

Legal Qualification of the Offense

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Abstract

The current Code of Criminal Procedure in Albania defines the procedural relationships between entities in all stages of the criminal procedure. This code focuses, inter alia, on the guarantee and respect of law and protection of the rights of the defendant in criminal proceedings. It should be noted that the Code of Criminal Procedure provides, inter alia, for the possibility of the court to change, in its final judgment, the legal qualification of the offense previously defined by the prosecution, in the formulation of the charge brought to trial. This action should be accompanied with some procedural guarantees which should provide the defendant real opportunities to effectively exercise the right to defense. A special emphasis in this paper will be given to the analysis on the decision of the court to change the legal qualification of the offense, particularly seen in relation to the rights of the defendant. This paper will also analyse the characteristics of the change to the legal qualification of the offense which will be illustrated with the practice of the European Court of Human Rights. In conclusion the paper will state some conclusions which are the product of the analysis of the doctrine and jurisprudence of the courts referred to in this paper.

Keywords: change of legal qualification, the defendant, the court, new charges, complaint (appeal), imaginary (fictitious) competition of criminal offenses.

1. General Considerations

The fourth section of the second chapter of the Albanian Code of Criminal Procedure stipulates the provisions related to *New charges* in criminal proceedings. These provisions regulate special legal situations that include the conducting of the proceedings by the prosecution during the hearing, in which the defendant is brought to trial for the relevant charge.

Normally the prosecution, on the conclusion of the preliminary investigation on the charge of a person suspected to have committed an offense, officially inform him the relevant charge for the specific offense adequately investigated and submits in the court the application for the trial of the defendant on the charge for which he has been already informed on completion of the investigation.

During the trial process the defendant presents the available arguments and evidences in favor of his procedural position in relation to the charge. This process, otherwise known as the judicial debate, helps the court, in the conclusion of the trial, to accurately determine the validity of the charge based on the evidence presented in the trial and in the synthesis of this process to announce the final judgment.

The aforementioned rule recognizes some exceptions. It may happen that the fact described by the prosecutor in the charge, appear differently during the trial or, an evidence of a new offense or a new fact may be presented during the trial, which is not mentioned in the application for trial and, the defendant is not prepared for this new situation created. Being in the new circumstances, where the prosecution changes its position in relation to the investigated charge and the fact brought to trial, the rights of an effective protection in the court should be guaranteed to the defendant to face the changes of the prosecution attitude (Skënderaj, 2014).

Referring to the above case the situation is legally clear. In the event of the change of the charge or communication of a new charge in the trial, the defendant has the right to seek in the court an adequate timeframe in order to prepare himself effectively to commit his defense.

The situation becomes difficult for the defendant, when it is the court which undertakes such a procedural action in function of the fair resolution of the criminal case. Pursuant to the Albanian Code of Criminal Procedure in the end of the trial the court, in its final decision, could give the fact a different legal definition from that done by the prosecutor. The different determination of the legal fact done by the court in its final judgment, may be lighter or more severe to the

defendant. In this case, the defendant is put before a real difficulty because of the court judgment which may have deteriorated the position of the defendant; this may be sudden to the defendant who has not been previously informed about the possibility of deterioration of his position.

Therefore the aim of this paper is to analyze the constituent elements of the change of the legal qualification of the offense made by the court in view of guaranteeing the rights of defendants to achieve an effective defense against this legal situation created by the judgment of the court.

2. Legal Qualification of the Offense

Article 375 of Albanian Code of Criminal Procedure entitles the court to provide, in its final judgement, the criminal fact found during the trial a legal qualification different from that which was specified in the charge brought against the defendant in trial. We can say that although in a restricted nature, the legal qualification of the fact found in the trial by the Court in its final judgement it is an expression of the latin principle *jura novit curia* ¹.

With the change to the legal qualification of the offense by the court we shall understand the exact legal definition of the concrete figure of the criminal offense, stipulated by the criminal law, committed by the defendant with his acts or omissions. So the legal qualification of the offense relates closely to the acts or omissions committed by the person which are provided by the criminal law as essential elements of the criminal offense. In this case the court facing the criminal fact must determine the specific criminal provision that would apply to the perpetrator. This court action relates to the exercise of the right that it has to fairly define the legal qualification of the criminal offense evidenced during the trial of the criminal case.

3. The Elements of Changing the Legal Qualification of the Criminal Offense

The elements of changing the legal qualification of the offense are included in Article 375 of the Code of Criminal Procedure. This provision stipulates that "*The court, by its final decision, could give the fact a definition different from the one that the prosecutor or the injured accuser has made, lighter or more severe, provided that the court has jurisdiction over the offense*".

