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Articles

Studia Iuridica Lublinensia vol. 34, 1, 2025
DOI: 10.17951/sil.2025.34.1.11-27

Lora Briški
University of Ljubljana, Slovenia
ORCID: 0000-0002-7719-4670
lora.briski@pf.uni-lj.si

Redistribution of Responsibility in Framing Criminal Charges? An Empirical Study of the Modifications of Charges during Criminal Trial in Slovenia

Ponowny podział zadań w zakresie przedstawiania zarzutów karnych? Studium empiryczne zmiany zarzutów w procesie karnym w Słowenii

ABSTRACT

While several important consequences have been associated with modifications of the charges during the criminal trial, empirical studies into this phenomenon remain limited. To address this gap, the article delves into the possibilities of charge modifications during the trial in Slovenia and the impact of these possibilities on the dynamics between the court and the prosecutor. Its main objective is to investigate whether possibilities for charge modifications have the potential to partially redistribute responsibility for formulating the criminal charge between the prosecutor and the court. Using a dataset of criminal court judgments for the offences of manslaughter and murder and judgments of the Supreme Court of the Republic of Slovenia, we examine the frequency and intensity of charge modifications during the trial, as well as their potential causes. We identify some factors contributing to the prosecutor's modifications of the charges as systemic: the court's active role in gathering evidence and establishing relevant facts on its own, which may reveal errors in the indictment or prevent the prosecutor from proving his charge, and the prosecutor's reliance on court-appointed experts during the proceedings. The article represents the first comprehensive empirical investigation within the Slovenian legal system on this topic, offering insights that can contribute to the ongoing debate on improving procedural efficiency in similar systems worldwide.

Keywords: modification of the criminal charge; separation of functions; criminal trial; court's role; prosecutor's role; criminal charge

CORRESPONDENCE ADDRESS: Lora Briški, PhD, Teaching Assistant, University of Ljubljana, Faculty of Law, Poljanski nasip 2, 1000 Ljubljana, Slovenia, and Researcher, Institute of Criminology, Faculty of Law in Ljubljana, Poljanski nasip 2, Ljubljana, Slovenia.

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INTRODUCTION

At first glance, the question of who determines the criminal charges seems to have a straightforward answer. The principle of separation of powers of the prosecution and the court, reflected in the accusatory principle, requires that criminal proceedings can only be initiated by the prosecutor's indictment that also limits the scope of proceedings.[1] In a nutshell, the prosecutor frames the charges, and the court decides on them. Since the court cannot initiate proceedings *ex officio*, one of the most critical decisions in criminal justice system is the prosecutor's decision on who to charge and for which offence. Accordingly, the literature sometimes refers to the prosecutor as the gatekeeper of criminal proceedings.[2]

Rules governing the prosecutor's decision (not) to charge vary between systems and have been extensively discussed in the literature.[3] The extent to which an initial charge can be adjusted during the criminal trial significantly varies between different legal systems. The possibilities to modify the charge during the trial, with respect to facts and/or their legal qualification provide room for correcting potential errors the prosecutor made when drafting the indictment. Some authors point out that rules on modifying the charges have significant consequences for the position of the defence, the relationship between the prosecutor and the court, the efficiency of the trial and even the impartiality of the court.[4] Furthermore, the authors claim these rules have far-reaching effects on charging practices that develop within

[1] K. Šugman Stubbs, P. Gorkič, Z. Fišer, *Temelji kazenskega procesnega prava*, Ljubljana 2020, pp. 118–119.

[2] A. Ashworth, *Prosecution, Police and Public – A Guide to Good Gatekeeping?*, "The Howard Journal of Criminal Justice" 1984, vol. 23(2).

[3] For example, see K. Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, "Yale Law Journal" 2008, vol. 117(7); D.D. Ntanda Nsereko, *Prosecutorial Discretion before National Courts and International Tribunals*, "Journal of International Criminal Justice" 2005, vol. 3(1); V. Medica, *Državni tožilec kot enakopravna stranka v kazenskem postopku ali sodnik v sivi togi?*, Ljubljana 2023 (PhD thesis); G. Gilliéron, *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany*, Cham 2014; A. Kristková, P. Kandalec, *The Principle of Opportunity in the Czech Criminal Procedure Code*, "Studia Iuridica Lublinensia" 2016, vol. 25(1).

