Analysis of the legal qualification in Albania

Ina Rama

Abstract

Article 375 of the Albanian Code of Criminal Procedure which provides that "*With the final decision, the court may give the fact a different definition from that made by the prosecutor or the accusing victim, lighter or heavier, provided that the offense is within its competence*" will be addressed in this paper, in particular by the provisions of Article 332/d of the Albanian Code of Criminal Procedure which regulates the rights of the parties and the court at the pre-trial stage, according to which the role of the Court is orienting and suggestive with regard to changes in the legal qualification but not decision-making, role and competence which is attributed to the court only in the final decision after review.
This wording of this provision in this form was made after the changes that the Criminal Procedure Code underwent, initially with law no. 8813 dated 13.06.2002 and then with law no. 35/2017 date 30.03.2017,changing in this definition the moment when the court has at its disposal to change the legal qualification of the fact.
In the previous wording of the provision this right of the court was foreseen to be exercised at any moment of the judicial process. As the unchanged provision did not stipulate that the court had to rule with a final decision, the court had the right to make the legal change even during the examination of the case. In these cases, in implementation of the position held in decision no. 51 dated 30.07.1999 of the Constitutional Court, the court was obliged to communicate to the parties the new determination of the criminal fact and give them the opportunity to prepare for the change made. Main objective of this article is the analysis of the legal qualification in Albania.

Keywords: legal qualification, Albania, Albanian Criminal procedure Code.

Introduction

With the changes made in the Albanian Code of Criminal Procedure this process is exhausted and the court decides on the legal change of the offense only in its final decision. This change I think has been not only a need to avoid confusion created in the courts regarding the moment of accurate legal determination of the fact, but also the need to avoid a seeming bias of the issue.
In this sense it was difficult to justify at what point the court met to discuss the legal determination of the criminal fact. Discussion about this argument before the court convenes to discuss the final decision to create the idea that it was judging on the resolution of the case before the main trial was over and retreat to the counseling room. In these circumstances the principle is that the court must not only be impartial but must also behave or appear as such.
In conclusion, explicitly determining that the court has the final decision to change the legal qualification of the offense, is an arrangement that avoids the above discussions and places the court in its role of arbitrator defined in the accusatory system, also embraced by our criminal procedure.

With the new changes that the Code of Criminal Procedure has undergone with law no. 35/2017 the right of the Court is expressly provided to dispose of a different legal definition of the criminal fact after completing the judicial review of the case. The legislator in these cases has provided exemption from the general rule under the provision of guarantees for a due process of law, in cases when the criminal offense which is assessed by the Court as having to cover the criminal fact in a formal sense, is more serious than the one charged and defended by the defendant, that the court, without giving a final decision on the case, communicates this qualification to the parties giving them the opportunity to defend themselves against this new setting more serious than the one for which they have been summoned to trial.
The essential elements on which the courts rely when changing the legal law of actions are:
- *criminal facts;*
- *the determination made by the prosecutor or the accuser of the criminal fact;*
- *new criminal offense whether it is easier or more serious for the defendant;*
- *the jurisdiction of the court to adjudicate the offense it qualifies.*

I. Criminal facts

Supporting the treatment of the criminal fact, I must briefly underline that by criminal fact we will understand the actions or omissions of the defendant committed under a certain mental state, which are contrary to the law and pose such a social danger to raise this behavior of the legislator to the level of a criminal offense.
The fact in order to become determinable for the court within the meaning of Article 375 of the Code of Criminal Procedure must
a) to prove that it exists
b) be provided by law as a criminal offense
If the court is faced with different alternatives from the above, it is clear that we can no longer talk about the exact legal definition of the fact and we would be found before cases of innocence within the meaning of Article 388 of the Code of Criminal Procedure.
This is one more reason that the legislator has recognized this right of the court at the end of the main trial of the case, to give the court the opportunity to make a decision as close to the truth as possible at the end of the process.
Article 375 of the Code of Criminal Procedure provides that the court may make a different determination of *"fact"* than determined by the prosecutor or the injured party. This fact may turn out to be different at the end of the trial from what the prosecutor described in the request for trial.
According to Article 372 of the Code of Criminal Procedure in case the fact turns out to be different at the end of the trial from what was submitted in the request for trial, the prosecutor has the right to change the charge and proceed with the relevant charge.
In view of this provision the prosecutor may precede the court in filing it by announcing the change of charge himself. On the other hand, regardless of the mood of the prosecutor, the court has the right to qualify the fact differently beyond

the charge that the prosecutor has changed pursuant to Article 372 of the Code of Criminal Procedure.

