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THEORETICAL AND APPLICATIVE ISSUES REGARDING CHANGES IN THE LEGAL CLASSIFICATION

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Abstract: *The legal classification against which the criminal prosecution in rem or in personam is stage, regardless of the procedural phase, constitute genuine problems of application of criminal procedural law with major implications on the legal situation of the accused person. Therefore, considering that it is not exaggerated to dedicate a praxiological analysis to the change of the legal classification of the act, the present study aims to address in detail certain legal issues arising in judicial practice regarding the applicability of this institution. carried out (with suspect and defendant in the case) and the subsequent notification to the court by issuing the indictment, in relation to which the object and limits of the trial are established, as well as the possibility of changing the legal classification during the trial*

In the specialized literature, it is argued that the legal classification involves establishing the legal text that provides for the offense in the standard version or, if applicable, in an aggravated or qualified version or in a less serious version compared to the standard version. If the act constitutes an attempt, the legal classification involves establishing both the legal text that provides for the offense and the applicable punishment, as well as the text that provides for the punishment of the attempt of that offense. In the case of participation, the legal classification involves, in addition to establishing the incriminating text of the act, also determining the contribution of each participant to the commission of the offense, as well as establishing the legal text that provides for and sanctions that contribution. Finally, in the case of a plurality of offenses or enforcement acts, the legal classification involves additionally establishing whether this plurality constitutes a contest of offenses, a recidivism or a continued offense. The legal classification also involves establishing the legal provisions that also affect the outcome of the criminal trial. The finding

that another legal text provides for and sanctions the act for which the court was notified, therefore establishing a different legal basis for criminal liability than that shown by the notification act (indictment)
Keywords: *notification; the case; problems; classification; contribution.*

Introduction

The legal classification under which criminal prosecution is conducted *in rem* or *in personam* (with a suspect and defendant in the case) and subsequently the notice to the court through the issuing of an indictment, in relation to which the subject matter and limits of the trial are established, as well as the possibility of changing the legal classification during the trial, regardless of the procedural stage, constitute real problems in the application of criminal procedural law with major implications for the legal situation of the accused. Therefore, considering that it is not excessive to devote a praxiological analysis to the change in the legal classification of the offence, this study aims to address specific legal issues that have arisen in judicial practice regarding the applicability of this institution.

The specialized literature (Dongoroz and collaborators, 2003, p. 188) argues that legal classification involves establishing the legal text that defines the offence in its *typical* form or, if applicable, in an *aggravated* or *qualified* form, or in a *less serious* form compared to the typical form. If the offence constitutes an *attempt*, legal classification involves establishing both the legal text that defines the crime and the applicable punishment, as well as the text that provides for the punishment of the attempt to commit that crime. In the case of *participation*, the legal classification involves, in addition to establishing the incriminating text of the offence, determining the contribution of each participant in the perpetration of the offence, as well as establishing the legal text that provides for and punishes that contribution. Finally, in the case of *plurality of offences or acts of execution*, the legal classification also involves establishing whether this plurality constitutes a concurrence of several offences in one action, repeated commission, or a

continuing offense. Legal classification also involves *establishing the incidental legal provision applicable* and the outcome of the penal case; Finding out that another legal text provides for and punishes the offence that has been brought before the court, thus establishing a legal ground for criminal liability other than that indicated in the writ of summons (indictment).

However, as established by praetorian law, legal classification involves maintaining the same material facts entrusted to the court to be judged (Supreme Court, 1981, p. 67).

Theoretical and applicative issues regarding changes in the legal classification

In relation to the "legal reclassification of the charge", the European Court of Human Rights has ruled that "the accused must be duly and fully informed of any change in the charge, including changes relating to its «cause» and must be given the time and facilities necessary to respond to these changes and to organize their defence on the basis of any new information or allegations. Any change in the charges brought against a person, whether it concerns the nature of the acts alleged or their legal classification, must be brought to their attention under the same conditions of promptness by means of the provisions of art. 6, align. 3, lit. a of the European Convention on Human Rights, so that they are able to have the facilities necessary to organize their defence under the new conditions that have arisen.[1]

As regards the conceptual scope of the legal classification, i.e. its legal extent or, more specifically, the elements that determine the change in legal classification, the determination of it must take into account the legal definition of the term *commission of the offence*.

