the offence of embezzlement, the Court stated that

> *"the defendants' acts of remitting amounts of money under the guise of granting 'loans', without observing the minimum conditions laid down by the banking rules for such operations, in reality, constitute acts of* ***appropriation*** *of the amounts of money* ***for the benefit*** *of those to whom they were ultimately remitted" ... "in the case herein, the offence of is* ***'appropriation' for another*** *and not 'trafficking' because the defendants AA. and BB. finally removed the money granted by way of 'loan' from the bank's assets - which they administered as members of the credit committee - when they remitted it to the defendants CC. and S.S. or their companies".*

At the same time, the Court pointed out that *"since the real beneficiaries of the "loans" could not repay them, which happened in this case, and the amounts remitted remained mostly unpaid, the acts of the defendants AA. and BB. to order the removal of this money from the bank's assets constitute acts of "appropriation" carried out for the benefit of the defendants CC and S.S. or their companies".*

In the same decision, the court also pointed out that *"since Article 295 of the Criminal Code does not distinguish between the three ways of committing the offence of embezzlement - appropriation, use, trafficking" ... "there is no reason to interpret the legal text as meaning that only use and trafficking can be committed for the benefit of another, while appropriation can only be committed for the benefit of the perpetrators".*

The arguments of the Brasov Court of Appeal regarding the fulfilment of the elements of typicality are opposed both in doctrine and in judicial practice.

The appropriation is achieved by the perpetrator taking possession of the property which is the material object of the embezzlement.

Thus, the perpetrator dispossesses the aggrieved party for appropriation, i.e., to make it effectively his/her own. Property is deemed to be appropriated when the **perpetrator** takes possession of it and can carry out acts of disposition of the property such as disposing of it, consuming it or even destroying it. The property must become the property of the perpetrator even if only temporarily.

Thus, literature has pointed out that "appropriation, as a means of removing property, consists, on the one hand, of an initial act of removing the property from the possession or custody of a public or private legal entity and transferring it to **its possession**" (Diaconescu, G., Duvac, C., 2009, p.291). The most widely accepted doctrine is along the same lines (Dongoroz & collaborators, 2003, p. 566; Ciolei, V., Rotaru, C., Trandafir, A.R., 2019, p.278; Barasab, M., et.al. 2008, pp. 494-495; Boroi, 2014, p. 462; Bulai, C., Filipaș A., Mitrache, C., 2006, p. 403). Appropriation is equivalent to the definitive removal of the property from the aggrieved party's assets, followed by the **perpetrator**'s possession of that property (Bodoroncea, G., et.al., 2016, p.958).

In an issue in fact similar to that in the case analysed above, under the old Criminal Code, the Supreme Court (Supreme Court of Justice, Sentence, Decision no. 5717/2001 *apud*. Diaconescu, G., Duvac, C., 2009, p.413) ruled that the granting of loans in breach of the lending rules by an official of a privately-owned bank constitutes the offence of abuse of office against the interests of persons, provided for in Article 246 of the old Criminal Code.

The decision remains valid today regardless of whether the bank's capital is private [The High Court of Cassation and Justice ruled by Decision no. 18/2017 of 11 July 2017 that "for the purposes of criminal law, the bank official, an employee of a fully privately owned banking company, authorised and supervised by the National Bank of Romania, is a public official within the meaning of Article 175, para. (2) of the Criminal Code", thus, even if the bank's capital is fully private, the bank official is a public official and may be an active subject of the offence of abuse of office] or public, as long as the perpetrator's activity was limited to facilitating the granting of loans from which other persons benefited.

For embezzlement to be considered to have been committed, it must be proven that the asset has passed into the unlawful possession of the manager or the administrator, i.e., appropriation, since the mere absence of the asset cannot amount to a presumption of embezzlement (Bulai, C., Filipaș A., Mitrache, C., 2006, p. 404). In this regard, it has been pointed out in practice that "the evidence does not show that the defendant appropriated part of the goods that he/she had taken under management from the civil partybut it was handed over to the clients, he/she did not show up on time to collect the value of the goods, and in this regard, it is worth mentioning the statements of the witnesses heard in the case, namely witnesses C.T.M. and G.C. (Bucharest Court of Appeal, Criminal division I, Decision no. 613/2020 of 02 July 2020)

"*Appropriation*" means what is defined in the offence of theft as "*taking the property*". The perpetrator removes the property permanently from the possession of the establishment, whose assets are therefore diminished, by unlawfully transferring it to his/her possession.