[4] E. Fry, *Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?*, "Leiden Journal of International Law" 2016, vol. 29(2); K.J. Heller, *'A Stick to Hit the Accused With': The Legal Recharacterization of Facts under Regulation 55*, [in:] *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements*, ed. C. Stahn, Oxford–New York 2015; L. Stevens, B. de Wilde, M. Cupido, E. Fry, S. Meijer, *De tenlastelegging als grondslag voor de rechterlijke beslissing*, 2016, https://repository.wodc.nl/bitstream/handle/20.500.12832/2208/2597_Volledige_Tekst_tcm28-132520.pdf?sequence=2&isAllowed=y (access: 10.1.2024).

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the prosecutor's office.[5] They attribute these effects also to provisions permitting modifications that *prima facie* appear almost neutral, e.g. rule allowing the court to modify the prosecutor's charge and convict for a lesser included offence, which can be found in many adversarial and inquisitorial legal systems. This rule is believed to have broader systemic effects that shape the prosecutorial practices and, consequently, the court's role and the defendant's position. The broad power of the court to reduce the charges not only allows but even encourages the prosecutor to overcharge, that is, to include in the indictment as broad a description of facts as possible and include even those inculpatory facts he knows he cannot prove.[6]

Despite the number of effects of the rules governing charge modifications, the literature highlights that a comprehensive assessment of these effects in practice is hampered by the gap in empirical research on the frequency and characteristics of the changes being made.[7] To address the existing gap, this paper seeks to empirically investigate the modification of the charges in Slovenian criminal proceedings during the trial. We analysed a dataset comprising of 89 final criminal court judgments for the offences of manslaughter and murder and 197 judgments of the Supreme Court addressing the prosecutor's charge modification, to examine the frequency and intensity of charge modifications during the trial, as well as their potential causes. Based on the analysis, we aim to ascertain whether the rules governing modification of the charges enable the court to play a role in shaping the content of the criminal charge and not only decide its merits, thus partly taking on a prosecutor's role. These conclusions may be of interest to different legal systems since many of them allow at least some deviation from the initial indictment.[8]

The article seeks to confirm or disprove the following hypotheses:

H1: Prosecutors often modify the charges during the criminal trial.

H2: The court taking an active role in investigating the facts beyond the prosecutor's description of a historical event can prompt the prosecutor to correct the possible errors in the indictment.

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[5] P. Gorkič, *Opis kaznivega dejanja v kazenskem postopku, prvi del: vsebinske in formalne razsežnosti opisa kaznivega dejanja*, "Pravna praksa" 2018, vol. 37(2), pp. 17–18.

[6] M. Bošnjak, *Sklepno razmišljanje ob raziskavi analiza poteka in trajanja kazenskih postopkov v Sloveniji*, [in:] *Potek kazenskih postopkov v Sloveniji: analiza stanja in predlogi za spremembe*, ed. M. Bošnjak, Ljubljana 2005; A.W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, "The University of Chicago Law Review" 1968, vol. 36(1).

[7] *Stacked: Where Criminal Charge Stacking Happens – and Where It Doesn't*, "Harward Law Review" 2023, vol. 136(5), p. 1391; K. Graham, *Overcharging*, "Ohio State Journal of Criminal Law" 2014, vol. 11(1).

[8] Even common law systems which are reluctant to grant substantial modifications of the charge during the trial, allow reduction of the charges (see C. Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55*, "Criminal Law Forum" 2005, vol. 16(1), p. 5) or deviations from the indictment that are considered insignificant (G. Tumanishvili, *Indictment and Deviation Therefrom Trial on Merits*, "Journal of Law" 2016, no. 1, pp. 244–245).

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H3: The reasons behind the prosecutor's modification of the charge, along with the court's own modifications, suggest the possibility of a redistribution of responsibility for shaping the content of the criminal charge between both the prosecutor and the court.

MODIFICATION OF THE CHARGES DURING THE TRIAL IN SLOVENIA

Before discussing the results, it is useful to outline some key characteristics of Slovenian criminal procedure. Slovenia is recognised as a typical civil law country[9] with an adversarial-mixed type of criminal procedure.[10] The trial phase is dominated by the court, which has investigative powers in the evidentiary phase and must actively seek evidence that will show the true course of events[11] and is not bound by the prosecutor's legal qualification of the offence.[12]

The rules of criminal procedure that govern the drafting of the charging document, with the basic form being the indictment, and its modification are laid down in the Slovenian Criminal Procedure Act.[13] Hereinafter, we will use the term "indictment" to encompass all types of charging documents under Slovenian law.