[1] Judgement of 25 July 2000, Mattocia v. Italy, para. 61; and Decision of 5 September 2006 on the admissibility of the application in Bäckström and Andersson v. Sweden.

In this regard, according to art. 174 of the Criminal Code, "the commission or perpetration of a crime means the commission of any of the acts that the law punishes as a completed offence or as an attempt, as well as participation in its commission as a co-author, instigator, or accomplice."

Therefore, based on the explanation of the legal relationship of criminal conflict that gives rise to the initiation of criminal case, the legal classification should only regulate the situations that strictly refer to the *stricto sensu* notion of legal classification, and not when analysing the retention or removal of legal circumstances (extenuating or aggravating) or aggravating states mentioned in the general part of the Criminal Code, which produce legal consequences only in terms of determining the penalty.

This is also the common orientation of judicial practice, with the mention that there are also opposing jurisprudential orientations, whose fairness we do not deny.

Thus, practice shows that if the court finds that provocation or other extenuating or aggravating circumstances exist, which are not mentioned in the indictment or in the decision subject to appeal, or if it removes their application, the court does not apply the provisions relating to the change in legal classification, because in such cases the application or removal of the circumstances does not change the legal classification, which remains as provided for in the Special Part of the Criminal Code or in the laws[1].

If it finds that the provocation referred to in art. 75, align. 1, lit. a of the Criminal Code or other extenuating or aggravating circumstances not mentioned in the indictment or in the judgment under appeal exist, or if it excludes their application, the court shall not apply art. 386 of the Criminal Procedure Code because extenuating circumstances, whether legal or judicial, are circumstances external to the constituent elements of

[1] High Court of Cassation and Justice, Criminal Section, Decision no. 3679/2003.

the offence and are therefore related to the individualization of the penalty and not to the legal classification of the facts.[1]

In the following, we will outline the way change in the legal classification depends on the procedural cycle in which the criminal case is, as well as the theoretical and practical difficulties involved in carrying out such a procedural operation.

Thus, according to the provisions of art. 311 of the Code of Criminal Procedure, provided that after the start of the criminal prosecution, the prosecution body discovers new facts, data regarding the participation of other persons or circumstances that may lead to a change in the legal classification of the act, it shall order the extension of the criminal prosecution or the change in the legal classification.

Therefore, the prosecution body (prosecutor and criminal investigation bodies of the judicial police) has the original competence to order a change in the legal classification, which will be carried out by means of a procedural order, in accordance with art. 286, align. 4 of the Code of Criminal Procedure. From the perspective of extending criminal prosecution, some authors (Voicu, Uzlau, Tudor, & Vaduva, 2014, p. 354) have pointed out that although the text does not provide for a distinction regarding the type of extension of criminal prosecution that may be ordered by the criminal investigation body, from the teleological interpretation of the provisions of art. 311, align. 1 in relation to the provisions of art. 305, align. 1 and 3 of the New Code of Criminal Procedure, the criminal investigation body may order the extension of the prosecution only with regard to new facts, and not with regard to other persons.

For similar reasons, we consider that changing the legal classification after the criminal case has been initiated is the exclusive prerogative of the prosecutor, and that the criminal investigation bodies of the judicial police are not permitted to order such a measure, which would amount to changing the legal basis for criminal liability. However,

