



Research Article

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Problems on legal qualification of criminal offense during precautionary measures

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Abstract

The court is the only constitutional body that delivers justice. One of the functional competences of the court is also giving justice through legal qualification of the criminal offense. The court has the right to make the legal qualification of the criminal offense and this is its exclusive competence. It is important for the court, when making the legal qualification of the criminal offense, gives the criminal fact, the qualification that results from the acts of the investigation file. The provision regarding the competence of the court to change the legal qualification of the criminal offense, has undergone constant changes, with the aim of guaranteeing the right to a fair legal process, the principles of this right such as effective protection, equality and contradiction in obtaining evidences.

Appropriate legal qualification of the criminal offense is a very effective tool in terms of delivering justice during the trial at first instance and beyond. The situation becomes problematic in the legal qualification of the criminal offense during the precautionary measures, where the court cannot at this procedural moment make the appropriate legal qualification of the criminal offense, different from the one brought by the prosecutor.

From the practice, we have seen the subjective attitudes of the prosecution body, in relation to the accusation raised during the request for the imposition of a precautionary measure. There are cases where the prosecution improperly facilitates the prosecution, in order to justify the search regarding the measure of security, but there are also cases when the prosecution has aggravated the prosecution, even though the criminal fact is not the one qualified by the prosecutor.

These subjective qualifications of the prosecutor during the phase of imposing precautionary measures have led to violations of the freedoms and rights of individual, due to the lack of competence of the court to make the appropriate legal qualification of the criminal offense. These problems in practice must be solved by

legal amendments or interpretations by the Supreme Court.

Keywords: charge, criminal fact, legal qualification of the criminal offense, prosecutor, court, precautionary measure.

1. Introduction

The prosecutor's office is the constitutional body that carries out criminal prosecution and charges on behalf of the state.¹ The prosecution performs this constitutional function of bringing charges during the preliminary investigation phase, as well as during the trial, until there is a final criminal decision (Hasneziri, 2024).

In the Albanian Criminal Procedure Code (hereinafter: CPC), there is no precise procedural moment when the charge is notified, because this depends on many circumstances and the nature of the criminal proceeding. But there are a few procedural moments when the charge is raised from the prosecution body. As a rule, the charge should come, when the prosecution has fully conducted the preliminary investigation, has received all the evidence and at the end of the investigation, it should give a determination to the criminal fact, qualifying it in the respective offence as prescribed in criminal code (Nela, 2024). Through the correct charge the prosecution not only does justice, but also guarantees the consistency of the accusation during the preliminary hearing, the trial on the merits and during the other stages of judging.

Raising a charge goes through several stages, until it is fully and precisely formed at the end of the preliminary investigation. But before this procedural moment arrives, the prosecution records the criminal proceeding with a relevant charge, which the prosecutor investigates until the end of the preliminary investigation, therefore, when the prosecutor issues the order for the registration of the criminal proceeding, he also determines the relevant charge. This charge may also change during the preliminary investigation phase depending on the evidence and data collected. In these cases, the prosecutor issues an order again by changing or specifying the relevant charge, he has the right to clarify the charge until the end of the preliminary investigation.

When the prosecutor puts an end to the preliminary investigation, he notifies the relevant charge and at this point the procedural accusation must be accurate and clear. The notification of the accusation is of great procedural importance, as only this act gives the person under investigation the status of the defendant, since without the status of the defendant, the trial court has no subject that can judge (Miha, 2024). The Code has set a very high standard, for the act of notification of charge, which includes sufficient data attributing the criminal offense to the person under investigation. This means during the preliminary investigation phase, the competence of the prosecutor to register a relevant charge, to formulate, amend, clarify and finally to notify it. The accuracy of the accusation at the end of the preliminary investigation is not only a way of delivering justice, but it shows professional ability, correctness

¹ Article 148 of the Constitution of the Republic of Albania provides that: " 1. *The prosecution exercises the criminal prosecution, as well as represents the accusation in court on behalf of the state.*"

and serves the consistency of the accusation throughout the criminal proceedings, until there is a final criminal decision (Vito and Rakar, 2024).

The code also provides for some procedural moments, in which the prosecutor is obliged in advance to file an initial charge, which will be analyzed.

