

Legal classification and judicial syllogism

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Abstract

Particularly in criminal matters, the judicial errors register an alarming increase, so much so that it not only affects the destiny of the wrongfully sentenced or the groups that they belong to, but also the destiny of the entire society. A cause of this situation resides, from what it seems, in the lack of thorough legal studies with regards to the logical operations which should stand at the base of the decision that an actual act does constitute a certain offence, with a well specified “classification” or “qualification”. The present paper tries to actuate debates on the matter, which has been wrongfully neglected. With this purpose, the author begins from a rather old idea, but insufficiently known, and that is that any court sentence is the result of two types of judicial syllogisms: qualificative and decisional. Elaborating this idea, the author observes a series of other aspects, such as: the fact that, in criminal matters, the qualificative syllogisms serve to establish the legal classification, while the decisional syllogisms serve to establish the sentence; the fact that, in criminal qualificative syllogisms, the subject is always the actual act, and the predicate is a criminal concept (the notion of an offence); the fact that the legal classification is not an “operation”, as is claimed by many authors, but a conclusion, specifically to a qualificative syllogism etc.

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JEL Classification: K10, K14

1. Preliminary explanations

The expression “legal classification” is a common in the Romanian jurisprudence and it appears in several criminal procedure texts in force (art. 386 of the Criminal Procedure Code in Romania, art. 403 of the Criminal Procedure Code in Romania etc.)

However, the law does not define this expression, and the doctrine has rarely and hurriedly approached it, and as such its meaning and importance have remained somewhat uncertain.

According to the legal dictionary ², this expression designates the *identification operation within an actual committed act, of the elements pre-established by a legal provision in force as setting forth the character of offence for one person’s behavior* – from which we can conclude, in a quite difficult manner, that “legal classification” is the operation of identifying the acts which constitute offences.

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² *Legal classification (legal dictionary)* – document accessible on-line at <https://legeaz.net/dictionar-juridic/incadrare-juridica> (accessed on 20.01.2018).

According to other works on the matter³, this expression designates the *operation executed by a judicial body for the establishment of full correlation between the committed act and the special criminal norm which incriminates that act, as well as in relation with the general legal provisions applicable with regards to the committed act* – from which we may conclude, again, in a quite difficult manner, that the expression “legal classification” does not only designate the operation of identifying the acts which constitute offences, but also the operation of identifying the causes of extension of incrimination (of the various forms of criminal participation), as well as the operation of identifying the causes of the amendment of special sentences (attempt, plurality of offences etc.).

It is also worth mentioning that the expression “legal classification” was relatively recently imposed within our doctrine. For a long time, the Romanian doctrine, such as other European doctrines, has used other equivalent formulas or words, such as: “criminal qualification”, formula which, according to French doctrine, defines the intellectual operation through which a judge establishes if the acts attributed to a person fall under the scope of an incrimination provision⁴; or “qualification”, term which, according to the same doctrine, designates the operation of determining the legal regime which is applicable to the factual situation⁵. The abandonment of such formulas (words) and legislative establishment of the expression “legal classification” was requested by a part of our doctrine⁶, which considers that we must differentiate between “legal classification”, which is an operation conducted by the judicial body, within the process of exerting the criminal law, and “legal qualification”, which is an operation conducted by the lawmaker, with the privilege of elaborating the incrimination provisions.

This terminological distinction has a certain merit, as it asserts the fact that the judicial body may commit error, that it can make an erroneous classification of the actual act, which does not correspond to its legal classification. However, in our opinion, this is a secondary aspect; the underlying issue is that the expression “legal classification” does not have the same meaning for all authors, as it results from the previously cited definitions.

³ Gheorghe Nistoreanu, Alexandru Boroï, Ioan Molnar, Vasile Dobrinouiu, Ilie Pascu, Valerică Lazăr, *Criminal law. Special Part*, Europa Nova Publishing House, Bucharest, 1997, p. 22; with the same purpose, *Technique for the legal classification of offences*- document accessible online at <http://www.creeaza.com/legislatie/drept/TEHNICA-INCADRARIJURIDICE-A-813.php> (accessed on 20.01. 2018).