In the indictment, the prosecutor describes the act of which the defendant is accused, proposes its legal qualification, the evidence to be taken by the court, and states the reasons for the facts he wishes to prove (Article 269 ZKP). In practice, prosecutors usually describe the facts in a single sentence, no matter how complex.[14] Notably, ZKP does not allow the prosecutor to formulate alternative counts that are known in some other jurisdictions.[15]

The prosecutor's indictment determines the scope of the trial because the court may examine evidence and base its decision only on the act described in the in-

[9] M.M. Plesničar, *The Individualization of Punishment: Sentencing in Slovenia*, "European Journal of Criminology" 2013, vol. 10(4).

[10] K. Šugman Stubbs, *Strukturne spremembe slovenskega kazenskega procesnega prava v zadnjih dvajsetih letih*, "Zbornik znanstvenih razprav" 2015, vol. 75(1), p. 123.

[11] M. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, "University of Pennsylvania Law Review" 1973, vol. 121(3), p. 525; H. Kuczyńska, *The Accusation Model Before the International Criminal Court: Study of Convergence of Criminal Justice Systems*, Cham 2015, pp. 342–343.

[12] C. Stahn, *op. cit.*, pp. 5–6.

[13] Zakon o kazenskem postopku, Official Gazette of the Republic of Slovenia, no. 176/21, as amended, hereinafter: ZKP.

[14] P. Gorkič, *op. cit.*

[15] K. Šugman Stubbs, P. Gorkič, Z. Fišer, *op. cit.*, p. 104; E. Fry, *op. cit*., p. 585; H. Kuczyńska, *op. cit.*, p. 137.

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dictment.[16] The act is interpreted as a historical event and refers to the factual basis of the accusation. In contrast, the court is not bound by the prosecutor's proposal regarding the legal qualification (Article 354 ZKP). This is a typical feature of modern inquisitorial systems, where the court is responsible for choosing the most accurate legal qualification that best corresponds to the facts of the case.[17]

During the presentation of evidence at the main hearing, the prosecutor may modify the charge; however, the indictment must still refer to the same act (Article 344 ZKP). When modifying the indictment, the prosecutor is not limited to his initial legal qualification and may also add facts to the description of the alleged offence that change the legal qualification of the offence, even to the defendant's disadvantage.[18] Therefore, the intensity of the prosecutor's intervention in the description of the offence can vary considerably: at one end of the spectrum lie subtle changes relating only to the non-essential circumstances of the offence that do not impact the decision on the criminal responsibility and sentence, while at the opposite end of the spectrum, there are significant changes of the decisive facts.[19]

To understand potential reasons for modifications of the charges, the authors have examined a correlation between the power of the prosecutor to modify the indictment and the rules governing the conduct of evidentiary procedure at the main hearing. They stressed that the court has an obligation to actively investigate the factual situation (historical event) and find out the truth in each case. To this end, the court may also produce evidence during the trial on its own initiative (Articles 17, 299 and 329 ZKP). Therefore, activity of the court can point out the possible errors in the indictment. Errors discovered by the court do not necessarily lead to an acquittal because the prosecutor still has the power to modify the charges accordingly. Furthermore, the court, which is not bound by the prosecutor's legal qualification, should correct the potential errors the prosecutor made when choosing the legal qualification. The judicial practice has also established a rule that the court is allowed to deviate from the description of the act from the indictment to a limited extent, if it is not to the disadvantage of the accused.[20]

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[16] K. Šugman Stubbs, P. Gorkič, Z. Fišer, *op. cit.*, p. 444.

[17] C.-F. Stuckenberg, *Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions*, [in:] *The Oxford Handbook of Criminal Process*, eds. D.K. Brown, J.I. Turner, B. Weisser, New York 2019, p. 470.

[18] Decisions of the Supreme Court of the Republic of Slovenia: of 7 May 2017, no. I Ips 6155/2013; of 24 May 2018, no. I Ips 52779/2014; of 3 April 2021, no. I Ips 3691/2013; of 16 January 2014, no. I Ips 61800/2010-63; of 7 February 2020, no. I Ips 97604/2010.

[19] Decision of the Constitutional Court of the Republic of Slovenia of 12 May 2005, no. Up-328/03-21, Concurring Opinion of Judge Z. Fišer.

[20] M. Jelenič-Novak, A. Auersperger Matić, Z. Čibej, P. Gorkič, *Vmesna faza in glavna obravnava*, [in:] *Izhodišča za nov model kazenskega postopka*, ed. K. Šugman, Ljubljana 2006, pp. 274–275.