The theory of appropriation as defined in the doctrine is also fully valid in the case of the offence of embezzlement, provided, of course, that the specific requirements of the acts of management or administration are met.

Thus, first of all, we have an act of removing the property from the aggrieved party's assets, followed by an act of entry of the property into the possession of the perpetrator of the embezzlement, possession which must be definitive from the perpetrator's point of view.

Even if the final beneficiary is another person, it is absolutely necessary for the offence of embezzlement in the form of "appropriation" to be committed that the property first passes into the possession of the manager or administrator. It is irrelevant what subsequent action the active subject takes concerning the embezzled property once he/she has appropriated it.

For its part, the Constitutional Court has stated that *"appropriation means the removal of an asset from the possession or custody of one of the above-mentioned legal entities and its transfer to the property of the perpetrator so that he/she can dispose of it by consumption, use or even alienation"* (Constitutional Court of Romania, decision no. 256/2017 published in the Official Gazette 571 of 18.07.2017)

To the same effect, the High Court of Cassation and Justice (High Court of Cassation and Justice, decision no. 64/RC/2019 of 19 February 2019), in a similar case in terms of the legal issue of the offence of embezzlement in the form of "appropriation for another", correctly ruled that we cannot speak of an offence of embezzlement in the absence of an appropriation, ordering the acquittal of the defendants for the offence of embezzlement.

Thus, the High Court of Cassation and Justice held that

> "*examining the issue in fact, as held by the court of appeal, it is found that it does not reveal that the defendants appropriated any amount of money for themselves or another but that they caused the conclusion of the sale-purchase contract of the land located outside the built-up areas of Roata de Jos Commune, Giurgiu County, which resulted in the payment of an overvalued price so that an amount of money not owed entered* ***in the seller G.'s assets*** *and prejudice was caused to the civil party's assets in this way. The price for the purchased land was transferred by the buyer, the Romanian Register of Motor Vehicles,* ***directly to the seller's assets. At no time was that amount of money taken, possessed or appropriated by any of the defendants****. As a result, the definitive removal of the money from the aggrieved party's assets and the causing of damage is not the result of the appropriation of money by the defendants and such an act does not correspond to the incriminating pattern of the offence of embezzlement*".

The Court of Appeal (Bucharest Court of Appeal, Criminal division II, Decision no. 491/A/2018 of 10.04.2018) held as a material element for defendant A. *"the conclusion of the sale-purchase contract through an agent, in his/her capacity as Managing Director of the Romanian Register of Motor Vehicles, which resulted in the* ***seller's appropriation*** *of an amount of money higher than the actual price and, implicitly, the damage to the*

Romanian Register of Motor Vehicles", and for the defendant B. it held that *"by his/her involvement in the same procedure for the purchase of the property and the preparation of the technical memoranda, by failing to comply with the internal rules, he/she assisted the defendant A. and caused the purchase of the land in question at a much-overvalued price".* In this regard, the appealed decision established that *"by concluding the sale-purchase contract of the land between the said G. - as a seller and the Romanian Register of Motor Vehicles- as a buyer, the defendants acted* ***to obtain a profit for another****".*

In the reasoning of the decision to acquit the defendants for the offence of embezzlement, the High Court of Cassation and Justice (Decision no. 64/RC/2019 *precited*) stated that *"in this case, there is no action of theft, of taking possession by the defendant A. (considered the perpetrator) of the goods that are the subject of the offence of embezzlement. Defendant A., like defendant B. (considered to be an accomplice), was not accused of appropriating any money from the assets of the Register of Motor Vehicles but of* ***having caused damage to the civil party by failing to perform his/her job duties,*** *by concluding a land sale-purchase contract at an overvalued price and that the money was thus appropriated by the seller. In this case, it was not acknowledged as a factual basis that any amount of money had entered the assets of the defendants, the Court of Appeal having established that the* ***profit was made by the seller G.*** *by overvaluing the land and that the conclusion of the sale-purchase contract was aimed exclusively at removing the amount of money, representing the price, from the civil party's assets,* ***an amount which was appropriated by witness G****."*

Concerning the comparative analysis of the offences which are the subject of the material herein, the offence of abuse of office by defectively performing an act (an offence for which the defendants were sent to trial by the indictment and convicted by the decision of the court of the first instance) could have been acknowledged in this case.