⁴ *Qualification pénale* - document available online at https://fr.wikipedia.org/wiki/Qualification_p%C3%A9nale (accessed on 20.01. 2018).

⁵ Michelle Cumyn, *Les catégories, la classification et la qualification juridiques: réflexions sur la systématique du droit*, „Les Cahiers de droit”, vol. 52, n°3-4, 2011, p. 369; in the same respect, Nicolae Buzea, *Infrațiunea penală și culpabilitatea*, Iași, Faculty of Law, 1944, pp. 95, 107 etc.

⁶ Gh. Nistoreanu, A. Boroï, I. Molnar, V. Dobrinouiu, I. Pascu, V. Lazăr, *cit. works*, pp. 22-23.

2. Judicial syllogism

As to clarify which is the exact definition of the expression “legal classification”, we shall turn our attention to the explanations given by professor Paul Georgescu, with regards to the judicial syllogism⁷.

These explanations have as basis the fact that, in any judicial action, the activity of managing the evidence and establishing the factual situation is followed by an operation of applying the law within the actual case, and this operation, which is inherent to any judicial decision, shall take the form of a syllogism of the sort: *Theft shall be punished by N years in prison; X has committed theft; therefore, X shall be punished with N years in prison.*

Beginning here, the author grasps two aspects, which are less observed. Firstly, the author observes that, in this type of syllogisms, which the author calls *decisional syllogisms* or *final syllogisms* (as they conclude with a decision), the facts set forth in the minor premise already occur with a legal classification (*X has committed theft*), which means that such a syllogism is invariably preceded by an operation of technically defining the acts. Then, the author observes that this prior operation, of technically defining the facts, is also a syllogism, which the author calls *qualificative syllogism* (as it is meant to conceptualize the acts, to give them a legal denomination). In consequence, the author concludes that, far from it being the result of a single syllogism, the judicial decision occurs as a result of two types of syllogisms: some qualificative and others, decisional.

However, if we keep in mind the explanations given by this author, we can, in turn, make more observations regarding the two types of judicial syllogisms.

Firstly, we can observe that the two types of syllogisms are different, mainly, through the content of the major premise: in decisional syllogisms, the major premise contains a primary norm, which has its own precept or commandment⁸ (within the criminal law, the primary norm is invariably presented as a sanctioning norm, which establishes the punishment rule); on the other hand, within qualificative syllogisms, the major premise contains a secondary norm, and specifically, an explicative or declarative⁹ norms, which provides the legal definition of a words or an expression (within the criminal law, the explicative norm establishes a criminal concept: theft, attempt, relapse etc.¹⁰)

⁷ Paul Georgescu, *Logica probelor și silogismul judiciar*, „Revista de filosofie”, no. 3-4 (July-December), 1942, p. 26.

⁸ *Norme perfette, imperfette e meno che perfette* – document available at http://www.dirittoeconomia.net/diritto/norme_giuridiche/norme_perfette_imperfette_meno_che_perfette.htm (accessed on 21.01.2018).

⁹ G. Del Vecchio, *Lecții de filosofie juridică*, Europa Nova Publishing House, Bucharest, 1995, p. 212.

¹⁰ We recall that each branch of the law has a primary regulation field and that the rules and definitions established by it, within the limits of this field, must preserve their validity in all other branches of the law, because, if not, this could affect the entire unitary character of the law. Therefore, logically, it is impossible for a criminal explicative norm to amend a definition specific to civil law or vice-versa, a civil explicative norm to amend a definition specific to criminal law.

Secondly, we may observe that the decisional syllogisms are not all final syllogisms (which conclude with a judicial decision), as this author states. In criminal matters, at least, the decisional syllogism is final, only if, in fact, there is no operating cause of extension of incrimination or amendment of the sentence. If not, the same syllogism shall appear as an intermediary syllogism – for example, if, in fact, the defendant has committed several offences, which are on-going, the court shall be required to, firstly, establish the punishment for each offence, by means of intermediary decisional syllogism, and only afterwards, by means of a final decisional syllogism, can it establish the resulting punishment, according to the sanctioning rules of the train of offences.