The court's discretion in these cases remains the same and is not related to the new determination of the charge made by the prosecutor. It is obliged in these cases to assess all the circumstances resulting from the trial and to assess according to her conviction the act committed.

The court may make a different legal determination for the fact that in the case it results from the review as submitted by the prosecutor in the request for trial. So the court could differently define the same fact and not a fact that turned out to be different at trial with new elements who are not known to the defendant.

In these cases, with the fact that it turns out differently must be understood a fact that is presented radically differently from that submitted in the request for trial and not in cases where the fact is specified or corrected through the evidence obtained at the main trial.

Recognizing that the criminal fact is a historical moment in the life of persons characterized by their actions or inactions, the one who is treated by the court for the effect of the legal qualifications of the offense must be the one for whom the defendant is being prosecuted and for whom the criminal prosecution has started.

The court may not qualify as a criminal offense by exercising the right of legal qualification of the offense, elements of the criminal fact, who, although they have become evident in the request for trial and have resulted as such during the main trial, no charges have been filed against them by the prosecution.

In the case where the defendant has been charged with the criminal offense of murder and during the main trial it turns out that he committed it using a weapon he was carrying without permission, the court may not, in the name of the legal qualification of the criminal fact, declare the defendant guilty even for the criminal offense of illegal possession of weapons of war. In these cases we would be facing an indictment for another offense which is prerogative of the prosecution body. As long as the prosecution has not exercised the right of prosecution for this criminal fact, the court in the exercise of its position in the prosecution system may not exercise such jurisdiction, even in the name of the administration of justice.

In terms of criminal fact the court receives and evaluates those actions or omissions of the defendant which are part of an episode of his life which, the prosecuting authority had the will to investigate and formulate an accusation.

The court cannot assess the actions or omissions of the defendant which, although they result from the main trial or have been submitted as such in the request for trial have not been formalized by the prosecuting authority with a concrete charge which corresponds to a special provision in the special part of the Criminal Code.

The same reasoning applies to an aggravating circumstance not mentioned in the request for trial as such. The fact that Article 373 of the Code of Criminal Procedure considers the aggravating circumstance as an element equal to the charge of another criminal offense in terms of the way it communicates to the defendant and the obligation that the prosecution body has to do it, it should be considered by the court as a new element of the criminal fact for which there is no will of the prosecution body for criminal responsibility and consequently cannot be part of the legal determination

of the fact for which the defendant is being prosecuted.
While aggravating circumstances are considered as such by law, moreover it will be considered as a fact for which there must be the will of the prosecution for criminal proceedings, qualifying circumstances.
In a trial where the defendant is charged with committing the offense separately and from the main trial of the case it results that the offense was committed in cooperation, qualifying circumstance of the provision, what should the court do?
The practice has accepted the change of legal qualification by qualifying the offense in the paragraph where cooperation is provided as a qualifying circumstance. This seems to be a wrong attitude of the court.
By acting in this way, the defendant is denied the right to defend himself against this element that fundamentally changes the fact presented in the request for trial.
While the procedural law in Article 373 recognizes the obligation of the prosecutor to communicate the aggravating circumstance (even more so the qualifying one), provides that this new circumstance is communicated to the defendant and he is given the right to defend himself (Article 376), there is no reason to deny this right of the defendant when this circumstance is ascertained by the court.
It seems that the determination that the court can give the fact of an easier or more severe determination overcomes the problem. In fact, the law gives the court the right to qualify the offense correctly even in determining a more serious offense, but it must make this determination on the fact raised in the request for trial or on what has resulted from the main trial and on which the prosecutor has made a determination of his own, with whom the defendant is acquainted and has taken measures to defend himself.
In the determination that the court makes in the final decision by reasoning on new elements of the fact from the one considered by the prosecutor, elements which ascertained during the main trial, court denies the defendant the right to defend herself.
The court exercises its right only in relation to the fact described in the request for trial which, is normalized with a concrete charge, when it turns out the same as submitted but, that it is considered by the court as an offense that should be considered otherwise more serious or easier than that determined by the prosecutor.
In case the court finds that from the circumstances of the fact presented in the request for trial it turns out that there is room for another criminal offense committed by the defendant, without a new charge filed by the prosecutor, court could not proceed to a different determination of the fact.
The court cannot take in this case even the prerogatives of the prosecution body under the name of changing the qualification of the offense. In these cases the fact itself contains more than one criminal offense. The court is obliged to state and qualify correctly the fact for which the prosecutor has filed the accusation and not that part of the fact which contains the elements of another criminal offense for which the prosecutor has not filed the relevant charge.
A descriptive situation of what was elaborated above are the following cases. The prosecutor presents the fact before the court claiming that a robbery with a weapon was committed by several persons. As evidence to prove the charge are the report of