By analyzing the constituent elements of procedure provision referred to above, we arrive at several conclusions, which are listed below.

First, the procedural subject that could give the fact a legal definition different from the charge, is the court. Compared to the right of the prosecutor on the same issue, the court in this case has the right of final determination of the former legal qualification that the prosecution has made to the criminal fact on trial. In this sense, the court is the procedural entity that at the end decides on the law to be applied in the concrete case.

Second, changing the legal qualification of the criminal offense the court may can only give its final decision. During the trial, the court is forbidden by law to give the fact brought to trial and found as such during the debate, the appropriate legal definition. The court can exercise such action of procedure nature only at the end of the trial, after having heard the latest conclusions of the parties. In this way, the court maintains its neutral position for the whole judicial process and it shows its will on the case on trial, only in its final decision.

Third change of the legal qualification of the offense by the court is made only when the change refers to the same fact brought to trial by the prosecution. The fact attributed to the defendant by the prosecution, should remain unchanged from the time that a court process started until the court gives the final decision.

The same fact means the same actions committed by the same person responsible before the law, with which it has affected or injured the same legal values or benefits specifically protected by criminal law, which are conducted at the same time. These findings relate to the criminal fact that they should not be different in the prosecution and court assessment. The term "same fact" should be understood as a fact that not only results to be the same in general, but it is also necessary that the essential elements of the criminal fact which configure the offense provided by the criminal law should be the same.

Fourth, legal qualification that the court makes to the fact in its final decision may be lighter or more severe than the legal qualification that the prosecution has made to this fact in the formulation of the charge brought to trial. So the court, in the legal qualification that it makes to the offense, is connected to the legal definition that the prosecution has

¹ *The Court knows the law.*

made to the fact criminal.

Fidth, the court can change the legal qualification, provided that the offense is in its jurisdiction to be tried.

The issue that can be raised for discussion relates to the question "Why should the court change the legal qualification of the offense, when the criminal fact brought to trial in the court assessment remains the same?"

In response to the question above we can say that there are some legal reasons which give to the court the opportunity to give to the same criminal fact brought to trial a different legal assessment from that which has been previously provided by the prosecution office.

In the criminal doctrine it is known the institute of *criminal doctrine of the competition of imaginary (fictitious) offenses*. Imaginary (fictitious) competition of criminal offenses in cases where an offense committed is composed of some elements that are not provided only by a single criminal provision but by certain provisions. In a preliminary assessment, it appears that some criminal provisions may be applied in this case, therefore, we may say that in alternative terminology in this case we have criminal provisions competition (Mëngjesi, 2016). In fact, of all the criminal provisions, only one of them will be implemented, after being found an unchanged criminal fact, to which an offense corresponds and the perpetrator should be sentenced normally only once.

Imaginary competition case of criminal offenses may be accompanied with an example. A person, with a firearm shooting spree, at the same time intentionally kills a police officer on duty, and a citizen nearby. Pursuant to the Criminal Code in Albania, some criminal provisions compete fictively for this case, which may be applied to the perpetrator. Namely, *Intentional murder of a Police Officer of Public Order* is provided for as a criminal offense pursuant to Article 79 / b of the Criminal Code, *Intentional murder* is provided for as a criminal offense pursuant to Article 76 of the Penal Code, and *Intentional murder of two or more individuals* is provided for as a criminal offense pursuant to Article 79 / dh of Penal Code.

We can say in a preliminary assessment that in the abovementioned example, according to the Albanian Criminal Code, we are situated before an imaginary competition of offenses, as the application of criminal provisions can be discussed against the author for *Intentional murder of a Police Officer of Public Order* and *Intentional murder* of the citizen who coincidentally was nearby, or the application of criminal provision of *Intentional murder of two or more individuals*. Amongst these two legal alternatives, it is the Court that should ultimately decide which of the criminal provisions should be implemented. If the prosecution, in the formulation of the charge against the perpetrator has chosen the wrong application of criminal provision, the court than, in its final judgment, should change the legal qualification of the offense previously made wrongly by the prosecutor.

Thus, referring to the criminal doctrine *imaginary (fictitious) competition of criminal offenses* we can say that this institute of criminal law serves as a legal reason that justifies the need for the intervention of the court in legal requalification of the offense brought to trial before the prosecution. Thus, the legal provision of the legal qualification change of the offense by the court is necessary, as an expression of the implementation of the principle of legality and fairness in deciding the culpability of the author and his sentence.