Thirdly, we can observe that, within criminal qualificative syllogisms, the subject (the minor term) is always the *actual act*, while the predicate (the major term) is the *criminal concept*, the notion of an offence (theft, homicide etc.) or, as the case may be, of a criminally relevant circumstance (minority, relapse). From which we can understand that, on the one hand, the qualificative syllogism invariably implies a comparison between the actual case and the case defined by law, and, on the other hand, within criminal matters, this syllogism is used with two different purposes: mainly, it is used as to identify the acts which constitute offences; secondly, it is used as to identify those circumstances which determine the extension of the incrimination or the amendment of the special limits of the punishment.

Fourthly, we can observe that, in criminal matters, the qualificative syllogism does not necessarily lead to a “legal classification” (technical definition) of an actual act. If we consider that the actual act constitutes an offence, only when it is *typical*¹¹, when it completely agrees with a “legal model”¹², with an *act described* within an incrimination provision, we can easily deduce that, if not (when there is no concordance), the actual act shall not receive any legal classification, as it does not have any criminal prevalence (it does not constitute an offence), and as such, its circumstances also remain irrelevant. Or, from this point on, it means that the legal classification cannot be defined as “the operation which the judicial body executes”, as it is not a physical operation (as the verb “to execute” suggests) and it is not, even, a logical operation, a syllogism. The expression “legal classification” designated only certain conclusions of certain qualificative syllogisms: primarily, it designates the conclusion that there is a complete concordance between an actual act and an *act-species* (“*fattispecie*”¹³ – as the Italians name it), provided by law as an offence; secondly, it designates the conclusion that a certain concrete circumstance is provided by the criminal law, as a cause for the extension of the incrimination or, as the case may be, as a cause for the amendment of the punishment.

Fifthly, we can observe that, it being a simple conclusion, the legal classification is of minimal importance, in relation to the syllogism from which it

¹¹ *Fatto umano tipico: definizione* - document available at <https://bwww.tesionline.it/v2/appunto-sub.jsp?p=56&id=206> (accessed on 11.02.2018).

¹² George Antoniu, *Unele reflecții asupra conceptelor de incriminare și infracțiune*, „Revista de drept penal”, no. 4/2010, p. 13.

¹³ *Fattispecie* - document available at <https://it.wikipedia.org/wiki/Fattispecie> (accessed on 16.02.2018).

derives, as is proven by the fact that its validity is dependent of the validity of the premises. From which we may conclude that the primary concern of the judicial body must be that of correctly formulating the premises of the qualificative syllogism.

3. The premises of the criminal qualificative syllogism

Given the fact that, in the criminal qualificative syllogism, the subject is always the *actual act*, the construction of this syllogism must begin by formulating the minor premise, respectively with a clear, complete and objective description of the actual act, as it results from the case evidence.

With this purpose, the judicial body must ensure that, first of all, the gathering of the evidence has been performed with the utmost respect of the rules meant to impede the alteration or falsification of evidence (if not, the judicial body must remove the evidence obtained illicitly). Then, the judicial body must ensure that the act described finds support within coherent and solid evidence. Even if the procedural laws do not expressly stipulate such an obligation, it, however, is self-imposed, if we bear in mind the nature of the evidence operation.

With regards to this subject, we recall the fact that, by following the example of other famous authors (Jeremy Bentham, Edmond Goblot etc.), professor Paul Georgescu demonstrated¹⁴, in contradiction with the common opinion, that the evidence is not a finding, but a rational deviation, an inference from the *factual evidence* (document, confession, clue etc.), which is current and sure, to the *proven evidence*, which has passed and is unsure and has to be proven. Furthermore, he demonstrated that the factual reasoning is a particular reasoning, which does not increase from singular to general as does the induction, but nor does it decrease from general to singular as does inference, but it passes from singular to singular, from one act to another, establishing a causal relationship between them. Because of this particularity, the factual reasoning, as opposed to syllogistic inference, cannot give rise to a logical certainty, only to “a probability”¹⁵, a supposition, a hunch. As such, the principle of proof no longer resides within the logical subordination (in this case, a single inference would suffice), but it resides within *the complex concordance of independent inferences*¹⁶, just as it is proven that the probability degree of a supposition increases constantly, with each new piece of evidence (inference) it confirms, until the supposition transforms into certainty.