2. Notification of the charge during the arrest in *flagrante delicto* and detention of the suspect for committing a crime

Notification of the charge remains the exclusive attribution of the prosecutor, but in the Criminal Procedure Code, there are some procedural moments, when the Judicial Police, performs some actions on initiative, such as arrests in *flagrante delicto*,² detention of the suspect for committing a crime³ and during this moment, the judicial police makes a preliminary notification of the accusation to the arrested or detained person.⁴

After receiving these acts from the judicial police, the prosecutor records the criminal proceeding with the concrete criminal offenses, which result from the materials of the judicial police. In these cases, the prosecutor, as an exclusive prosecution body, records the criminal proceedings, not according to the report prepared by the judicial police and not related to it, but only what results from the data collected so far.⁵

In this sense, the CPC regulates some procedural moments, when the charge is formed, such as the case of arrest in *flagrante delicto*,⁶ when the person is accused of a concrete criminal offense, as he is caught with material evidence belonging to the criminal offense, during its commission, immediately after its commission.⁷ In this case, there are sufficient data to enable the initial charge to be filed and to go to court with a request for validation of the arrest in *flagrante delicto* and imposition of a precautionary measure.⁸

Even in the case of the detention of the suspect for committing a crime,⁹ the prosecution has collected sufficient data that can attribute to the person under investigation the criminal offense. Under these conditions, the prosecution has registered the criminal proceeding with the relevant charge in the criminal proceeding record books and issues the detention order. After the execution of the detention order, the prosecution appeals to the court for the validation of the detention and the imposition of precautionary measures.¹⁰

In these two procedural moments, the prosecutor has formed a charge and goes

² Article 251 CPC.

³ Article 253 CPC.

⁴ Article 255 CPC.

⁵ Article 287 CPC.

⁶ Article 251 CPC.

⁷ Article 252. CPC.

⁸ Article 258 CPC.

⁹ Article 253 CPC.

¹⁰ Article 258 CPC.

with the relevant requests where, in addition to the legal validation of the arrest and detention, he also requires the imposition of precautionary measures. From practice, it can be noticed that the referral by the judicial police of criminal offenses that the person is suspected of having committed so far is not correct, neither professional nor accurate. Police often aggravate the procedural position, to justify the arrests in *flagrante delicto* or detentions of suspects for committing a crime, by establishing charges that are not supported by the investigative actions carried out so far and the data obtained from these investigations. In these conditions, it is the duty of the prosecution office, when registering the criminal proceeding, to register in the registers of the notification of criminal offenses, not necessarily those charges forwarded by the judicial police, but to make the appropriate qualification of the criminal offense with the relevant charge.

3. Accuracy of the accusation during the consideration of the request for imposition of an insurance measure

After the prosecution make a validation on his own of the arrest and detention of the suspect for committing a crime, it initiates procedural requests at the court for a validation of the arrest in *flagrante delicto* and detention and also makes a request for the imposition of precautionary measures, when there are security needs.

The request to impose the security measure finds legal support in Article 228 CPC. One of the compulsory conditions, without which the precautionary measure is not imposed, is that: *"No one may be subjected to personal security measures if there is no reasonable suspicion, based on evidence, of the commission of the criminal offense."*

Therefore, this condition requires that the prosecutor has collected sufficient data and on the basis of these data has also made a note in the registers of the criminal offense. In this procedural moment, the prosecutor informs the court that there are security needs due to the criminal offense that the person is accused of until these moments, therefore he necessarily comes with a concrete accusation when imposing precautionary measures.

The requirement to impose a security measure and the need to have security measures is directly related to the charge and the dangerousness of this charge. The prosecutor, in order to be legitimized in imposing heavy precautionary measures, must have equally heavy charges, and in cases where he must demand the imposition of a light precautionary measure, he may bring a light charge. In order to avoid these subjectivisms of the prosecutor related to the charge, we must have an effective control of this qualifications of charges, by the preliminary investigation judge, the preliminary hearing or the judge of merits, as precautionary measures can be applied at any time. But does the judge have the right to check the accuracy of the charge? That's what we'll be dealing further in this paper.