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Therefore, the authors argue that the existing possibilities for modifying the charge during the trial effectively allow prosecutors to shift part of their burden of formulating and proving the charges to the court.[21] If the court is obliged to, in part, take on the prosecutor's role, its workload can get excessive, particularly in more complex cases. Consequently, the court may need more time to resolve a criminal case.[22] Should the factual or legal basis of the charge ultimately change in a specific case, the defence must be given sufficient time to prepare for the modified charge.[23] This can lead to further delays. Described impact of modifications of the charges on the length of the trial is relevant not only for the rights of the accused, particularly the right to trial within a reasonable time, but also for the public trust in the criminal justice system. Length of procedures, especially in more high-profile cases (that are often more complex), undoubtedly shapes the public's image of the judiciary.[24]

RESEARCH METHODS

The above theoretical discussions raise the question of whether courts in the Slovenian system not only share part of the prosecutor's burden of proof but also, as a result of the above-mentioned power of the prosecutor to modify the charge during the trial and the power of the court to change the legal qualification and make limited changes to the description of the act, influence the very formulation of the charge, and thereby partly take on a role of the prosecution.

To address this main research question, the presented study analysed judgments of the Slovenian Supreme Court and Slovenian district courts. The first research part of the study[25] investigated (i) how often prosecutors and courts in the Slovenian system modify the charges, (ii) the potential causes of these modifications and (iii) their characteristics. We examined 89 decisions of Slovenian district courts concerning the offences of manslaughter (Article 115 of the Criminal Code[26]) and murder (Article 116 KZ-1), comprising 62 cases of manslaughter and 27 cases of murder, that became final between 2015 and 2021. According to the KZ-1, both manslaughter and murder mean an intentional killing of another person, with murder being the more serious (qualified) form of manslaughter. Manslaughter, a so-called

[21] M. Bošnjak, *op. cit.*, p. 431.

[22] M. Jelenič-Novak, A. Auersperger Matić, Z. Čibej, P. Gorkič, *op. cit.*, pp. 283–284.

[23] Decision of the Constitutional Court of the Republic of Slovenia of 12 April 1997, no. U-I-289/95.

[24] M. Jelenič-Novak, A. Auersperger Matić, Z. Čibej, P. Gorkič, *op. cit.*, p. 283.

[25] This part of the research was partially conducted within the project "Improving consistency of sentencing in criminal proceedings" funded by the European Commission.

[26] Kazenski zakonik, Official Gazette of the Republic of Slovenia, no. 50/12, as amended, hereinafter: KZ-1.

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basic offence, is punishable by 5 to 15 years imprisonment. Certain circumstances, e.g. if the killing is committed in a particularly cruel or perfidious manner, out of a desire to murder or for wanton revenge, qualify culpable homicide as murder, which is punishable by a sentence of imprisonment of 15 years or more.

We chose to analyse murder and manslaughter for several reasons. First, since Slovenia is a small country, we were able to analyse the entire available statistical population of criminal cases for the two offences during the selected period. Second, these cases typically involve complex evidentiary procedures, and we assumed there would likely be many opportunities for the charges to be modified. Third, these are two of the most serious offences for which the most severe sanctions are prescribed (and imposed) and whose treatment in the judicial system is typically subject to public scrutiny, which may (further) stimulate the activity of the participants in criminal proceedings, including modification of the charges.

In the second research part of the study, we addressed the question of whether the courts actively engage in forming the criminal charge by taking evidence and establishing relevant facts on their own and whether the prosecutor merely follows that activity with the modification of the charge. We examined 197 Supreme Court judgments issued since 2010 that referred to the prosecutor's modification of charges to identify cases that provide a substantive insight into why the prosecutor modifies the charges and the dynamics between the court and the prosecutor before such modification occurs.

RESEARCH AND RESULTS

1. Frequency and characteristics of charge modifications – analysis of decisions for the offences of murder and manslaughter

1.1. Prosecutor's modification of the charge

A review of court decisions for manslaughter and murder reveals that prosecutors regularly modify their charges during the trial, with modifications being made in 41% of the cases.[27]

That said, our findings indicate considerable diversity in the extent and intensity of these modifications.[28] On one end of the spectrum, there are mere grammatical corrections of the description of the offence, while on the opposite end, there are

[27] This proportion may be even higher, as we were only able to detect modifications to the charges that were mentioned in the minutes of the last hearing or in the judgment.

[28] While some types of modification were indiscernible from the data, we present here those that we were able to identify.

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modifications that cause the change of the legal qualification of the charged facts. Between these extremes, there are modifications of the circumstances which describe the offence more precisely (e.g. further specifying place and/or time of the offence or manner in which the offence was committed) and modifications to the capacity (*prištevnost*) of the accused at the time of the commission of the offence (i.e. the circumstances that describe the defendant's diminished ability or lack of ability to understand his actions or control his conduct due to a mental disorder or mental underdevelopment).