the victims and the statements of a co-defendant about this event and about another event for the other defendants, given at the investigation stage. The court acquits the defendants of this offense because it cannot be proved only by reporting the victims and the statements of the co-defendant cannot be used as they remain unrelated to other evidence and changes the qualification for this co-defendant by declaring him guilty under Article 302 of the Criminal Code, for the other offense in which he was not a participant meanwhile there are no charges for this offense.

The defendant shoots at several police officers. The work remains tentative. The accusation comes under Article 79 / c of the Criminal Code, the court makes a change by finding him guilty under Article 79 / c and 79 / dh since there were more than two persons.

The appellate court reverses the decision arguing that the court has violated the rights it has in a criminal proceeding by assuming the role of prosecution.

The court makes the new legal qualification in the final decision of the case. This means that the court due to the law has the right to make such a decision only after it has been recognized has it examined all the evidence in an open process in application of the principle of adversarial proceedings. Only after such a process can the court as a body above the parties decide whether the fact should be qualified in one way or another.

The provision stipulates that the court is not bound in its determination by the character of the new criminal offense. It may also qualify the criminal fact as a more serious criminal offense than that determined by the prosecutor. The condition is that the determination be related to the criminal fact with which the defendant was acquainted and for which an indictment was communicated to him.

The court cannot announce with a final decision a different definition of the fact if the criminal offense qualified by it is not within the substantive jurisdiction of that court. Lack of competence should be related to the newly defined criminal offense and may belong to another court (e.g., special court against corruption and organized crime under Article 75 / a of the Code of Criminal Procedure) or may belong to a panel of the same court but composed of three judges within the meaning of Article 13/3 of the Procedural Law. In both cases the lack of substantive jurisdiction prevents the court examining the case from finally resolving it with a final decision.

Whereas procedural law within the meaning of Article 375 obliges the court to consider the correct determination of the fact only at the time it is withdrawn for a final decision, even the lack of competence it could not ascertain at a moment other than this.

I think this regulation is in conformity with the principle proclaimed in Article 85 of the Code of Criminal Procedure, that the court in the trial at first instance declares its incompetence for any reason, regulating and conditioning the declaration of incompetence only with the cause accepted by the court and not with time, it suffices for it to be within the judgment of the first instance.

In this sense the court due to the disposition of Article 375 of the Code of Criminal Procedure it can potentially ascertain its incompetence only at the end of the main trial when this incompetence is related to the change of qualification of the criminal fact and it is at this moment that it announces it.