4. The competence of the court to intervene in the charge filed by the prosecutor

The charge filed by the prosecutor is subject to verification by the court, as the body that gives justice. Given the constitutional powers to administer justice, the lawmaker has found the procedural means of how the court gives justice, by declaring the person guilty of the criminal fact that he has committed and which results proven by the investigative actions of the prosecutor and the evidence obtained by the court. Since the prosecution is the only constitutional body that files a charge, the court cannot intervene to change the accusation, to add a new charge or a circumstance, so this competence remains exclusive of the prosecution. The court has another procedural mean that is, the change of the legal qualification of the criminal fact.¹¹ Specifically, the lawmaker gives the court the right to make the qualification of the criminal fact more severe or easier, provided that this is within the subject matter competence of this court. The provision of the right of the court to make the legal qualification of the criminal fact has been provided in Article 375 CPC, defining this right during the trial on the basis of the charge filed by the prosecutor.

With the changes that the code underwent in August 2017, a new procedural figure was created, the Preliminary Hearing Judge, who controlled the preliminary investigation phase and, of course, the charge filed by the prosecutor during the preliminary investigation phase. Thus, article 332/d CPC provides for the right of the preliminary hearing judge to change the legal qualification of the criminal fact, inviting the prosecutor to make the necessary corrections or clarifications. If the prosecutor does not act, the court decides to return the documents. With the new amendments of the Criminal Procedure Code, the judge of the preliminary hearing, is given the competence to change the legal qualification of the criminal fact or to intervene in the prosecution. This is also a consolidated practice of the Supreme Court.

5. Problems of legal qualification of the criminal offense when imposing precautionary measures, practical cases

As mentioned above, when the prosecutor brings the request to the court for the imposition of the precautionary measure, he has definitely made a qualification of the criminal offense. In practice, it has been noticed an unprofessional attitude of the prosecutor in relation to the qualification of the criminal fact, which is often heavier or lighter and does not support the evidence collected so far. The defense lawyers of the defendant under investigation conclude that this qualification is not correct, asking the court to make the appropriate legal qualification of the criminal offense and, after this qualification, to determine the extent of personal precautionary measures in relation to the appropriate legal qualification of the criminal offense. A different attitude of judges has been noticed; there are those who accept the qualification, related to the decision to impose the precautionary measure, but there are also those who do not make the appropriate legal qualification of the criminal offense, as they

¹¹ Article 375 CPC.

think that the court is not competent, due to the lack of legal provision for changing the legal qualification during application of the precautionary measures.

In a decision of Tirana Judicial District Court, the General Jurisdiction,¹² this court has concluded that:

“The Prosecution has requested the imposition of a precautionary measure against the person under investigation for the criminal offense of attempted murder. The court found that the actions of the person under investigation were instigated and came as a reaction to the actions of the victim and appear to have been carried out in conditions of strong psychic shock and caused by these unjust actions of the victim. In these circumstances, the actions performed should be qualified in the figure of the criminal offense of serious injury in the conditions of strong psychological shock.”

On the basis of this conclusion, the court set a different security measure from what the prosecution had requested, finding a fair ratio between the security needs and the criminal offense it had committed until then, according to the data collected by the prosecution.

5. Conclusion

The prosecution is the only constitutional body that can bring charges and defend it until the end of the criminal proceedings. It has the right throughout the criminal proceedings to register the criminal fact, with a concrete accusation, to change it, to clarify it until it makes a notification of the accusation at the end of the preliminary investigation. In practice, there have been problems regarding the legal qualification of the criminal offense during the request for precautionary measures, where prosecutors have made mistakes on the qualification of the criminal fact. Prosecutors often record criminal proceedings, as reported by the judicial police, but there are also those prosecutors who correctly register the accusation independent of the suggestions or references of the judicial police.

Wrong charges of the prosecution require the intervention of the court, which makes a proper qualification of the criminal fact, in determining the precautionary measure. The CPC foresees the competence of the court to change the legal qualification of the criminal offense, during the preliminary hearing and during the trial on the merits and does not provide for the competence to change the legal qualification of the criminal fact when imposing the precautionary measure. The Albanian Supreme Court has indirectly given the right to the court to make the appropriate legal qualification of the criminal fact, when imposing precautionary measures.

In this sense, the Albanian Supreme Court, should issue a unified decision interpreting the provisions and determining the right of the preliminary investigation judge to change the legal qualification of the criminal offense when reviewing the requests for the imposition of security measures.

¹²For more information, see Decision No. 985 of Tirana Judicial District Court, dated 15.04.2024.

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