[1] Bacău C.A., criminal decision no. 746/19 June 2019

according to the provisions of art. 14 of the Code of Criminal Procedure, criminal case is aimed at holding persons who have committed offences criminally liable and are initiated by the indictment act provided for by law, and in accordance with art. 309 of the Code of Criminal Procedure, the measure is initiated by the prosecutor by order, during the criminal prosecution, and communicated to the defendant, it follows that the modification of the criminal charge, after the indictment has been issued, falls within the exclusive competence of the prosecutor. Only in this interpretation can the prosecutor's status as the "holder" of the criminal prosecution be preserved, as the only entity that can refer the criminal case to the criminal court for resolution, the initiation of the criminal case together with the issuance of the indictment and the referral order being the focal points of the criminal investigation. The opposite scenario, in which the indictment would contain the charges brought against the defendant, as finally amended by the criminal investigation body of the judicial police, would be equivalent to the criminal court being vested with the power to judge a criminal charge formulated and consolidated by the judicial police, in the absence of the prosecutor's filter, given that the provisions of art. 311, align. 2 of the Code of Criminal Procedure require the prosecutor to confirm, with reasons, only the extension order issued by the criminal investigation body, but not the order changing the legal classification. Finally, by analogy for similar reasons, after the initiation of the criminal case the only judicial body competent to order the extension of the criminal prosecution is also exclusively the representative of the Public Ministry.

That is why, according to another expert opinion (Udroiu and collaborators, 2017, p.1346), in order to change the legal classification of an offence for which the criminal case has already been initiated, it is not necessary to issue a new indictment referring to the new classification of the offence, an aspect also based on the fact that the last classification was made by the "depositary" of the criminal case, namely the prosecutor.

During the preliminary chamber proceedings governed by the provisions of art. 342-348 of the Code of Criminal Procedure, the only responsibility of the preliminary chamber judge in relation to the legal

classification is to verify the jurisdiction of the court. Thus, pursuant to art. 346, align. 6 of the Code of Criminal Procedure, if the preliminary chamber judge considers that the court does not have jurisdiction, he or she shall proceed in accordance with Articles 50 and 51, respectively, raise the objection of lack of jurisdiction, and decline jurisdiction in favor of the competent preliminary chamber judge. Therefore, from the combined interpretation of the legal provisions, it follows that the verification of the jurisdiction of the preliminary chamber judge will be carried out by reference to the legal classification adopted by the prosecutor and mentioned in the court referral document, as the preliminary chamber judge is not allowed to re-evaluate the evidence in order to correctly determine the legal classification and possibly order a change in the legal classification. The structure of the legal texts also supports the argument that the legal classification of the act brought to trial cannot be changed during the preliminary chamber phase by the preliminary investigating judge. In this guideline for legal interpretation, art. 386 of the Code of Criminal Procedure, which will be examined below and which regulates the change of legal classification by the court, it should be noted that it is included in "Chapter II. Trial in the first instance, Section 1. Conduct of the trial," and refers only to the possibility of the court, i.e., the judicial body exercising the procedural function of judgment, but not to the verification of the legality of the referral or non-referral to trial, a procedural function assigned by the legislator to the competence of the preliminary chamber judge.

As the separation of judicial functions is a general principle of criminal procedure, resulting from art. 3 of the Code of Criminal Procedure, we consider that a premise complementary to the opinion expressed above, which lies in the impossibility of changing the legal classification during the preliminary chamber phase, is also generated by the grammatical, restricted interpretation of the procedural provisions.

Last but not least, the provisions of art. 377, align. 4 of the Code of Criminal Procedure also support and reinforce the above. According to it, if the court finds, ex officio, at the request of the prosecutor or the parties, that the legal classification of the act given in the indictment must

be changed, it is obliged to discuss the new classification and to draw the defendant's attention to the fact that he has the right to request that the case be left until later[...]". Therefore, even in the case of a judicial inquiry within the abbreviated procedure of admission of guilt, the procedural law allows, and even requires, a change in the legal classification of the act given in the indictment. From the coherent wording of the legislator (i.e., the legal classification given to the act in the indictment must be changed), it is clear beyond doubt that the change in classification only affects the modification of the classification given in the indictment issued prior to the preliminary chamber proceedings. Since the provisions relating to the regulation of the preliminary chamber precede the trial stage, we conclude without doubt that at no point did the legislator envisage that the change in legal classification could be carried out in the preliminary chamber. The legal classification attributed to the material acts described in the referral document is the prerogative of the court, and the decision on changing the legal classification cannot depend on the potential assumption of the defendant of the offences described in the indictment.