We can understand that, logically, it is impossible that the evidence contains only one or two means of evidence. As to respect the principle of finding out the truth (art. 5 of the Criminal Procedure Code in Romania), the actual act (described within the minor premise) must be proven beyond all reasonable doubt, which implies that the evidence contains at least three convergent means of evidence, originating from independent sources. In not, that is if the evidence is insufficient or

¹⁴ P. Georgescu, *cit. works*, p.5.

¹⁵ *Idem*, p. 19.

¹⁶ *Ibidem*, p. 19.

discordant (thus, there is doubt), the judicial body is required to¹⁷ interpret any evidence in favor of the suspect or defendant, according to art. 4, para. (2) of the Code of criminal procedure.

With regards to the major premise of the criminal qualificative syllogism, we have already shown that it contains a definition (explicative norm), and the fact that this definition establishes a criminal concept, which shall become the logical predicate of the conclusion, that is, it shall show what is and what is not actual act (the subject), from a criminal point of view.

However, within this context, three specifications must be made.

First of all, we have to specify that, within the formulation of the major premise, it shall always begin with the actual act, searching for the most adequate legal definition for this act.

Then, we must specify that the definition included within the major premise shall never contain a description of the actual fact. It establishes a criminal notion or concept, which means it only renders the common attributes, which are defining for the entire class (category, species) of actual acts (circumstances) – for example, the definition of the theft offence describes the attributes specific to all theft acts, which offer individuality to these acts, allowing for them to be differentiated by other similar acts (offences). As such, the affirmation according to which an actual act completely corresponds to an incrimination provisions must never be interpreted in the sense that that provision reproduces the actual act, but it should be interpreted in the sense that the actual act represents all the attributes described within that provision or, in other words, that it meets all requirements deriving from that provision.

Finally, we have to mention that, when the actual act meets all the requirements of several incrimination provisions – situation known within the doctrine under “apparent conjuncture of norms”¹⁸ – the choice of the definition shall be made in relation with three alternative criteria, used even by the international courts: the specialty criterion, the subsidiarity criterion and the absorption criterion. According to the specialty criterion (*lex specialis derogat legi generali*), between the two similar definitions, the one which, besides the general (common) requirements, comprises one or more special requirements shall be applied, if and to the extent to which the actual act meets these special requirements – for example, in general, the act of taking a movable asset from a person, without their consent, with the purpose of appropriating it unlawfully, constitutes theft; but, if the same act was committed by an employee responsible for the administration of said asset, it no longer constitutes theft, but embezzlement. According to the subsidiarity criterion (*lex*

¹⁷ Constitutional Court Decision no. 47/2016, published in the Official Gazette of Romania no. 323/2016.

¹⁸ *Concorso apparente di norme* – document available at https://it.wikipedia.org/wiki/Concorso_apparente_di_norme (accessed on 17.02.2018).

*primaria derogat legi subsidiariae*¹⁹), the subsidiary provision is applied when, a special requirement not being met, the actual act cannot be qualified under the primary provision, which foresees the more serious case – for example, the norm incriminating attempt at homicide [art. 188, para. (2) of the Criminal Procedure Code in Romania] has a subsidiary character, in relation to the norm incriminating homicide [art. 188 para. (1) of the Criminal Procedure Code in Romania], which means that the attempt at homicide can be maintained, only if the result (death) is not achieved, respectively, if the victim survives. According to the absorption criterion (*lex consumes derogat legi consumptae*²⁰), the absorbent provisions is applied when, by means of its consequences, the actual act surpasses the scope of incidence of the absorbed provision²¹ - for example, the act of striking a person no longer constitutes battery offence or other violence (art. 193 of the Criminal Code), if it has caused the victim an invalidity; in this case, the act constitutes bodily injury (art. 194 of the Criminal Code), which absorbs the battery offence.

