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Research Article

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Limits of The Preliminary Hearing Judge's Review Under Article 332/D of The Criminal Procedure Code in Relation to The Prosecutor's Authority to Conduct Criminal Prosecution

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Abstract
The study of legal dilemmas arising from legal reforms is of particular importance for the proper interpretation and implementation of innovations incorporated into legal systems. As part of the 2017 reform of the Albanian criminal procedure system, new mechanisms were introduced concerning the clarification and amendment of the charge in the course of criminal proceedings, including at the preliminary hearing stage.
These innovations have raised questions as to the scope of the powers of the Preliminary Hearing Judge (PHJ) and the limits of the judge's review in relation to the prosecutor's power to conduct criminal prosecution. In this context, the study aims to analyse the content and application of Article 332/d of the Criminal Procedure Code (CPC), with a view to determining the boundary between judicial review of the charge and the preservation of the prosecutor's constitutional powers. Through an analysis of the legal framework and the problems arising in its application, the study aims to identify procedural solutions that can contribute to clarifying the powers of the PHJ, increasing the effectiveness of criminal proceedings, and avoiding unnecessary delays that may result from the divergent positions taken by the procedural authorities on the interpretation and application of the law.

Field of study: Criminal Procedure

Keywords: *Criminal prosecution, charge, legal classification, amendment of the charge, preliminary hearing, return of the case file, notification of the Head of the Prosecution Office, independence of the prosecutor.*

1. Introduction

Legal reforms in the field of criminal procedure aim not only to improve the mechanisms for conducting criminal proceedings but also to define clearly the powers of the procedural authorities and the limits within which they are exercised. In this context, the 2017 reform of the Albanian criminal procedure brought about significant changes to the function of the Preliminary Hearing Judge and to the manner in which the case is subject to judicial review before being sent to trial. One of the issues that requires special attention relates to the application of Article 332/d of the Criminal Procedure Code, which regulates the intervention of the Preliminary Hearing Judge in cases where the charge is not clearly or accurately formulated, or where the legal classification of the criminal offence is incorrect. The application of this provision requires an interpretation that guarantees the effectiveness of judicial review, without undermining the separation of procedural functions and the prosecutor's constitutional authority to conduct criminal prosecution and to represent the prosecution in court.

The issue becomes particularly important in determining the boundary between the control of legality exercised by the Preliminary Hearing Judge and the prosecutor's competence to formulate, clarify or amend the charge. Ambiguities that may arise in the application of Article 332/d of the Criminal Procedure Code, particularly as regards the procedural consequences of the prosecutor's failure to act following the court's invitation to remedy deficiencies, can affect the course of criminal proceedings and create room for differing interpretations in judicial practice. For this reason, the paper aims to analyse the constitutional and legal framework that defines the relationship between these two authorities, the content and application of Article 332/d, and the limits of the Preliminary Hearing Judge's intervention in reviewing the charge. This analysis aims to identify procedural solutions that preserve the respective powers of the procedural authorities, guarantee the rights of the defence and contribute to the conduct of effective criminal proceedings, in accordance with the requirements of legality and legal certainty.

2. Constitutional and procedural basis of the relationship between the prosecutor and the Preliminary Hearing Judge

The Prosecution Office is one of the institutions of the Albanian justice system and, given its importance, is enshrined in Article 148 of the Constitution of the Republic of Albania.

In interpreting Article 148 as it stood before the 2016 amendments, a provision which essentially carried over the traditional characteristics of the Prosecution Office, the case law of the Constitutional Court identified certain features of the Prosecution Office which placed this institution in a position distinct from the other branches of power, in particular: a) as the only body in the country that conducts criminal prosecution. The function of the Prosecution Office, as the representative of the prosecution on behalf of the state (Article 148/1 of the Constitution), gives this body the exclusive right to decide whether or not to prosecute, i.e. whether or not to bring a case

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to trial and whether or not to discontinue a case at the trial stage[1]; b) as the body that represents the prosecution at trial on behalf of the state, that has power of disposition over the cases being tried and that is free to seek the type and severity of the sentence against persons found guilty; c) as the body with full independence in the exercise of its functions, subject only to the Constitution and the laws, which means that the initiation of criminal proceedings, the bringing of persons to criminal liability, and the dismissal, suspension or referral of cases to court are prerogatives of the Prosecution Office; ç) as a centralised body.[2]

In 2016, in order to strengthen the functional independence of prosecutors in the cases under their investigation, provision was made for the Prosecution Office to be reorganised from a centralised into a decentralised body. This was a response to the situation in which the Prosecution Office found itself at that time. The hierarchical organisation of the Prosecution Office did not fully ensure the effective performance of its constitutional function. This had adverse effects on its activity, particularly with regard to respect for the principle of legality, the protection of individual rights and freedoms, and the conduct of proceedings in accordance with the principles of objectivity and transparency in decision-making. [3] The constitutional amendments aimed at: i) guaranteeing the internal and external independence of prosecutors and the Prosecution Office; ii) reviewing the powers of investigation and of representation of the prosecution in court, promoting the effective control and balancing of these powers by the responsible structures; iii) territorial reorganisation of the Prosecution Office, in order to adequately respond to the organisation of the courts; iv) ensuring sufficient independence of the special structures of the Prosecution Office.[4]

Following these studies, amendments to Article 148 of the Constitution were approved, whereby the paragraph providing for the centralisation of the Prosecution Office was deleted and it was established that prosecutors are independent, a reference, among other things, to their internal functional independence. This constitutional amendment was also reflected in procedural law. With the 2017 amendments, the provision of paragraph 4 of Article 24 "*The orders and instructions of the higher-ranking prosecutor are binding on the lower-ranking prosecutor*."[5] was removed from the Code, reflecting the decentralised nature of the Prosecution Office.