Assuming the above, judicial practice reveals an exceptional situation, consisting in the fact that when, although criminal prosecution was conducted for a specific material act, it has been given a manifestly erroneous legal classification, the correct legal classification determining the competence to conduct the prosecution in favor of a higher criminal prosecution body, for reasons of material competence. Of course, if the preliminary chamber judge notes a lack of territorial or personal jurisdiction, without it being necessary to change the legal classification, he will proceed to invoke and resolve the exception of lack of jurisdiction.

In such a practical scenario, apart from the possibility of sanctioning the criminal prosecution as a whole or in part, it must be analysed whether the preliminary chamber judge, unlawfully appointed in relation to the obvious and defective change in legal classification, could analyse the criminal case in the filter of the preliminary chamber.

In such a situation, the two procedural solutions are either to change the legal classification and decline jurisdiction, only at the trial

stage, or to raise the plea of lack of jurisdiction, setting out in the reasoning the grounds for which the court declares itself incompetent, followed by the transfer of jurisdiction to the preliminary chamber judge who is deemed competent.

Although both practical solutions are easily criticisable, we consider that the one that is closest to guaranteeing the right to defence and the right to a fair trial would be the second one, namely the preliminary chamber judge raising the objection of lack of jurisdiction, setting out in the reasoning the grounds for which it declares itself incompetent, followed by the transfer of jurisdiction to the preliminary chamber judge who is deemed competent. As it has been pointed out, such a working hypothesis constitutes a genuine exception in judicial practice based on the establishment of an obvious and striking legal misclassification (for example, the situation where a defendant was ordered to stand trial for the offence of bodily harm, under art. 194 of the Criminal Code, although all the actual and personal circumstances associated with the case show that in this case an offence of attempted murder was committed, under the provisions of art. 32 in conjunction with art. 33 of the Criminal Code in relation to art. 188 of the Criminal Code).

Examining further the institution of changing the legal classification, depending on the procedural moment in which it can be carried out, the general framework in this matter, in the trial phase, is constituted by the provisions of art. 386 of the Code of Criminal Procedure, according to which, if during the trial it is considered that the legal classification of the act given in the indictment is to be changed, the court is obliged to discuss the new classification and to draw the defendant's attention to the fact that he has the right to request that the case be left until later or that the trial be postponed in order to prepare his defence.

The legal provision above must be interpreted in accordance with Decision No. 250/2019 of the Constitutional Court[1], namely that it is constitutional only to the extent that the court rules on the change in the legal classification of the act referred to in the referral by means of a court decision that does not resolve the merits of the case. Conversely, the court does not have the possibility to change the legal classification by the decision ruling on the merits of the case (judgment/decision), thus violating the provisions of art. 21, align. 3 and art. 24, align. 1 of the Basic Law, as well as the provisions of art. 6, align.1 and 3, lit. a of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In essence, the constitutional court ruled in accordance with the above, based on ensuring the fairness of the criminal case and with a view to the effective exercise of the defendant's right of defence, given that only in relation to a legal classification that has been definitively established during the criminal case, and not at the end of the trial, can the defendant make concrete defences.