Table 1. Types of the prosecutor's modification of the charge

Types of the prosecutor's modification of the charge	Number of modifications	%
Modification to a comparable or more serious offence that includes a change of legal qualification*	2	8
Reduction of the charge to a less serious criminal offence	3	12
Change of facts describing defendant's criminal capacity	8	32
Change of the circumstances describing time, place, manner or means of commission and other circumstances that do not affect the application of law	11	44
Corrections of typing errors	1	4
Total	25	–

* In this category, a change in the legal qualification refers to a change from manslaughter (as defined in Article 115 KZ-1) to murder (as defined in Article 116 KZ-1), or a modification within Article 116 KZ-1 (such as a change from murder in a particularly cruel or perfidious manner under Article 116 (1) (1) to murder for base motives under Article 116 (1) (4) KZ-1).

Source: own elaboration.

As set out in Table 1, prosecutors most frequently modified the charges by adding or altering the circumstances that describe the charged criminal act in additional detail and are not particularly legally relevant. For instance, in one of the cases, the prosecutor provided a more detailed description of the knife allegedly used, and in another additional specifics about the injuries the victim sustained. The second most common category of modifications pertains to the facts determining the defendants' criminal capacity.

Less frequently, prosecutors made modifications in the most intensive way possible, by changing the legal qualification of the charged facts. This category of modification can be further divided into two subcategories. The first one includes cases where the prosecutor reduced the charge from murder to manslaughter. In these cases, the prosecutor lessened the charge.

The second subcategory of the changes that affect the legal qualification includes cases where the prosecutor modified the qualifying circumstances that elevate the offence from manslaughter to murder. An instance of such modification occurred when the prosecutor initially charged the defendant with taking the victim's life out of base motives (murder out of base motives) but later modified the

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charge accusing the defendant with taking the victim's life in a cruel or perfidious manner (murder in a cruel or perfidious manner). In another case, the prosecutor made successive significant modifications relating to the motive, which constitutes the qualifying circumstance of murder. The initial indictment accused the defendant of taking the victim's life out of vengeance and a self-serving interest (murder out of vengeance and a self-serving interest). At the trial, the prosecutor modified the charge and rather accused the defendant that he committed murder out of hatred and jealousy. The court of first instance convicted the defendant of manslaughter, but the verdict was later overturned by the higher court on the grounds that the expert's opinion was inconsistent. At the retrial, the prosecutor (again) modified the charge and accused the defendant of taking the victim's life out of hatred (murder out of hatred). The court found that the qualifying circumstances the prosecutor had added to the indictment were not proven, once again reduced the charge and found the defendant guilty of the (lesser included) baseline offence of manslaughter. Consequently, in both cases we can see that the prosecutor maintained the general legal qualification of murder, but changed the qualifying circumstances supporting this charge, which are listed in the individual subparagraphs of Article 116 KZ-1 that incriminates murder. Our analysis also revealed that despite the prosecutor having the authority by law to modify the charge from manslaughter to murder, such cases were not present in the sample.

Additionally, our analysis uncovered a potential reason why the prosecutors decide to modify the charge. In several cases, the reason was the (court-appointed) expert's opinion. Examples of the changes that the prosecutors made after the expert presented his opinion during the trial include a change in the description of a mental disorder affecting the assessment of the defendant's mental capacity, a change in the description of the object used to commit the offence, a change in the motive driving the defendant, and a change in the description of the physical injuries of the victim. Most of these changes impacted the application of the law. Some of them were qualifying circumstances that effectively turned manslaughter into murder; others changed the degree of the accused person's capacity.

1.2. Court's reduction of the charge

As indicated in Table 2, courts changed the legal qualification of the described act in six cases that represent 7% of all judicial decisions in the dataset. In all cases, the courts found the prosecutor's accusation too severe and reduced the more serious legal qualification for the offence of murder to a less serious one for the offence of manslaughter.

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Table 2. Relationship between the legal qualification in the indictment and the judgment

Relationship between legal qualification in the indictment and the judgment*	Number of changes	%
Legal qualifications in the indictment and the judgment are identical	79	93
The court changes the legal qualification to a less serious one	6	7
The court changes the legal qualification to a more serious one	0	0
Total	85	–

* In certain instances, we could not definitively determine whether there had been a change in the legal qualification due to lack of access to the indictment.

Source: own elaboration.