Within this constitutional and procedural framework, the preliminary hearing constitutes a phase of judicial review, in which the judge exercises the powers conferred by law to verify whether the procedural conditions for sending the case to trial are met. In this context, Article 332/d of the Criminal Procedure Code is of particular importance, as it regulates situations in which the prosecutor's powers to amend the charge intersect with the Preliminary Hearing Judge's authority to review its legal classification and clarity.

2.1. The right and competence of the prosecutor to conduct criminal prosecution

The prosecutor is the public authority that, on behalf of society and in the public interest, ensures the application of the law where its breach carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.[6]

In criminal justice systems, the prosecutor plays a key role in decision-making regarding the initiation and continuation of criminal prosecution, the presentation of the case for the prosecution in court, and the exercise of the right to appeal, in accordance with the powers granted by the relevant legislation. Given the importance of this function, the office of prosecutor must be strictly separated from judicial functions.[7] In Albania, Article 148 of the Constitution sets out the constitutional functions of the Prosecution Office, while its organisation and functioning are governed by the relevant constitutional and legal provisions. For this reason, the institutional relationship between the Prosecution Office and the courts should be understood in accordance with the separation of their functions: The Prosecution Office conducts criminal prosecution and represents the prosecution in court, while the court exercises its judicial function independently.

The function of the Prosecution Office, as the representative of the prosecution on behalf of the state (Article 148/1 of the Constitution), gives this body the exclusive right to decide whether or not to prosecute, i.e. whether or not to bring a case to trial and whether or not to discontinue a case at the trial stage.[8]

Article 24 of the CPC defines the content and scope of the prosecutor's competence in conducting criminal prosecution, conceiving of it as a function that includes not only representing the prosecution in court but also directing and supervising preliminary investigations and taking decisions on the course of criminal proceedings. In this context, the prosecutor has the authority to assess, in accordance with the conditions provided by law, whether the proceedings should be initiated, continued or terminated, and whether the case should be sent to trial. This power is also reflected in the prosecutor's ability to request the dismissal of the charge or of the case, to conclude cooperation agreements or agreements on the admission of guilt and the determination of the sentence (plea agreements), and to request

1. [1]Decision No. 12, dated 20.05.2008, of the Constitutional Court of Albania
2. [2]Decision No. 26, dated 04.12.2006, of the Constitutional Court of Albania
3. [3]Explanatory Report on the Draft Law on the Prosecution Office.
4. [4]See "Justice Reform Strategy", Chapter III "Criminal Justice", Objective 1. "Increasing the efficiency and effectiveness of criminal justice through the consolidation of the mission and functions of the Prosecution Office, the reorganisation of its structures and the redistribution of responsibilities among them". This strategy was approved by Decision No. 15, dated 13.07.2015 of the Special Commission for Justice Reform
5. [5]Law No. 7905/1995, Criminal Procedure Code, prior to the 2017 amendments.
6. [6] COUNCIL OF EUROPE COMMITTEE OF MINISTERS "RECOMMENDATION REC (2000)19 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE ROLE OF PUBLIC PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM (Adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies) https://rm.coe.int/16804be55a accessed on 24.10.2026.
7. [7]The 1990 United Nations Guidelines on the Role of Prosecutors https://www.ohchr.org/en/instruments-mechanisms/instruments/guidelines-role-prosecutors accessed on 24.10.2026
8. [8]Decision No. 26, dated 04.12.2006, of the Constitutional Court of Albania.

the approval of a penal order, in accordance with the relevant legal conditions. The provision that criminal prosecution is pursued ex officio, except where the law requires a complaint by the victim, highlights the distinction between prosecution initiated by the competent authorities on their own motion and cases in which its initiation is conditional upon a procedural act by the victim. In its entirety, Article 24 highlights the central role of the prosecutor in determining the course of criminal prosecution, but at the same time links the exercise of this function to the conditions and procedures set out in the Code, placing the prosecutor's competence within the limits of procedural legality.

However, the central role of the prosecutor in determining the course of prosecution does not imply an unlimited competence or one exempt from judicial review. Thus, the prosecutor's decision not to initiate criminal proceedings may be appealed to the court, which, if it finds the appeal to be well-founded, orders the registration of the criminal proceedings. This mechanism shows that, although the prosecutor remains the competent authority for the conduct of criminal prosecution, the legality of his decision-making is subject to judicial review in the cases and according to the procedures provided for by the Code. In this respect, the prosecutor-led model of criminal prosecution which characterises the Albanian system should be distinguished from the models that grant the prosecutor broader discretion in deciding whether to initiate or discontinue proceedings, as is the case in some common law systems, where one of the traditional expressions of this discretion is the legal institution of nolle prosequi.[9] On the other hand, continental legal systems, such as those of Germany and Italy, also provide for mechanisms of judicial control over the prosecutor's decisions not to prosecute. Consequently, Article 24 of the CPC, in its entirety, establishes the central role of the prosecutor in the conduct of criminal prosecution, but at the same time places this power within a legal framework that guarantees judicial review and respect for the principle of procedural legality.