This disposition of the court at this stage precisely for lack of jurisdiction cannot be a final decision, but only one incompetence decision remains, while the different definition of the criminal fact remains its cause.
Pursuant to the regulation of Article 85 of the Code of Criminal Procedure the court in these cases should not be satisfied only with the declaration of incompetence but it should also be expressed to which court it sends the acts as a competent court.
The problem is procedurally simplified when the competent court is one of the other criminal courts operating in our territory, and appears somewhat more problematic when the competent court is a trial panel of the same court composed of three judges. I think that in this case the acts should be deposited in the court secretariat of that court and for the case to apply all legal procedures for its adjudication as a new case, drawing lots for the appointment of the trial panel that will try him.
The decision declaring incompetence is a decision that cannot be appealed separately in the Court of Appeals. Based on the definition of Article 407/1 of the Code of Criminal Procedure which provides for the taxability of the appeal, while Article 85 of the Code of Criminal Procedure does not expressly provide for an appeal against this decision, then it must be concluded that you can appeal against it only with the final decision. Even the provision made by Article 86 of the Code of Criminal Procedure leads to the conclusion that the court of appeal addresses the issue of competence at the moment when considering the final decision of the case, consequently we can say that no appeal can be made against him.
The trial panel appointed by lot to adjudicate the case may file a dispute over jurisdiction before the High Court in the event that does not accept that the conditions exist for the case to be tried by that body.
Regardless of the position that the trial panel may take, I think that he in the trial of the case is not related to the legal determination of the fact for which the sole judge has concluded. He is therefore set in motion but still has the right to give a new definition to the fact with the final decision.
The acts which are forwarded to the competent court belong to a proceeding initiated by the prosecution body for a certain criminal fact, but only qualified otherwise. In this case pursuant to the principle cited above, that the criminal fact determined differently is the one submitted by the prosecutor and materialized with a concrete accusation, the suspicion that the court is taking on the role of an accusing body is avoided. The court in this case is only determining which forum will adjudicate a case, which is registered for trial at the request of the prosecution.
Through this decision the single judge does not determine the fact whether there is a case raised or not but only determines the court competent to adjudicate it. In case the prosecution body would feel that the court interferes with his rights and proceeds for an act he does not want, he has the legal capacity to dispose of the charge.
The right to change the legal qualification of the fact has not only the court of first instance but also that of the appellate court, which examines the case as a whole in terms of Article 425/1 of the Code of Criminal Procedure. In this new qualification the appellate court is limited to imposing a heavier sentence on the defendant when the qualified offense is more serious, when the appellant is only the defendant. In these cases, the appellate court can accurately determine the criminal fact according

to its assessment and may not impose on the defendant a sentence higher than that imposed by the court of first instance, pursuant to Article 425/3 of the Code of Criminal Procedure.
The same right is explicitly expressed by the high court according to the provision of article 441/1 letter "b" of the Code of Criminal Procedure.
In the sense of Article 375 of the Code of Criminal Procedure the court may determine the fact differently only with its final decision. This means that the only moment when the court makes a decision regarding the legal determination of the criminal fact is after the conclusion of the trial on the merits. Using the above reasoning, the court cannot conclude that the charge has been changed to any other type of trial related to the proceedings except at the end of the trial on the merits.
Confusion has been encountered in setting security measures when the court occurs in the analysis of the conditions and criteria for their appointment confuses proving reasonable doubt with determining the legal fact differently. As long as in the trials of precautionary measures the level of provability of reasonable suspicion is of a lower standard than that of the guilt test, the court cannot analyze the circumstances of the fact as long as these circumstances have not been proved to exist beyond any doubt. Given that the court is right to accurately determine the fact only after the evidence giving evidence about it has been subject to judicial debate, then this right cannot arise at the stage when it is accepted that these data only prove the suspicion that the fact has occurred.
I think that the court can give a different definition of the fact even in the cases when it declares the defendant not guilty of committing a criminal offense as his guilt is not proven.

The rights of the parties in the case of new charges

In Article 376 of the Code of Criminal Procedure the rights of the parties are provided in cases of application of new charges by the prosecutor.
According to this provision, in the conditions when during the trial of the case the cases provided by articles 372, 373, 374 and 375 are verified the presiding judge informs the defendant that he has the right to request a time limit for defense.
We have the application of Article 372 when the defendant is in front of the situation:
- during the main trial, data have resulted that has brought changes in the same criminal fact for which an indictment has been formulated for the defendant. These changes belong to the same fact for which the defendant was prosecuted but entail a different legal definition of the fact.
- The prosecutor has formulated a different accusation in which the identified changes take place and has communicated this to the defendant at the hearing.

We have the application of Article 373 when the defendant is in front of the situation:
- 1. during the trial of the case another criminal offense committed by the defendant emerges, which refers to a criminal fact that
- a) relates to the criminal offense being tried;
- b) was previously known and was mentioned in the request for trial but without being formalized in an indictment;
- c) was previously known but was not mentioned in the request for trial.