In four cases, the court omitted an inculpatory fact for which it considered had not been supported by evidence and consequently changed the legal qualification of the facts. For example, the prosecutor accused the defendant of murdering the victim out of hateful motives, but the court did not consider such motives to be proven and convicted the defendant of manslaughter. In two cases, the court found that the motives alleged by the prosecutor (revenge and hatred) were not sufficiently intense to constitute a base motive (*nizkotni nagib*) and, thus, the offence of murder.

While the data cannot answer why, in the cases described above, the prosecutors framed the charge as a more serious offence than the one for which the court eventually convicted, we will explore possible explanations in the discussion section below.

2. The prosecutor's modification of the charges in case law of the Supreme Court

In the second part of our research, we investigated whether the Supreme Court's case law can be used to understand the dynamics between the prosecutor and the court before the prosecutor modifies the charges. We were interested in whether it is possible to discern cases where the modification of charges is a direct consequence of the court actively investigating the facts of the case during the evidence-taking procedure. In most of the Supreme Court decisions, we were unable to ascertain whether the evidence that led the prosecutor to modify the charge was taken by the court of its own motion or at the request of the parties, and who pointed out the error in the indictment. However, in a few cases presented below, the Supreme Court has explored in depth the context in which the modification of the charge took place.

The first two cases show how the prosecutor's modification of the charge can stem from the efforts of the court, which actively investigates the relevant facts beyond the prosecutor's description of the offence in the indictment and reopens the proceedings whereupon then the prosecutor modifies the charge accordingly. In the first case,[29] the

[29] Decision of the Supreme Court of the Republic of Slovenia of 21 May 2020, no. I Ips 2730/2015.

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prosecution accused two defendants of assaulting the victim and charged them with the offence of violent conduct (*nasilništvo*). One of the defendants allegedly grabbed the victim by the neck from behind, and then they both knocked him to his knees and continued to hit him; one of them also kicked him. After all evidence had been given, each party gave a closing statement. In his closing statement, the defence council noted that the prosecutor had mixed up the roles of the defendants in the description of the offence. After his closing statement, the court decided that to clarify the roles of the defendants, the main hearing should be re-opened and that the video recording of the attack should be viewed for a third time. After the court had, of its own motion, taken evidence by viewing the video, the prosecutor modified the charge by changing the defendants' roles, and the court found the modification admissible and convicted the defendants based on modified indictment.

In the second case,[30] two defendants were initially charged with the offence of human trafficking (*trgovina z ljudmi*). The court of first instance found the defendants guilty of a less severe offence of violent conduct that they committed by beating, threatening, abusing and ill-treating the victim (as the prosecutor described in the indictment). The appellate court, upon reviewing the appeal of the defence, quashed the conviction because the description of the offence in the judgment did not contain the element of the offence of violent conduct that other people (besides the direct victim) were threatened and frightened by the defendants' conduct. It was understandable that the prosecutor did not include this element in the indictment, as he charged the defendants with another offence that did not have the same statutory element. At the retrial, the prosecutor changed the legal qualification of the offence to violent conduct and modified the description of the offence accordingly by adding the missing fact, and the court found the defendants guilty of violent conduct as charged in the amended indictment.

Contrary to the two cases just presented, the analysis revealed that the prosecutor's modification of the charge could also stem from an active court that prevents the prosecution from proving the charged offence by rejecting evidence suggested by the prosecutor. As a result, the prosecutor may modify the charges to reflect the other evidence presented during the trial.

This is illustrated by the third case,[31] where the defendant was charged with the offence of concealment (*prikrivanje*), accused of purchasing and selling a car which he knew to be gained unlawfully. The prosecution sought to prove this fact by examining a key witness: the seller, who the defendant claimed had sold him the car at a lower price because the defendant was in debt to him. The defence wanted to hear the same witness, but the court refused the evidentiary motion on

[30] Decision of the Supreme Court of the Republic of Slovenia of 25 November 2010, no. I Ips 83/2010.

[31] Decision of the Supreme Court of the Republic of Slovenia of 6 May 2021, no. I Ips 18657/2014.

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the grounds that the circumstances of the case had been sufficiently clarified. After the other evidence had been taken, the prosecutor modified the charge by including in the description of the offence that the accused had already bought several other stolen vehicles from the same seller before purchasing the car in question. As the Supreme Court explained, by refusing to hear the witness the prosecution (and the defence) suggested, the court made the fact that the defendant had already purchased stolen vehicles from the same seller before the event in question a key element in establishing the defendant's knowledge that the vehicle purchased had been stolen. The prosecutor, therefore, modified the charge accordingly.[32]

The presented cases show that the court's activity during the main hearing may instigate a modification of the charge. However, the court's activity may not always align with the narrative chosen by the prosecutor and substitute for his passivity in proving the charge. Instead, the court may also hinder the prosecution's activity and thus indirectly motivate the prosecutor to modify the change to succeed in the trial.