2.2. The role of the preliminary hearing judge and the nature of his review

Law No. 35/2017 introduced Chapter IX ("Preliminary Hearing") into the Criminal Procedure Code (CPC). The main purpose of introducing this judicial figure is to review the prosecutor's actions during the preliminary investigation and to strengthen the investigation phase, the most delicate phase of criminal proceedings, a need that existed even before the decentralisation of the Prosecution Office. This purpose is achieved through the specific powers vested in this judge.[10]

Review of the investigations by the PHJ serves the effectiveness of the trial and provides stronger safeguards for the defendant's procedural rights and guarantees. However, since this is a form of judicial review carried out through argument between the parties summoned to the hearing and in application of the adversarial principle, it follows that when the preliminary hearing judge decides pursuant to Article 332/dh of the CPC, he exercises judicial functions (as a trial judge) in a proceeding of limited scope, but without assuming the attributes of the judge who examines the merits of the case as regards the assessment of the facts, the evidence and the guilt of the defendant.[11]

At the end of this discussion on the function of the preliminary hearing judge and the nature of the control exercised by him, it is necessary to analyse how these powers are given concrete form in the application of the procedural provisions. In this regard, Article 332/d of the Criminal Procedure Code is of particular importance, as it defines the powers of the preliminary hearing judge at the end of this stage and the limits of the judge's intervention in relation to the function of the prosecutor and that of the trial court examining the merits. Consequently, the interpretation of this provision serves to highlight the scope of judicial review, the nature of the Preliminary Hearing Judge's decision-making and the boundary between reviewing the legality and procedural sufficiency of the investigations and assessing the charge.

3. Interpretation of Article 332/d of the CPC

One of the changes introduced by the justice reform, with a view to strengthening the preliminary investigation phase and avoiding delays at the trial stage through the submission of a complete case file, is the possibility of amending the charge at the preliminary hearing stage.

The indictment is the procedural act drawn up by the prosecutor whereby the person under investigation acquires the status of defendant and is informed of the criminal nature of the acts he is suspected of having committed, as well as of the legal characteristics of the criminal offence attributed to that conduct under the relevant provision of the Criminal Code or other Albanian criminal law.[12]

It should be emphasised, however, that the amendment of the charge remains an exclusive prerogative of the prosecutor in the conduct of criminal prosecution. Prosecution is not an activity that ends at the preliminary investigation stage; it continues with the prosecution of the case at trial.

The Code defines the cases in which the charge may be amended at the preliminary hearing and the procedure to be followed in such cases.[13] The provision sets out three situations, which are

9. [9]*Nolle prosequi* (abbreviated nol. pros.) is a Latin phrase, which directly translates to "not to wish to prosecute." Nolle prosequi is a legal notice or entry of record that the prosecutor or plaintiff has decided to abandon the prosecution or lawsuit.
10. https://www.law.cornell.edu/wex/nolle_prosequi accessed on 02.11.2026.
11. [10] Explanatory Report on the Draft Law on Amendments to the Criminal Procedure Code
12. https://www.aksesdrejtesi.al/dokumenta/1597827373RELACION-SHTESA-E-NDRYSHIME-7905-KODI-I-PROCEDURES-PENALE-Resized.pdf?utm accessed on 26.10.2026
13. [11]Unifying Decision No. 00-2021-1134 (62), dated 01.11.2021, of the Joint Colleges of the High Court of the Republic of Albania
14. [12]K. Kurushi, "New Charges in Criminal Proceedings", doctoral dissertation, University of Tirana, p. 36,
15. https://unitir.edu.al/wp-content/plugins/pdfjs-viewer shortcode/pdfjs/web/viewer.php?file=https://unitir.edu.al/wp-content/uploads/2018/02/Klodian-Kurushi-Disertacioni-per-graden-shkencore-doktor.pdf&attachment_id=0&dButton=false&pButton=false&oButton=false&sButton=true&editButtons=true&v=3.1.1&_wpnonce=e762311ab4#zoom=auto&pagemode=none, accessed on 26.10.2026
16. [13] Criminal Procedure Code Article 332/d "1. Where, during the preliminary hearing, the fact emerges as different from that described in the request for referral of the case to trial, or another criminal offence emerges within the meaning of Article 79(1)(b), or an aggravating circumstance not previously mentioned emerges, the prosecutor shall amend the charge and communicate it to the defendant, if present. Where the defendant is not present, the new charge shall be communicated to defence counsel, who shall be allowed a period not exceeding 10 days in which to communicate

also provided for at the trial stage, in which the charge may be amended. These situations are examined in detail later in this section.

In my view, the inclusion of such a provision in the Code is of considerable assistance to judicial practice, given that the law allows the charge to be reviewed at different stages of the proceedings, subject to the conditions and procedures laid down in the Code. This undoubtedly serves to guarantee due process of law in terms of procedural fairness.[14]

3.1. Amendment of the Charge

The charge may be amended at the preliminary hearing for several reasons and in the following cases:

1. The fact emerges as different from that described in the request for referral of the case to trial.

The criminal offence consists of the totality of acts or omissions that affect a social relationship protected by criminal law. In this situation, the prosecutor has carried out investigative acts that prove the existence of the criminal fact, but the evidence gathered during the preliminary investigation may have been incorrectly assessed by the prosecution.

