

## Alteration of court charges: ways of legislative solution of the problem

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**Abstract.** The article deals with the issues relevant for the criminal proceedings of Russia, connected with the practical need of legislative consolidation of procedural rules fixed in the Code of Criminal Procedure of the Russian Federation (CCP RF) that provide a possibility for the court to alter charges brought by preliminary investigation bodies. The current procedural rules, to change accusation for a graver verdict, establish the procedure enshrined in Article 237 of the CCP RF, according to which the court must return a criminal case to the prosecutor, while the latter has to return the same to the investigator (interrogating officer). This practice in fact returns the law enforcer to the provisions of the Russian Soviet Federative Socialist Republic Code of Criminal Procedure that maintained the existence of the institute of supplementary investigation; the court annually returned from 40 to 55 thousand cases to investigators within the framework of this institute. Having set the goal to explore the problematic issues of amending a faulty accusation in court and finding an optimal legal mechanism for the court's amending a charge towards its stiffening, the authors, using the methods of scientific knowledge – dialectical approach, comparative legal method, statistical and systemic analysis – analysed the scholarly views on the said problem and the practice of enforcing Article 237 of the CCP RF by Russian courts; made a comparative research of foreign laws governing the issues of alteration of court charges. The authors, on the basis of the research results, made a conclusion on the need to develop an efficient legislative procedure in terms of altering indictment towards a more serious verdict by the prosecution – directly at the court session, under supervision of the court and without returning a case for supplementary investigation.

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## 1 Introduction

The quality and efficiency of the preliminary investigation is an immutable sore point of the Russian criminal justice. One of the means of eliminating errors and shortcomings of preliminary proceedings is the institute providing for the court's return of a criminal case to the prosecutor in accordance with Art. 237 of the CCP RF. The procedure of return of a criminal case to the prosecutor, that was introduced into the Russian criminal procedure by the RF Code of Criminal Procedure adopted in 2001, replaced the completely abolished institute of supplementary judicial investigation. The latter had significant shortcomings and flaws that were referred to in the 1991 Concept of Judicial Reform in the RSFSR and in the juridical literature [1, 2].

Initially, the institute envisaging return of cases to the prosecutor was solely aimed at removing certain obstacles to judicial consideration of a case – those being a result of formal, procedural flaws relating to preparation and presentation of the indictment (Art. 237, Cl. 1, part 1, of the CCP RF), and it was supposed to ensure timely and dynamic consideration of cases by the court. This effect was, indeed, achieved: the return of cases from the litigation stage to the preliminary consideration stage decreased from 41,340 cases in 1999 to 6,468 and 6,466 cases in 2018 and 2019, respectively [3].

However, having formally liquidated the institute of supplementary investigation, the legislator did not offer any other effective judicial procedural tools in lieu of that practice – which would remedy such investigation flaws as unreasonable palliation of the scope of accusation and legal qualification of an offence. As a result, the problem of investigative errors and abuse related to statement of offence became widespread in the administration of justice in Russia.

The changes made in Art. 237 of the CCP RF, introduced by the federal laws No. 64-FZ as of April 26, 2013, and No. 269-FZ as of July 21, 2014, that were initiated by the Constitutional Court of the Russian Federation [4, 5], which provided for additional grounds for return of criminal cases to the prosecutor (Art. 237, Cl. 6, part 1 and part 1.2, of the CCP RF) and were aimed to stiffen the charge, did not solve the problem radically, but caused controversy in the scientific community.

Most legal scholars recognise inconsistency, deficiency and inefficiency of the procedural rules regulating the grounds and the procedure for returning cases to the prosecutor; they also point to significant transformation of this institute towards approximation to the institute of supplementary judicial investigation [6-8]. At the same time, some authors favour such approximation [7] or advocate complete restoration of the procedure of the court's referring a case for supplementary investigation [9-11]; the others call for maintaining the existing order, considering it more acceptable and optimal [12, 13]; still others propose new forms of altering charges in the course of judicial proceedings [14-16].

The purpose of this study was resolution of problematic issues of modifying a flawed charge in court; the premise is the assertion of a possibility to change the course of a trial without returning cases to the prosecutor.