- 2. an aggravating circumstance is evidenced which was not mentioned in the request for trial. The circumstance should not have been mentioned in the request for a trial with this quality and not as a factual circumstance, but as a special circumstance to which the law entails its consequence in determining the sentence of the defendant.
- In both cases the prosecutor has formulated an indictment for the other criminal offense in addition to the one submitted in the request for trial and has evidenced in the charge of the defendant the circumstance of the fact with the quality of aggravating circumstance and communicated this to the defendant at the hearing.

We have the application of article 374 in cases when:

- During the trial of the case from the examination of evidence results in the defendant being charged with a new criminal fact which is not mentioned in the request for trial and that has nothing to do with the criminal offense for which he is being prosecuted. As a rule being a new fact of which the prosecutor becomes aware at the hearing, he must be subjected to the usual forms of proceedings by investigating him in advance and then becoming the subject of a judicial review. For this reason the provision provides that the prosecutor withdraws the file to continue the preliminary investigation as to this fact he must investigate and conclude at the end of the investigation of his materialization on a concrete charge.
- The court is in application of Article 376 of the Code of Criminal Procedure when the prosecutor despite the fact that it results again in the trial due to the circumstances of the case is able to formulate an indictment to communicate to the defendant as soon as he ascertains the fact. In these cases the consent of the defendant is required in order for this new fact to become part of this ongoing proceeding. In the sense of the law the application of this type of judgment for this new fact in the absence of the preliminary investigation phase leads in some way to a direct trial of the case. In this case they serve as a stage of preliminary investigation the main trial of the case which may have sufficiently supplied the prosecutor with evidence and data proving the charge of the new criminal fact.
- The court allows the development of this trial within the one that is taking place when this action does not impair the development of the investigation of the case.
- So for the effect of applying Article 376 of the Code of Criminal Procedure the defendants have rights only when the second part of Article 374 of the Code of Criminal Procedure applies.

We have the application of article 375 when:

- With the final decision, the court may give the fact a different definition from that of the prosecutor or the accusing victim. The criminal condition must always be met in order to live within the jurisdiction of this court.
- When at the end of the main trial the court assesses that the fact for which the defendant is charged there may be a more serious legal qualification than that made by the prosecutor or the accusing victim. In this case, the court notifies the parties, giving them the opportunity and time necessary to defend themselves. The parties have the right to present new evidence.
- When the trial takes place in the absence of the defendant according to Article 352 of the Code, the court shall apply the rules set out in paragraphs 1 and 2 thereof.

In the first three cases the prosecutor communicates to the defendant a new charge which changes the existing one or adds to it. For this reason, in respect of the right to defense in the context of guaranteeing a court process that respects the equality of the parties to the proceedings, the defendant is informed by the court that he has the right to request a deadline for defense.

Depending on the defendant's position on the new charges, the court decides whether or not to adjourn the trial. The court is obliged to terminate the main trial of the case when the defendant is tried in absentia. In these cases when the prosecutor changes the charge or formulates a new charge for a criminal offense related to that for which the defendant is being tried, no charge may be communicated under Article 374 for a new fact as to perform this action the prosecutor is required the consent of the defendant who is absent.

In these cases the new charge is formulated by being reflected in the minutes of the court session and its extract is notified to the defendant.

For the defendant in absentia because he is hiding from the trial, after the resumption of the suspended trial, this act must be notified pursuant to the notification rules under Article 141 of the Code of Criminal Procedure. The act of notifying the new charge is considered to be communicated to the defendant when he communicates to his defense counsel after it has been decided for the trial to take place in absentia within the meaning of Article 352 of the Code of Criminal Procedure. In other cases the act must be communicated to the defendant pursuant to Articles 139 and 140 of the Code of Criminal Procedure.

In case the defendant agrees to continue the trial as he can realize the defense in that session, the court continues the process. In case the defendant requires time, the court is obliged to adjourn the main trial for a period not longer than ten days.

During this time the defendant invests in preparing the defense and presenting new evidence.

- The defendant may request the court to proceed with the abbreviated trial of the case for new charges added to the one filed in the request for trial.
- Article 428 / ç of the Code of Criminal Procedure provides for the reversal of the decision when the provisions are violated for filing new charges and returning the case for retrial. The disposition is made in defense of the right of the defendant to defend himself and precisely for its realization the case is returned to the trial in the first instance.

References

Albanian Criminal Procedure Code.
Albanian Constitution.