During the proceedings before the PHJ, the parties engage in adversarial argument, through which the problem that has arisen in the proceedings may be identified. In such a case, the prosecutor may reassess the charge on the basis of the same evidence. Accordingly, the amendment of the charge by the prosecutor consists solely in a reassessment of the circumstances and facts identified during the preliminary investigation and contained in the investigation file.

In this case, the prosecutor clarifies the charge at the hearing in the presence of the defendant and the victim; since the parties are present, they are able to conduct an effective defence, given that at this stage the defendant may also raise applications concerning the nullity or inadmissibility of evidence. Where the defendant is absent, defence counsel is allowed a period of 10 days in which to communicate the clarification of the charge to the defendant. Compliance with the procedure for communicating the charge and the guarantee of a genuine opportunity to conduct a defence are intended to prevent breaches of due process.

2. A charge for another offence, in the situation provided for in Article 79/b of the Criminal Procedure Code. [15] An analysis of this provision in conjunction with Article 79/b shows that, for the charge to be amended on this ground, there must be an ideal (notional) concurrence of criminal offences.

What, then, is meant by the ideal concurrence of criminal offences? Ideal concurrence covers cases in which a person, by a single act or omission, fulfils the elements of two criminal offences.[16] In such a case, the defendant has, at the same time and by the same act, committed two criminal offences, which may be of the same kind (homogeneous ideal concurrence) or of different kinds (heterogeneous ideal concurrence).

For the prosecutor to communicate the charge at the preliminary hearing under this provision, the conditions of ideal concurrence must be met.[17]

Since the offences are linked through ideal concurrence, the investigations into the relevant criminal conduct have already been carried out by the prosecution. Accordingly, in the interests of procedural economy, the proceedings may be concluded on the basis of the existing investigation file, without the need for a further investigative phase in respect of the newly identified offence.

3. *Existence of an aggravating circumstance not previously mentioned. The same reasoning applies here as in the first case, where the fact emerges as different from that described in the request. In this case too, the aggravating circumstance was established during the preliminary investigation, but for one reason or another the prosecutor did not notify the defendant of it; the preliminary hearing gives the prosecutor the opportunity to do so. The law is, however, somewhat vague as to the procedure by which the new charge is to be communicated by the prosecutor.*

3.2. New criminal fact at the preliminary hearing

Paragraph 2 of Article 332/d of the CPC governs the situation in which a new criminal fact, not mentioned in the request for referral of the case to trial, emerges during the hearing. Here, on a systematic interpretation of the provisions, and in view of the different manner in which the legislature provides for the judicial authorities to proceed in the first[18] and the second case, we consider that the latter involves a real concurrence of criminal offences, where the person has committed several criminal offences at different times and by different acts.[19] The newly identified criminal fact satisfies all the conditions for separate proceedings to be initiated de novo. The fact that the Article requires that the new fact must not have been mentioned

with the defendant. 2. Where, during the preliminary hearing, a new criminal fact emerges against the defendant which was not mentioned in the request for referral of the case to trial and in respect of which proceedings are to be conducted ex officio, the court shall grant leave to communicate the charge for the new fact, provided that the prosecutor so requests and the defendant consents. Otherwise, the court shall return to the prosecutor the case file relating to the new charge and shall notify the Head of the Prosecution Office. 3. Where, during the preliminary hearing, it appears that the legal classification of the fact is incorrect, or that the charge is not formulated clearly and precisely, the court shall invite the prosecutor to make the necessary corrections or clarifications. If the prosecutor fails to do so, the court shall order the return of the case file. This decision shall be notified to the Head of the Prosecution Office."

17. [14]A. Belishta, "Procedural guarantees of the defendant in criminal proceedings through the provisions on the amendment of the charge: a historical perspective and their reinforcement by the amended procedural provisions", Criminal Law Department International Scientific Conference "Criminal Law between Tradition and Challenges of Actuality" p. 456
18. [15]Criminal Procedure Code, as amended by Law No. 35/2017, Article 79/b: "1. The prosecuting authority may decide to join the proceedings: b) where a person is charged with several criminal offences"
19. [16]S. Mengjesi, "Fundamentals of Criminal Law", Tirana, Morava Publications, 2016
20. [17]G. Conso, V. Grevi, Compendio di Procedura Penale, 2nd edn, CEDAM, 2003, p. 705
21. [18]See Section 2.1, which discusses Article 332/d(1).
22. [19] Unifying Decision No. 3, dated 02.11.2015, of the Joint Colleges of the High Court, www.gjykataelarte.gov.al which addresses the concept of real concurrence of criminal offences.

in the request for referral of the case to trial indicates that the facts are not objectively connected; their only common element is the identity of the perpetrator.

The opposite is true of Article 332/d(1), where the criminal offences are connected by the time of their commission and the conduct of the perpetrator, which makes it possible to continue the trial in the same proceedings, since the investigation of that conduct has been completed by the prosecutor. Were the contrary view to be accepted, the legislature, in keeping with its own terminology, would also have provided for the return of the case file to the prosecutor for further investigation as the procedural solution, as it does in paragraph 2. In the latter situation, however, unlike under paragraph 1, the criminal offences remain separate and the investigations already carried out do not necessarily serve the trial of the newly emerged criminal fact.