4. Change of Legal Qualification and the Rights of the Defendant

Change of the legal qualification of the offense by the court in its final judgement, especially when this change is more severe than the previous qualification made by the prosecution, could lead to problems for the position of the defendant, causing deterioration of this position of the latter, in relation to the court decision. Furthermore, the deterioration of the position of the defendant in relation to the court's final judgment may be unexpected to the defendant. Thus, in this new situation, he is not given the opportunity to defend himself effectively before the court which has made the new legal qualification.

Constitutional Court of the Republic of Albania in its decision no. 4, dated 10. 02. 2012 determined the positions that the court should keep in relation to the legal qualification of the offense, when the defendant is tried by abbreviated trial ritual. Prior to refer to this decision for purposes of this paper, we put forth a brief information regarding the nature of the abbreviated trial stipulated by articles 403-406 of Code of Criminal Procedure in Albania.

Based on the code of criminal procedure in Albania, abbreviated trial ritual takes place only at the request of the defendant. In this case, the investigative file brought to trial is transformed into a judicial file and the court supports its decision only in the acts brought to trial by the prosecutor.

Upon submitting the application for an abbreviated trial the defendant waives some of the procedural rights such as the right to present evidence other than those that are found in the file brought to trial by the prosecutor, the right to realize a judiciary debate for the evidence presented by the prosecutor, etc.. In exchange for the development of trial with

the abbreviated trial ritual, the defendant benefits 1/3 of sentence reduction if he is found guilty, whereas the sentence with life imprisonment is substituted with the sentence of imprisonment of thirty five years.

According to the Constitutional Court, the possibility of changing the legal qualification of the offense by the Court does not exist in the proceedings of the abbreviated trial. Change of the legal qualification by the court is contrary to the purpose of the abbreviated trial, as the possibility of realization of the right to effective protection by the defendant is violated, especially if the new legal qualification of the offense could be more severe from that which was previously defined by the prosecutor.

The problem related to the change of the legal qualification of the offense is otherwise presented when the criminal case brought to trial by the prosecutor is judged in the ordinary trial ritual traditional.

In the ordinary judgment the court, based in the Albanian procedural law, by its final judgement, may change the legal qualification of the offense for the same criminal fact, even giving the criminal fact a legal qualification more severe than the one formulated by the prosecutor on the charge brought to trial.

If the whole process of the trial would end upon the final judgement of the court, a judgement which has deteriorated the position of the defendant, then we can say that this trial may contain irregularities which naturally affect the standard of guarantee for an effective protection the defendant should benefit. Violation of the right to an effective protection results in not giving enough time to the defendant to prepare his defense regarding a new qualification of the offense made by the court in its final judgment.

Upon the final decision which declares the defendant guilty, the entire judicial process is concluded, which was initiated by the prosecution with the application for trial. Upon the termination of the the judicial process, the defendant, pursuant to Article 375 of the Code of Criminal Procedure, could hypothetically be found in a more serious and severe procedural situation caused by the court with its final judgment than the situation in which he was under investigation before he tried.

In the case I. H and others against Austria the Strasbourg Court has assessed the judgment given by the Austrian Court, contrary to Article 6/1 in relation to Article 6/3-a-b of the Convention. In this decision, the Austrian Court changed the legal qualification of the offense brought to trial by the prosecutor, by deteriorating the position of the defendants, without previously giving the necessary time to defendants to prepare their defense in relation to the change of the legal qualification of the criminal offense made by the Austrian Court.

The content of the decision, the Strasbourg Court, *inter alia*, pointed out that in criminal cases the defendant should be notified in detail and in full all the elements of the accusation against him, as well as including the relevant legal qualification the court could adopt in the criminal case against the defendant. These actions are essential conditions to ensure that the trial conducted against the defendants is fair (ECHR – Case of I.H and others v. Austria Application no. 42780/98).

Therefore, according to this decision the defendant has the right to be informed of the nature and cause of the charge against him and these actions must be assessed that are consistent with the right of the defendant to prepare for his defense.

Pursuant to Article 6/1 in conjunction with Article 6 / 3- a-b of the Court of Strasbourg Convention it does not matter which procedural entity (the prosecution or the court) should inform the defendant about the detailed information relating to the charge or the law that should be applied for the charges filed on the criminal fact investigated. If the legislation of a Member State of the Convention stipulates the right of the court (as is the case of the Albanian legislation) to decide which criminal law should apply to the defendant on the criminal fact brought to trial, then the court, in this case, has committed an action which pursuant to Article 6/1 in conjunction with Article 6 / 3- a-b of the Convention constitutes the essential part of the notice of the charge attributable to the defendant. Consequently, based on Article 6 of the Convention, at the time that the court informs the defendant of the the criminal law applicable to the criminal fact, then it should provide the defendant sufficient time to prepare his defense in relation to the notification for the criminal law which will be applied.