4. The importance of legal classification

To legally classify an actual act means to formulate an accusation, to affirm that that act constitutes a certain offence and that its culprit is to be punished.

Such an affirmation gains relevance in one case, and that is when it is made by a judicial body, under the law. In this case (and this case only), the legal classification becomes an essential condition, of which the existence of the criminal proceedings depend, as is proven by the fact that this proceeding starts with the first official legal classification and last as long as the act maintains such a classification.

The importance of the legal classification is also disclosed at the time when the applicable punishment is established. In this respect, we have shown that the punishment is established by means of a decisional syllogism, and as to formulate the minor premise of this syllogism, it is absolutely necessary that the act's legal classification be established a priori. However, we must also observe the fact that the punishment applied to the culprit differs in relation to the legal classification, which means that this punishment shall or shall not be legal, depending on the legal or illegal character of the legal classification.

Two additional observations may further clear this aspect.

The first observation is that an erroneous legal classification incurs a wrongful application of the punishment rules, with the consequence that the culprit

¹⁹ *Principio da subsidiariedade* – document available at <https://rodrigocastello.jusbrasil.com.br/artigos/121936803/principio-da-subsiariedade-lex-primaria-derogat-subsiariedade> (accessed on 17.11.2017).

²⁰ Carsten Stahn, *The Law and Practice of the International Criminal Court*, Oxford, 2015, Chapter 33.2.1. „The matrix of substantive *concursum delictorum*”.

²¹ Stefano Finocchiaro, *Concorso di reati o concorso apparente di norme?* - document available at [https://www.penalecontemporaneo.it/upload/FINOCCHIARO_Malversazione-truffa%20\(1\).pdf](https://www.penalecontemporaneo.it/upload/FINOCCHIARO_Malversazione-truffa%20(1).pdf) (accessed on 18.02.2018).

shall receive an inadequate or even exaggerated, excessively lax or severe punishment, in relation with the actual gravity of the act.

The second observation is that the application of an exaggerated punishment, in one sense or another, cannot be analyzed as a simple judicial error, either. The judge shall make himself/herself guilty of having committed an offence, not only when sentencing a person, even though the evidence of the case does not indicate that that person had committed an offence (wrongful punishment), but also when applying the convicted person an excessive punishment: if the punishment is excessively lax, then there could be the issue of favoring the culprit, and if the punishment is too severe, then there could be the issue of an act of torture (we also recall the fact that causing psychological suffering may be analyzed as torture, if these sufferings have been provoked or incurred by means of an illicit sanctioning).

5. Conclusions

From the aforementioned considerations, we can determine several conclusions, both with regards to the particularities presented by the legal criminal syllogisms and with regards to the meaning and importance of the legal classification.

With regards to the particularities of the legal criminal syllogisms, there are five conclusions: 1) in criminal matters, the qualificative syllogisms serve to establishing the legal classification (qualification), while the decisional syllogisms serve to establishing punishment; 2) within the legal criminal syllogisms, the subject is always the actual act, and the predicate is a criminal concept (the notion of an offence); 3) the construction of the criminal qualificative syllogism must begin with a clear, complete and objective description of the act, as it results from the case evidence; 4) the major premise of the criminal qualificative syllogism contains a legal definition; 5) this definition is chosen, by beginning from the actual act and taking full consideration of the rules of resolution of the so-called “apparent conjuncture of norms”.

With regards to the meaning and importance of the legal classification, four conclusions are imposed: 1) the legal classification is not an “operation”, as is claimed by most authors, but a conclusion to a certain qualificative syllogism; 2) the legal classification is an essential condition, on which the existence of the criminal proceedings depends (this proceeding begins with the first official legal classification of the actual act and lasts as long as the act maintains such a classification); 3) the legal classification is an essential conditions, of which the culprit’s punishments depends; 4) the legality of the punishment applied to the culprit is dependent on the legality of the legal classification.

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