These conclusions have not, however, been developed in case law or legal scholarship and therefore remain the author's own assessment based on the interpretation of the provision.
In this situation, the Code provides for two ways in which the prosecutor may proceed:
The prosecutor notifies the defendant of the charge where the prosecutor considers that the evidence relating to this criminal fact is sufficient, meaning that a fair trial on the newly emerged criminal fact can be conducted on the basis of that evidence. In addition to the prosecutor's assessment, the defendant's consent is also required in order to proceed in this way. This condition is intended to ensure that the defendant is not deprived of the right to an effective defence against the new charge brought against him. If the defendant considers that it is in his or her interests to defend the charge on the basis of the existing case file and evidence, the defendant may consent, relying on the judicial examination at trial for the taking of any further evidence. Consequently, at the trial on the merits, the defendant will be tried on two or more charges, as the case may be, brought by the prosecutor.

In the second case, where the two cumulative conditions laid down in the provision are not met, the prosecutor requests the court to return the case file in respect of the new criminal fact, for which the relevant investigative steps will then be taken. Meanwhile, the proceedings concerning the original fact, in respect of which the prosecutor submitted the request for referral to trial to the PHJ, continue in the ordinary way. In this case, when ordering the return of the case file, the judge notifies the Head of the Prosecution Office.

Since the Criminal Procedure Code does not expressly define the purpose of this notification, nor the procedural consequences that may arise from it, its nature and function remain subject to interpretation. In this sense, the notification can be considered not only as an informative mechanism, but also as an instrument enabling the Head of the Prosecution Office to be informed of the manner in which the prosecutor in charge of the case exercises his or her powers and to take this into account in assessing that prosecutor's performance. This notification may also be of significance where the Head of the Prosecution Office has previously issued non-binding instructions[20] that have not been followed by the prosecutor in charge of the case.

However, in the absence of an express legal provision, it cannot be concluded that the notification automatically entails disciplinary consequences or that it constitutes a mechanism to compel the prosecutor to act in accordance with the judge's legal assessment. Consequently, the function of this notification should be assessed in the light of the managerial and evaluative powers of the Head of the Prosecution Office, while respecting the functional independence of the prosecutor in the conduct of criminal prosecution.

3.3. Amendment of the legal classification

Paragraph 3 of Article 332/d of the Criminal Procedure Code provides that the prosecutor may amend the legal classification of the criminal fact following guidance from the Preliminary Hearing Judge.
3. When, during the preliminary hearing, it appears that the legal classification of the fact is incorrect, or when the charge is not formulated clearly and precisely, the court shall invite the prosecutor to make the necessary corrections or clarifications. If the prosecutor fails to do so, the court shall order the return of the case file. This decision shall be notified to the Head of the Prosecution Office.
It follows from the wording of the provision that the court's intervention may concern two situations relating to the constituent elements of the charge:
- The legal classification of the fact is incorrect. This situation relates to the nature of the charge, by which we mean the legal characteristics attributed to the criminal fact under investigation. Here, the prosecutor has clearly and accurately identified the criminal fact, i.e. the criminal conduct committed, but the legal provision under which that fact has been classified does not correspond to the conduct committed.
- The charge is not clear and precise. This situation relates to the cause of the charge (causa), i.e. the criminal conduct committed. Here, the court's activity extends not only to determining the legal classification of the fact but also to assessing whether the investigations are complete and sufficient: do the investigations carried out prove the criminal fact alleged by the prosecutor? The evidence obtained from the investigations may fail to prove the criminal conduct, even though that conduct may have been correctly identified by the prosecution.

In both cases, the court invites the prosecutor to make the relevant amendments. This follows from the fact that the PHJ has no power to amend or draft the charge, which remains a core and exclusive function of the Prosecution Office, the only authority empowered to conduct criminal prosecution.

If the prosecutor does not accept the judge's guidance, the PHJ is empowered to return the case file to the prosecutor, thereby remitting the proceedings to the preliminary investigation stage, and to notify the Head of the Prosecution Office accordingly. It is essential that the PHJ give detailed reasons for such a decision.

3.4. Absence of a specific appeal remedy against decisions of the Preliminary Hearing Judge under Article 332/d of the CPC

The prosecutor has no standing to lodge a separate appeal against the decisions of the Preliminary Hearing Judge provided

23. [20]Law No. 97/2016 "On the Organisation and Functioning of the Prosecution Office in the Republic of Albania", Article 48 (Non-binding instructions in specific cases)

for in Article 332/d of the Criminal Procedure Code. This conclusion applies to the invitation addressed to the prosecutor to correct or clarify the charge, to the decision to return the case file to the Prosecution Office, and to the refusal to grant leave to communicate the charge in respect of the new fact.

This position is supported by the principle of the exhaustive enumeration (taxativity) of remedies, according to which judicial decisions may be appealed only in the cases and in the manner expressly provided for by law.[21] In the context of the preliminary hearing, Article 332/gj of the Code lays down a specific rule on appeals, providing that no appeal lies against the decision to send the case to trial, whereas the prosecutor, the defendant, the victim or the victim's heirs may appeal against the decision to dismiss the charge or the case, subject to the statutory conditions. By contrast, for the decisions provided for in Articles 332/ç and 332/d, the Code does not expressly provide for any specific means of appeal. [22] Within the system of remedies, this omission supports the conclusion that such decisions are not separately appealable.

To understand further the absence of a specific appeal remedy, the nature of the decisions provided for in the three paragraphs of Article 332/d, and the procedural consequences they entail, are also relevant.

None of the three situations under Article 332/d affects the prosecution to an extent that would justify an appeal.
Paragraph 1 (amendment of the charge, related offence, aggravating circumstances). This is not a decision of the judge. Under the text of the provision, the prosecutor amends the charge and communicates it to the defendant, if present. The act is the prosecutor's; therefore, no judicial decision is issued against which an appeal may be brought.