DISCUSSION AND CONCLUSIONS

The analysis of court decisions for manslaughter and murder showed that prosecutors modified the charges in more than one third (41%) of the cases. Therefore, we – at least as far as the included offences are concerned – confirmed hypothesis H1 that Slovenian prosecutors often modify the charges. The open question is whether similar results would have been obtained if other offences had been included in the analysis. An empirical study on the sentence disparity by the Institute of Criminology at the Faculty of Law in Ljubljana (Slovenia), which in addition to the decisions presented here included court decisions for nine other criminal offences, showed that prosecutors modified the charges during the trial in 30% of the cases.[33] Similarly, a study by the same Institute on sentencing for sexual offences showed that the charges were modified in 27% of cases.[34] This shows that modifications of the charges are common in trials for different offences.

However, our study showed that modifications vary greatly in intensity, ranging from stylistic corrections in the description of the offence to changes of the essential elements of a criminal offence and its legal qualification.

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[32] *Ibidem*. In this case, the Supreme Court found a violation of the defence rights and overturned the judgment. This violation did not stem from the modification of the charge *per se* but rather from the fact that the court did not inform the defendant of the modification made by the prosecutor in the defendant's absence.

[33] M.M. Plesničar, *Poenotenje odločanja o sankcijah v kazenskih postopkih*, Ljubljana 2022 (research project).

[34] Eadem, *Kaznovalna politika pri spolni kriminaliteti*, Ljubljana 2022 (research project).

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We have identified systemic causes that can contribute to the prosecutor's modification of the charges during the criminal trial. First, the prosecutor may modify the charge because he is merely following the court that must investigate and establish the relevant facts and whose activity may reveal possible errors in the indictment. Therefore, we have confirmed hypothesis H2 that a court taking an active role in investigating the facts beyond the prosecutor's description of a historical event can prompt the prosecutor to correct the possible errors in the indictment. Since the court is obliged to establish legally relevant facts that are not included in the indictment but are connected to the historical event charged in it, the court will be able to compensate for the passivity of the prosecutor, who is, according to the ZKP, responsible for framing the factual basis of the charge. However, there is a limit to this shifting of the burden: the final decision to modify the charge remains with the prosecutor, who must decide that the trial showed the relevant facts in a different light as he described them in the indictment and to modify the charge accordingly. The court is not allowed to order him to modify the charge and cannot, in this respect, replace the passivity of the prosecutor, who remains autonomous in deciding whether to stick to the initial indictment or not.

Second, the prosecutor may modify the charge because an (overly) active court restricts him from proving his case. An analysis of Supreme Court decisions has shown that the prosecutor may modify the charge because the court turns down his request to hear evidence that could confirm his version of the events outlined in the indictment. In these cases, the prosecutor effectively gives in to the version of the historical event established by the court, knowing that such modification increases his chances of securing a conviction.

These two identified causes behind the prosecutor's modification of the charge mean that the burden of drawing up the final version of the charge is, in part, shifted from the prosecutor to the court. The courts interpret prosecutor's power to modify charges as a tool that enables the prosecutor to come closer to the substantive truth without being definitively limited to the description of the offence contained in the initial indictment.[35] This power gives the prosecutor a rather broad licence to correct even the more significant substantive errors in the indictment that come to his attention after the court produces evidence. On the other hand, however, we showed that the reason for the charge modification cannot solely be attributed to the prosecutor's passivity. It may also stem from the tension that arises between the court and the prosecutor, due to the court's duty to search for the truth by producing evidence at trial, and its power to decide on the motions filed by the prosecutor to hear evidence. If the court refuses to allow the prosecutor to prove his case, the

[35] Decision of the Supreme Court of the Republic of Slovenia of 28 January 2010, no. I Ips 250/2009.

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prosecutor may modify the charge to align with the court's version of what facts the evidence should establish at trial.

The third cause behind the modification of the charges may be rooted in the prosecutor's dependence on the court-appointed experts when determining relevant facts of the case. In several cases, the prosecutor changed the relevant facts affecting the application of the law because of an expert opinion presented at trial. In Slovenian criminal proceedings, an expert is an assistant to the court, not to the party.[36] Expert opinions obtained by the parties are not expert opinions but can only be used by the parties to support a motion for the appointment of an expert[37] or a re-examination of the expert.[38] In some cases, the prosecutor will only be able to acquaint himself with the report and the opinion of the expert appointed by the court at the main hearing. That was apparent in one of the cases, where the expert opinion that prompted the modification was only submitted during the trial. Before the trial, the court had appointed a psychiatrist as an expert but had, during the pre-trial hearing, found his expert opinion to be unclear and therefore appointed an expert committee of three psychiatrists. Based on this second expert opinion, the prosecutor changed his assessment of the defendant's capacity and, consequently, changed the description of the offence in the indictment.