The question whether the Article 375 of Code of Criminal Procedure provides for the guarantees required by Article 6 of the Convention?

A criminal cases tried by the Albanian courts is considered in the Strasbourg Court on the basis of complaints and appeals submitted by some convicted individuals by the Albanian courts (EHRC – Case of Haxhia v. Albania Applications no. 29861/03). Applicants in the Court of Strasbourg, *inter alia*, alleged that their right to defense was directly violated, pursuant to Article 6 of the Convention, due to the retraining of the offense made by the Court of First Instance in its final judgment, by virtue of Article 375 of the Code of Criminal Procedure of Albania.

In relation to the change of legal qualification made by the Court of First Instance, the Strasbourg Court, in its

judgment, held that during the assessment the lawfulness exercised in respect of all procedures, the reclassification of a crime does not constitute a violation of the right to defense if the defendant, after this action made by the court, has had sufficient opportunity to defend himself. In this case, the complainant objected to the reclassification of the offense in the Court of Appeal, a court which has legal jurisdiction to examine the complaint on the basis of fact and the criminal law applied. In the assessment of the Strasbourg Court, the applicant had adequate time and facilities to prepare his defense against reformulating the offense made by the Court of First Instance. In fact, the complainant filed his complaint *inter alia* as part of the violation of the right to defense for the reclassification of his offense in the Court of Appeal (EHRC – Case of Haxhia v. Albania Applications no. 29861/03).

Thus, Article 375 of the Albanian Code of Criminal Procedure has passed the test of controlling its compatibility with the principle of exercising an effective defense by the defendant in a criminal trial.

5. Conclusions

The aim of this paper was to identify the characteristics and content of Article 375 of the Code of Criminal Procedure. In this paper we tried to outline the flexible nature of this procedural provision. It may result, in a preliminary assessment, that taking in consideration the way this procedural provision is formulated, it violates the right of the defendant to defense, when he is informed at the end of the trial upon the announcement of the final court judgment on the amended legal qualification that court has made to the offense for which he has been tried.

However, a judicial process does not end with the final judgment given by the Court of First Instance. Referring to the criminal procedural system, upon the announcement of final judgment of the court, the defendant is recognized and is guaranteed the right to appeal the final judgment, *inter alia*, due to reasons related to the reclassification of the offense in the Court of Appeal.

In this context, the Albanian law provides the defendant the possibility to present his defense before the Court of Appeal within a reasonable time limit and along with the appeal the defendant has the right to present the unlimited evidence, which in his appreciation, could serve him to achieve an effective defense.

Consequently we can say that the ratio between *the change of the legal qualification of the offense* and *the exercise of an effective defense* cannot be assessed separately from its components. In the beginning, it was the Court which has the initiative of changing the legal qualification of the offense, when there are legal cases that it should make this change, then, the initiative is transferred to the defendant, who is guaranteed the right to exercise effective defense in the Court of Appeal and the right to appeal the reclassification of the offense for which he is informed in the final judgment given by the Court of First Instance.

At the end, we conclude that the change of the legal qualification of the offense stipulated by Article 375 of Code of Criminal Procedure, assessed in accordance with the right of the defendant to appeal this legal change in the Court of Appeal, meet the standard of exercising the right to an effective defense of the defendant in the criminal proceedings, stipulated by Article 6 of the Convention.

References

- Islami, H., Hoxha, A., & Panda, I. (2010). *Commentary of Criminal Procedure*. Tirana: Morava.
- Mengjesi, S. (2016). *Fundamentals of the Doctrine of Criminal Law*. Tirana: Morava.
- Skënderaj, K. (2014). *Special Trials and Their Importance in the Criminal Process*. Tirana: Faculty of Law, University of Tirana.
- Code of Criminal Procedure of Republic of Albania*. (2012). Tirana: AlbJuris.
- European Convention for Human Rights and Freedoms*. (1950). Strasbourg: European Court of Human Rights; Council of Europe.
- Judgment no. 4, dated 10.02.2012 of the Constitutional Court
- ECHR – Case of I.H and others v. Austria Application no. 42780/98
- EHRC – Case of Haxhia v. Albania Applications no. 29861/03
- EHRC – Case of Mulosmani v. Albania Applications no. 29864/03