Paragraph 2 (new fact). The court grants leave to communicate the charge for the new fact where the prosecutor so requests and the defendant consents. Otherwise, the court returns to the prosecutor the case file relating to the new charge. The refusal of leave does not prevent the prosecutor from investigating the newly identified criminal fact in accordance with the ordinary procedural rules, while the proceedings concerning the initial charge continue towards trial.

Paragraph 3 (wrong classification, unclear or incorrect charge). The court invites the prosecutor to make the necessary corrections or clarifications. If the prosecutor fails to do so, the court orders the return of the case file. The invitation is not binding on the prosecutor, who may decline it and accept the consequence, namely the return of the case file to the Prosecution Office. The judge cannot draft the charge himself or impose it on the prosecutor. The only option available to the Preliminary Hearing Judge, as a last resort, is to return the case file to the prosecutor.

The return of the case file neither terminates the proceedings nor determines the merits; the proceedings are simply remitted to the investigation stage. The prosecutor then has two options: either to correct the charge or to resubmit the request for referral of the case to trial, even with the same legal classification if he remains convinced of it.[23] Consequently, in this situation, resubmission of the request for referral of the case to trial may be regarded as the procedural avenue available to the prosecutor, in place of a specific appeal.

A particular issue arises where the Preliminary Hearing Judge orders the return of the case file without first inviting the prosecutor to correct or clarify the charge. In that situation, it may be argued that the judge has omitted a procedural step expressly provided for in Article 332/d(3), thereby failing to observe the sequence of steps prescribed by law.

In this regard, Italian case law offers a comparative reference. The United Sections (Sezioni Unite) of the Italian Court of Cassation, in Decision No. 5307 of 1 February 2008, addressed the return of the case file to the prosecution on account of a generic or insufficiently specified charge, without the prosecutor first having been given the opportunity to make the necessary clarifications. In that case law, the judge's decision was assessed under the doctrine of the atto abnorme (abnormal act), which in the Italian system allows judicial acts falling outside the procedural framework laid down by law to be challenged before the Court of Cassation.[24]

However, this solution cannot be transposed automatically to the Albanian system, since the doctrine of the atto abnorme is not expressly codified in the Albanian CPC. Nevertheless, the Italian case law may serve as a doctrinal argument that returning the case file without first inviting the prosecutor to act may constitute a departure from the procedure laid down in Article 332/d(3). The question may then arise whether the judge's decision, given the nature of the irregularity and the consequences it produces, can be regarded as an act falling outside the legal framework. This remains a doctrinal argument de lege ferenda, not an avenue of appeal recognised in practice.

3.5. The limits of the PHJ's review of the charge and the prosecutor's exclusive competence to conduct criminal prosecution

Article 148 of the Constitution defines the function of the Prosecution Office in conducting criminal prosecution and representing the prosecution in court. On the other hand, international standards emphasise the importance of clearly defining in law the status, powers and procedural role of the prosecution service, in order to guarantee the separation of functions and the independence and impartiality of the judiciary.

In this context, Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe emphasises that the legal status, powers and procedural role of public prosecutors should be established by law in such a way that there can be no legitimate doubt as to the independence and impartiality of judges. This standard serves as a starting point

24. [21]Criminal Procedure Code, Article 407
25. [22] Decision No. 00-2023-469 (8), dated 16.01.2023, of the Criminal Chamber of the High Court follows the same line of reasoning: it held that the defendants "have no standing to lodge an appeal or recourse against the decision of the Court of Appeal to send the case to trial, since this remedy is not provided for in the specific provisions of criminal procedure law".
26. [23]Electronic Commentary, School of Magistrates, Article 332/d
27. https://komentarielektronik.magjistratura.edu.al/sq/eli/fz/2017/7905/332-d
28. [24]K. Kurushi, "New Charges in Criminal Proceedings", doctoral dissertation, University of Tirana.

for examining the relationship between the prosecutor's powers and judicial control during the preliminary hearing.[25]

In this context, the question arises as to how far the review exercised by the Preliminary Hearing Judge (PHJ) over the formulation of the charge may extend without encroaching upon the powers of the prosecutor. More specifically, Article 332/d(3) of the Criminal Procedure Code provides that, where the legal classification of the fact is incorrect or the charge is not formulated clearly and precisely, the court invites the prosecutor to make the necessary corrections or clarifications and, if the prosecutor fails to act, orders the return of the case file. This issue is of particular importance given that the prosecutor has the power to amend the charge during the trial on the merits, in accordance with the conditions and guarantees provided by the Criminal Procedure Code.[26]

It is therefore necessary to analyse the nature and limits of the PHJ's intervention in this procedure, the effect of the court's invitation on the prosecutor and the procedural consequences of the prosecutor's failure to act.

Discussions among legal practitioners have raised the question of how far the competence of the PHJ may extend. The position of the prosecution is that the principle that criminal prosecution is conducted by the prosecuting authority must be strictly observed and that the PHJ should not direct the prosecutor as to how to frame the charge, since this would undermine the independence and exclusive prerogative of the prosecutor in conducting prosecution. On the other hand, where the prosecution has not accepted the PHJ's invitation to clarify the charge, the PHJ has activated the mechanism of returning the case file to the prosecutor, resulting in the case reverting to the preliminary investigation stage.