With regard to changing the legal classification during judicial inquiry, a situation that requires in-depth analysis is that which arises when a request is made to change the legal classification from one offence to another, exceeding the limits of the court's initial jurisdiction, as established by the act of referral to the court. Such a situation is found in judicial practice, for example, when, in the case of a traffic offence under art. 336 of the Criminal Code, the defendant agrees to a blood sample being taken but refuses a second one. Thus, without entering into legal arguments, as this is a separate legal issue, the Public Prosecutor's Office orders the defendant to be brought to trial for the offence of refusing to provide biological samples, as provided for in art. 337 of the Criminal Code, and during the trial, the defendant, the prosecutor, or even the court ex officio, brings up the change in the legal classification from the offence of refusing to provide biological samples, as provided

[1] Published in the Official Gazette, Part I, no.500 of June 20, 2019.

for in art.337 of the Criminal Code, to the offence of driving a vehicle under the influence of alcohol, as provided for in art. 336 of the Criminal Code, in relation to the evidence in the case file. Although the case file contains sufficient evidence to establish criminal liability, such a request to change the legal classification is inadmissible because the charge, as reconfigured, would fall outside the limits of the trial.

In this regard, the criminal investigation focused on pursuing a specific material act, socially dangerous conduct, objective and determined, attributed to the defendant, which triggered the criminal liability process, an act which the court was tasked with judging. Only within these material and procedural limits could the court reclassify the legal classification, namely only if the material act brought to trial gives rise to a different legal classification.

In all other situations, changing the criminal charge without it having been formulated during the criminal investigation constitutes a genuine extension of the criminal action, which, in the current architecture of criminal procedure law, is not permitted during the judicial inquiry, but only during the criminal investigation. Therefore, changing the legal classification implies the mandatory maintenance of the same material facts with which the court was invested, and it is the judge's obligation to verify whether such a procedural operation exceeds the legal framework of the court's jurisdiction.

Addressing a new issue that has arisen in judicial practice, resulting from the lack of material jurisdiction of the court of first instance, which is attracted by the change in the legal classification during the trial, for example, in that situation, when the act brought to trial was incorrectly classified, and the preliminary chamber judge, as explained above, cannot change the legal classification. And then, either at the first hearing on the merits of the case, the court discusses and changes the legal classification, and subsequently declines jurisdiction for the new classification, or later, possibly after the conclusion of the judicial inquiry.

In the event that the judge notices from the moment of his appointment that the legal classification is erroneous, we consider that

the judicious interpretation of the procedural rules in the light of Decision No. 250/2019 of the Constitutional Court obliges the court, as soon as possible, i.e. at the first hearing, in order to guarantee the right to defence, to discuss the new classification, to change it, and to refer the criminal case to the court with jurisdiction over the subject matter.

From practice, critics of this approach argue that the trial court would not be able to evaluate and interpret the evidence on which the indictment is based in the absence of evidence that should result from the judicial inquiry and, thus, the court could not change the legal classification until the end of the judicial inquiry, after it has been finally clarified. However, we consider that such a view is erroneous, because the considerations on which Decision No. 250/2019 of the Constitutional Court is based converge towards the idea that the judicial body is called upon to change the legal classification as soon as possible after it finds such a need, if possible, at an early stage of the criminal case or trial, precisely so that the defendant can prepare a thorough defence in relation to the new charge brought against them. In this context, changing the legal classification at the first opportunity available to the court does nothing more than guarantee the right to a fair trial and to a defence and does not imply a presumption of the defendant's guilt, especially since the criminal case will be transferred to the court that will decline jurisdiction to hear the case. Moreover, no criminal procedural rule requires a change in the legal classification at the end of the judicial inquiry, as the provisions of art. 386 of the Code of Criminal Procedure use the phrase "during the trial", meaning all throughout the trial phase. Of course, this does not exclude changing the legal classification at the end of the judicial inquiry when the evidence presented shows that the material act needs to be reclassified, but it does not mean that in all cases the legal classification can only be changed at the end of the evidence presentation.

Another distinct issue regarding the change in legal classification, which draws its substance from the content of Decision No. 250/2019 of the Constitutional Court, raises the question for the judicial authorities of the procedural act by which it should be carried out during the appeal phase of the proceedings. This is because, in interpreting the

Constitutional Court's decision, the court should rule by conclusion regardless of whether or not it changes the legal classification of the act in the referral document, so that the conclusions on the merits of the case take into account a "definitive" legal classification established for that stage of the proceedings, regardless of whether it is the one given in the referral document or the one given by the court, following the application of the provisions of art. 386 of the Criminal Procedure Code.