In addition to a judge's activity in the evidentiary process that can indirectly encourage the prosecutor to modify the charges, courts themselves sometimes deviated from the prosecutors' charges in their judgments. Our analysis of judicial decisions for the offences of murder and manslaughter showed that in 7% of cases, the courts convict for manslaughter based on the prosecutor's murder charge.

The courts reduced the charge upon establishing that the qualifying circumstances were not proven, and the prosecutor's charge was too severe. Such charge reductions may indicate that prosecutors, when in doubt, prefer to charge a more serious offence, and consider that the court may omit incriminating facts from the description, but cannot add them to the description.[39] However, this is not necessarily the case. The interpretation of the qualifying statutory elements which transform the offence of manslaughter into murder, particularly those of a subjective nature such as wanton revenge and base motives, can be controversial in practice.[40] This is demonstrated by our finding that in three cases, the appellate courts changed the legal qualification of the first instance court from murder to manslaughter.

[36] K. Šugman Stubbs, P. Gorkič, *Dokazovanje v kazenskem postopku*, Ljubljana 2011, p. 232.

[37] M. Hafner, *Judging Homicide Defendants by Their Brains: An Empirical Study on the Use of Neuroscience in Homicide Trials in Slovenia*, "Journal of Law and the Biosciences" 2019, vol. 6(1), p. 233.

[38] K. Šugman Stubbs, P. Gorkič, *op. cit.*, p. 239.

[39] M. Bošnjak, *op. cit.*, p. 431.

[40] M. Jančar, *Umor ... je napisal*, 19.8.2020, https://www.iusinfo.si/medijsko-sredisce/kolumne/268911 (access: 10.1.2024); M. Ambrož, *Umor na grozovit način*, "Pravna praksa" 2007, vol. 26(12).

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Therefore, the possible explanation may also be that the prosecutor may have taken a different view from the court as to which offence was committed.

Overall, our analysis demonstrated that possibilities for charge modifications have the potential to partially redistribute responsibility for the final formulation of the charge between the prosecutor and the court, thus confirming our hypothesis H3. Given the implication that courts in this context partly take on a prosecutorial role as envisioned by statutory law, further research using alternative empirical methods would be recommendable.

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ABSTRAKT

Pomimo tego, że wiele ważnych skutków wiąże się z modyfikacją zarzutów podczas procesu karnego, empiryczne badania tego zjawiska nadal należą do rzadkości. Aby wypełnić tę lukę, autorka artykułu sprawdza możliwości modyfikacji zarzutów w trakcie procesu w Słowenii oraz ich wpływ na dynamikę pomiędzy sądem a prokuratorem. Głównym celem jest zbadanie tego, czy możliwości modyfikacji zarzutów mają potencjał częściowego ponownego podziału zadań związanych ze sformułowaniem zarzutu karnego pomiędzy prokuratorem i sądem. Korzystając ze zbioru danych dotyczących wyroków sądów karnych w sprawach o przestępstwa nieumyślnego i umyślnego zabójstwa oraz wyroków Sądu Najwyższego Republiki Słowenii, zbadano częstotliwość i intensywność modyfikacji zarzutów w trakcie procesu, a także ich potencjalne przyczyny. Niektóre czynniki przyczyniające się do modyfikacji zarzutów przez prokuratora zostały uznane za systemowe. Należy do nich aktywna rola sądu w gromadzeniu dowodów i samodzielnym ustalaniu istotnych faktów, co może ujawnić błędy w akcie oskarżenia lub uniemożliwić prokuratorowi udowodnienie wysuwanych przez niego zarzutów, a także poleganie przez prokuratora na biegłych powołanych przez sąd w trakcie postępowania. W artykule omówiono pierwsze kompleksowe badanie empiryczne na ten temat w słoweńskim systemie prawnym oraz zaprezentowano spostrzeżenia, które mogą stanowić wkład w trwającą debatę na temat poprawy sprawności proceduralnej w podobnych systemach na świecie.

Słowa kluczowe: zmiana zarzutów karnych; podział funkcji; proces karny; rola sądu; rola prokuratora; zarzut karny