3.6. Correction and clarification of the charge: the competence of the PHJ and the consequences of the prosecutor's failure to act

Paragraph 3 of Article 332/d of the CPC provides for the amendment of the legal classification of the criminal fact.[27] This mechanism applies where it is found at the preliminary hearing that there is a problem with the nature of the charge, that is, with the legal characteristics attributed to the perpetrator's conduct (the cause).

In accordance with the principle iura novit curia, under which the court knows the law and is not bound by the legal arguments advanced by the parties, criminal procedure law recognises the court's power to determine the legal classification of the criminal fact. At the preliminary hearing stage, however, given that the review carried out by the PHJ is a preliminary screening of the case file and there is no full trial based on the examination of evidence, the legislature has not expressly empowered the PHJ to change the legal classification of the criminal fact, but has left this prerogative to the prosecutor.

The procedural mechanisms provided for by law consist of inviting the prosecutor, at the hearing, to clarify the legal classification of the criminal fact and, failing compliance, ordering by decision the return of the case file to the prosecutor and notifying the Head of the Prosecution Office.

Where the prosecutor does not accept the PHJ's invitation to clarify the charge and maintains the position set out in the request submitted at the preliminary hearing, a 'conflict' arises between the two procedural actors.

The absence of an express statutory provision governing the procedural consequences of the prosecutor's failure to act may give rise to a procedural deadlock (a 'chronic conflict') where the prosecutor and the PHJ each maintain their divergent positions on the charge. This raises the question of whether the PHJ may declare the request for referral of the case to trial invalid on the ground that it fails to satisfy one of the requirements set out in Article 327(3) of the CPC [28].

In the light of the procedural provisions currently in force, we consider that such a conclusion cannot be reached and that the PHJ cannot declare the request for referral of the case to trial invalid, as this would amount to a procedural solution going beyond the statutory framework. [29]

We consider, however, that in this case the legislature has empowered the PHJ to activate the mechanism for reviewing the charge at the procedural stage in question. The provision offers two procedural alternatives: first, the PHJ invites the prosecutor at the hearing to clarify the charge and to give the facts the appropriate legal classification; failing that, the PHJ orders the return of the case file to the prosecutor. The latter decision should take the form of an interlocutory decision setting out the relevant factual elements and the legal grounds underlying the court's assessment of the charge.

Case law contains reasoning to the effect that "only when examining the request for referral of the case to trial may the court, at the preliminary hearing, proceed with the communication of new charges by the prosecutor at the hearing, or with the amendment of the legal classification of the criminal offence by the court, pursuant to Article 332/d of the CPC; and even in that case, as noted above, the court merely states its position, since the decision rests in every case with the prosecution".[30]

The recent case law of the High Court likewise suggests that the power to clarify the charge lies with the prosecutor, while the PHJ may provide guidance on the legal classification of the criminal fact. [31]

29. [25]Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system: Council of Europe: Committee of Ministers, Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000, Rec(2000)19, https://rm.coe.int/16804be55a
30. [26]Criminal Procedure Code, as amended, Article 372.
31. [27]See Section 2.3, "Amendment of the legal classification".
32. [28] Criminal Procedure Code, Article 331(2): "The request for referral of the case to trial is invalid where paragraphs 2, 3 and 4 of Article 327 of this Code are not complied with." Article 327(3): "The notice shall contain a summary description of the criminal fact being prosecuted, *the time and place of its commission, the legal classification, notice that the case file has been lodged with the registry, and the right to inspect the case file and obtain copies."*
33. [29]See Decision No. 5307, dated 1 February 2008, Italian Court of Cassation (United Sections).
34. [30]Decision No. 129 (Reg. Them.), dated 18.11.2025, Special Court of First Instance for Corruption and Organised Crime.
35. [31] Decision No. 00-2026-5, dated 13.01.2026, of the Criminal Chamber of the High Court, § 17.

However, having regard to the procedural principles enshrined in Article 2 of the CPC, which lays down the obligation of the participants in criminal proceedings to comply with procedural rules,[32] the prosecutor, faced with such a procedural provision, must take into account the guidance given by the PHJ.

Failure to comply with this obligation may subsequently affect the validity of the charge in the final decision ordering that the case be sent to trial. In that event, the safeguarding function of preliminary review against unsubstantiated or improperly formulated charges would be lost.

Article 332/d(3) is unclear as to the procedural consequences that follow where the prosecutor declines to act in accordance with the PHJ's guidance. The paragraph provides that the Head of the Prosecution Office is to be informed of the decision to return the case file, but it does not specify the purpose of this notification or what action the Head is expected to take to resolve the matter. It should be borne in mind that the prosecutor enjoys independence in conducting the investigation and is not answerable to the Head of the Prosecution Office for the manner in which the investigation is concluded or the charge is brought. The contrary view would take us back to the period when the Prosecution Office was centralised.

We consider, however, that the purpose of notifying the Head of the Prosecution Office should be construed narrowly, in the light of the statutory powers vested in the Head concerning the organisation of the Prosecution Office. The Criminal Procedure Code should provide greater clarity in this respect, particularly since the notification mechanism has no counterpart in the corresponding Italian provision from which the institution of the Preliminary Hearing Judge was derived.[33]

As regards the procedural safeguards enjoyed by the defendant in these cases, reference should also be made to the case law of the ECtHR. In Pélissier and Sassi v. France, the ECtHR addressed the limits of the legal recharacterisation of the criminal offence in relation to the rights of the defence. The Court emphasised that the right to be informed of the accusation covers both the material facts alleged against the defendant and their legal characterisation, and that the adequacy of this information must be assessed in relation to the defendant's ability to prepare a defence.[34] The Court acknowledged the right of national courts to recharacterise the facts, but stressed the obligation to afford the defendant the opportunity to exercise his defence rights in respect of the new characterisation in a practical and effective manner and in good time.[35]

In these circumstances, we consider that any changes made to the charge at the preliminary hearing should be communicated to the defendant in such a way as to give the defendant the opportunity to conduct an effective defence.