Concerning the charge of abuse of office, it was held that defendant A. failed to perform his/her job duties, damaging the Romanian Register of Motor Vehicles and benefiting from the complicity of defendant B. The Court of Appeal ordered the change of the legal classification to the offence of embezzlement, being determined by the effects of the Constitutional Court's decision no. 405/2016 and the lack of provision in the criminal law for failure to perform or defective performance of job duties to obligations found in non-statutory normative acts or internal documents of the employer.

However, I must point out that, since the High Court of Cassation and Justice was notified of the extraordinary legal remedy of cassation appeal, there was no possibility of changing the legal classification given the case of cassation appeal supported by the appellant and the only legal solution that could be adopted was to acquit the defendants under Article 16(1)(b) of the Criminal Procedure Code for the offence of embezzlement.

In the decision analysed above, the Supreme Court (Decision no. 64/RC/2019 *precited*) stated that

"the cassation appeal is the legal remedy by means of which the conformity of final decisions with the rules of law is analysed by reference to the cases of cassation expressly and restrictively provided for by the law, which concerns exclusively the legality of the decision and not matters of fact, the Supreme Court not being able to re-trial for a third time a case within the limits of the judgment in first instance and appeal. Thus, the review of the decision is exclusively under the law and the de facto rulings of the court whose decision was appealed cannot be censured in any way".

3. Conclusion

However, we believe that the offence of embezzlement and not an abuse of office may be acknowledged when the perpetrator embezzles assets (which he/she manages or administers) through a third party, provided that the final beneficiary is the perpetrator or at least also the perpetrator.

In this respect, the situation must be analysed *in concreto* on a case-by-case basis, the fundamental issue being to establish whether the official has benefited from these assets following the final dispossession of the aggrieved party.

Therefore, if the embezzled assets have become the property of a legal entity whose partner and administrator is the perpetrator, there can no longer be any question of an "appropriation for another" but of an "appropriation for his/her own benefit" since the embezzled assets have come into the possession of the perpetrator indirectly through a third party.

Similarly, the above arguments apply *mutatis mutandis* also in the situation where the apparent beneficiary is a family member of the manager or administrator of the assets that have been unlawfully removed from the legal entity's assets.

Another difference between the two offences is the immediate follow-on. In the case of the offence of embezzlement, the immediate consequence is the temporary or permanent removal of the property from the aggrieved party's assets and the causing of damage. In the case of the offence of abuse of office, the immediate consequence is clear from the legal text itself and consists in causing damage or injury to the rights or legitimate interests of a natural person or legal entity.

Another difference between the two offences in objective terms is the causal link. While in the case of embezzlement, this is in principle based on the materiality of the act, in the case of abuse of office, a causal link must be proved between the defective performance of an act or failure to perform an act and the immediate consequence produced, i.e., the causing of damage or harm to the rights or legitimate interests of a natural person or legal entity.

As regards the forms of the offence, the attempt is possible and incriminated in the case of embezzlement, while the attempt is only possible in the form of commission in the case of abuse of office but the legislator has decided not to incriminate it.

Also, concerning the forms of the offence, the offence of embezzlement is committed when the property is permanently or only temporarily removed from the aggrieved

party's assets as a result of the material element being achieved through one or more of the alternative and limited modalities set out in Article 295 of the Criminal Code.

Given that the offence of abuse of office is a result offence, it is not committed when an act is not performed or is performed defectively but when damage is caused or when the rights or legitimate interests of a natural person or legal entity are harmed.

In conclusion, we hope that this analysis has contributed to the crystallisation of all the essential elements of the two offences analysed to avoid situations in which final convictions are subsequently reversed by the admission of the extraordinary legal remedy of cassation appeal, the jurisprudential stability being a basic element in strengthening confidence in the act of justice.

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