On the other hand, according to art. 421 of the Criminal Procedure Code, the appeal shall be settled by issuing a decision. The legitimate question arises as to how the appeal will be resolved, regardless of who brought it, when this appealing is used to challenge the unlawful legal classification of the act on which the court of first instance ruled. In other words, how will the court of appeal discuss and resolve the change in legal classification invoked in the appeal, i.e., will it rule by means of a decision during the trial or even by means of the decision resolving the appeal? Therefore, by issuing a separate ruling on the change in legal classification, the court may issue an unlawful decision, because any grounds for the unlawfulness or unfounded nature of the trial court's decision, including that concerning legal classification, cannot be resolved other than by a decision issued in accordance with art. 421 of the Criminal Procedure Code. On the other hand, if it were to rule by decision, it would risk circumventing Decision No. 250/2019 issued by the Constitutional Court.

In doctrine, a point of view has been formulated according to which it must be taken into account that the court of appeal cannot change the legal classification except as a result of the annulment of the first instance decision, which necessarily implies the admission of the appeal, a solution that cannot be ordered by conclusion (Udroiu, 2019, pp.497-498).

Similarly, in a final decision[1], the supreme court stated that, with regard to the issue of changing the legal classification and the court's preliminary ruling, the High Court finds that these issues are included in the grounds for appeal and are limited to such legal debates, in which sense they will be developed when the merits of the case are discussed.

Therefore, to the extent that the appeal is upheld and the legal classification is changed, it is considered that, taking into account the fact that the incidental issue was developed in the grounds for appeal and put to debate by the parties, their right to defence being guaranteed, it cannot be argued that Decision No. 250/2019 of the Constitutional Court has been violated, as the fairness of the criminal case has been ensured which results in the effective exercise of the defendant's right of defence, under the new legal classification of the offense included.

Also, the third solution we see, which is equally questionable, could be to admit the appeal, overturn the first instance judgment, and send the case back for retrial, for the first instance court to change the legal classification accordingly, by means of art. 421, lit.b, second paragraph, of the Code of Criminal Procedure, by broadly interpreting the case of annulment consisting of the failure to judge an offence alleged against the defendant in the indictment, to which it could be subsumed, and the situation in which the court of first instance ruled on an offence retained against the defendant in the indictment but with an erroneous determination of the legal classification, a premise that could be equivalent to a failure to rule on the offence, given that, according to the provisions of art. 396 of the Code of Criminal Procedure, the resolution of the criminal case implicitly requires the court to rule on the legal classification of the fact brought before it.

[1] High Court of Cassation and Justice, The Panel of 5 Judges, criminal decision no. 380 of November 28, 2019

Conclusions

In conclusion, considering the above, we deduce that the institution of changing the legal classification raises questions about the application of substantive and procedural legal rules and crystallizes simultaneously with the evolution of judicial practice.

In light of Decision No. 250/2019 issued by the Constitutional Court, legal classification during judicial inquiry can only be achieved through a decision that excludes the examination of the criminal action on its merits, which has subsequently generated other doctrinal and jurisprudential debates, some of which being highlighted in this article, which, without claiming to be exhaustive, aims to bring to the attention of criminal law theorists and practitioners the interpretation of certain legal provisions intrinsically related to the exhaustion of the criminal action.

Similar to the trial phase, both in the prosecution phase and in the preliminary chamber phase, the change in legal classification gives rise to legal issues that are susceptible to inconsistent resolutions. This study aims to offer a specific solution, which can be supplemented with equally sustainable arguments or, of course, contradicted by presenting critical and different logical-legal reasoning. In any case, the study aims to focus on criminal procedural law, both established and emerging, in formation, in crystallization, but also in its aspirational structure, which, from the perspective of the legal practitioner and equally of the litigant, should consist of the standardization of judicial interpretations and the pronouncement of predictable and uniform solutions.

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