4. Conclusion

The analysis of Article 332/d of the Criminal Procedure Code, in relation to the constitutional function of the Prosecution Office and the powers of the Preliminary Hearing Judge, highlights the need to maintain a balance between judicial review of the legality of the proceedings and the prosecutor's power to conduct criminal prosecution. The 2017 reform aimed to strengthen judicial review at the close of the preliminary investigations, granting the PHJ the authority to verify the procedural requirements for referring a case to trial and to intervene where the charge contains deficiencies that affect its clarity and accuracy.

Firstly, the interpretation of Article 332/d indicates that the PHJ's review of the charge should not be understood as a power to replace the prosecutor in formulating or amending it. Where the legal classification of the fact is incorrect or the charge is not clearly and accurately formulated, the court must identify the shortcomings and ask the prosecutor to make the relevant corrections or clarifications. If the prosecutor does not act, the mechanism provided for by the provision is the return of the case file, accompanied by the necessary reasoning on the identified shortcomings. In this way, judicial review performs its safeguarding function without assuming the powers that the Constitution and the law confer on the prosecutor.

Secondly, the return of the case file should not be a merely formal decision. To ensure its effectiveness and avoid ambiguity in judicial practice, the PHJ's decision should specifically identify the deficiency, explain the legal grounds supporting the court's assessment, and clearly define the issue requiring correction or clarification. At the same time, the reasoning must maintain the distinction between the control of the clarity and accuracy of the indictment, the assessment of the completeness of the investigations, and the final assessment of guilt, which is a matter for the court examining the merits of the case.

Thirdly, a particular problem is the lack of clarity as to the procedural consequences of the prosecutor's failure to act following the PHJ's invitation to correct or clarify the charge. If the parties take opposing positions and the procedure does not provide a clear solution, there is a risk that the preliminary review will lose its effectiveness and that divergent judicial practices will emerge. For this reason, the issue should be specifically addressed in case law, by defining the limits of the intervention of the PHJ and the consequences that non-compliance with the mechanism provided for in Article 332/d may entail, without creating procedural solutions that are not supported by law.

Finally, respect for the rights of the defence remains an essential requirement for any correction, clarification or amendment of the charge. The defendant must be informed clearly and

36. [32]Criminal Procedure Code, Article 2(1): "Procedural provisions lay down the rules governing the conduct of criminal prosecution, the investigation and trial of criminal offences, and the enforcement of judicial decisions. These rules are binding on the participants in criminal proceedings, state bodies, legal persons and citizens."
37. [33]See Article 423(1-bis) of the Italian Code of Criminal Procedure https://www.brocardi.it/codice-di-procedura-penale/libro-quinto/titolo-ix/art423.html, accessed on 28.10.2026. In this situation, we consider that the law should either provide for a right of appeal for the prosecutor or, in the event of such a conflict, allow the case to proceed to examination at trial on the merits. Alternatively, the rules governing conflicts of competence could be applied, conferring the power to decide on a higher court or on the court of law, which in the Albanian system is the High Court, with a time limit of 10 days within which to rule.
38. [34]European Court of Human Rights, Grand Chamber, Pélissier and Sassi v. France, Application No. 25444/94, Judgment of 25 March 1999, §§ 51–54, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58226%22]}
39. [35] Ibid., § 62.

promptly of the facts alleged and their legal classification, and must be afforded a genuine opportunity to prepare a defence. Consequently, the interpretation of the relevant provisions must be consistent with the requirements of due process and the standards set by the case law of the European Court of Human Rights.

Recommendations

Statutory clarification of the consequences of the prosecutor's failure to act. The Criminal Procedure Code should be reviewed with a view to introducing a clearer provision on the procedural consequences of the prosecutor's failure to comply with the PHJ's invitation to correct or clarify the charge. Such a provision should determine the applicable procedural solution, respecting the separation of functions between the prosecutor and the court and avoiding the creation of grounds of invalidity without an express legal basis.

Unification of judicial practice by the High Court. The High Court should, through its case law, clarify the limits of the PHJ's review of the formulation of the charge, the content and reasoning of decisions ordering the return of the case file, and the procedural consequences of the prosecutor's failure to act. Such clarification would help avoid divergent interpretations and ensure legal certainty.

Strengthening the safeguards of the defence where the charge is amended. Any amendment or clarification affecting the alleged facts or their legal classification should be communicated to the defendant in such a way as to ensure a practical and effective opportunity to prepare the defence. This standard should be observed by both the prosecutor and the PHJ when exercising their powers.

In conclusion, the effectiveness of the PHJ's judicial review does not depend on an unlimited expansion of its powers, but on the clear definition of their scope and the manner in which they are exercised. A consistent interpretation of Article 332/d, aligned with the prosecutor's constitutional powers and the safeguards of a fair trial, would contribute to improving the quality of the charge, preventing procedural deficiencies, and ensuring effective judicial review at the preliminary hearing stage.

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