## 2 Methods

The research used dialectical, comparative legal and statistical methods of scientific knowledge, as well as the method of system analysis. In particular, the authors analysed the

scholarly views on the outlined problem and the practice of the courts' enforcement of legal norms regulating the procedure for return of cases to the prosecutor in connection with the existence of certain grounds permitting to qualify the defendant's actions as a more serious crime (Art. 237, Cl. 6, part 1 and part 1.3, of the CCP RF). A comparative study of the norms of Russian and foreign legislation regulating the issues of altering accusation in court was carried out. The authors' significant personal experience of law enforcement was used.

### **3 Results and discussion**

Among the most essential and common mistakes of preliminary investigation, bodies is violation of law in terms of formulation and presentation of charges. The shortcomings of accusal approved by the prosecutor, which are to be responded to by the court, when accepting a case for proceedings, are subdivided as follows: 1) formal shortcomings that do not relate to the essence of the brought charge; 2) flaws of content, affecting the essence of the brought charge one way or another. The substantive shortcomings represent incomplete or distorted presentation of factual circumstances of a case; or discrepancy of some other information, to be reflected in the accusation paper (factual errors), with the actual state of things; wrong wording of a charge, that does not match the description of a crime or established facts; and (or) erroneous classification of incriminated deed (legal errors) [17, 18].

In virtue of Article 252 of the CCP RF, a major part of factual and legal errors may be remedied only through certain investigative and prosecutorial activities of the officer in charge, connected with drafting and presenting a new, amended arraignment order, new indictment or ruling, which requires return of a case to the preliminary investigation body through the prosecutor. This procedure, in accordance with the current wording of Art. 237 of the CCP RF, may be applied by a court, including on its own initiative, in cases of unreasonable contraction of the scope of charge by the prosecuting authority and (or) palliation of defendant's deeds nature, as well as when new grounds for bringing a more serious charge have been ascertained or emerged in the course of court proceedings; this mandate has been exercised by courts since 2014 [18].

While positively assessing the urge of the Constitutional Court of the Russian Federation and the legislator to confirm the independence of the criminal court in selection and enforcement of criminal law norms, the authors presume to doubt the reliability and efficiency of the proposed means for correction of flawed charges. Moreover, the Constitutional Court of RF [4] earlier stated that the scope of a trial should be determined by accusation formulated in the indictment (prosecution order).

Returning a criminal case to the prosecutor under Article 237, clause 6, part 1, of the CCP RF, with a view to change the accusal towards incriminating a more grievous offence, obviously implies the need for supplementary investigation and, accordingly, gives rise to retrial, which is one of the reasons underlying violation of a reasonable timeframe of proceedings, infringement of rights and interests of trial participants. In addition, it draws the court into accusatory activities incompatible with the administration of justice and creates a threat of loss of objectivity and impartiality necessary for fair justice during subsequent consideration of a case by the court. Respectively, the courts have encountered objective practical difficulties in justifying their decisions to return criminal cases to the prosecutor on the said grounds [19]; they practice an expeditious approach in passing such resolutions, without thorough verification of the latter at a court session [20].

The said negative consequences of supplementary judicial investigation can be avoided if the court remedies prosecution faults directly in the course of a trial. This method has been time-tested and is successfully applied in many countries.

Unmediated rectification, directly in court, of flaws and facts of discrepancy with established circumstances, is allowed by the legislation and confirmed by the litigation practice in England, Wales and Scotland [21-23]. According to §265 of the Code of Criminal Procedure of the Federal Republic of Germany, the defendant may be convicted on the grounds of a different criminal law than the one referred to in a previous accusation of the court, on the condition that he/she was informed about the projected change in legal evaluation in advance and was given an opportunity to defend the case. In Italy, the prosecutor is entitled, in the course of judicial investigation, to change the original accusal for more grave or significantly different from the original one – subject to the defendant’s right to defence and other reservations – by means of new notification or new exposition of the deed (Articles 517, 519 of the CCP) [24, 25]. According to Article 732 of the Code of Criminal Procedure of Spain, changes made in respect of preliminary evaluation by the prosecution represent an independent stage of litigation, which, in case of stiffening the charge, provides for postponed hearing of a case at the request of the defence counsel, in order to prepare due evidence to refute the changed accusation [26-29]. The possibility of altering the accusal for more grievous directly during the court proceedings without returning a case to the prosecutor is provided for by Article 301 of the CCP of the Republic of Belarus and Articles 340-341 of the CCP of Kazakhstan.

The authors believe, with regard for the peculiarities of the Russian criminal litigation, that the general scheme of the judicial procedure intending to change the accusal for more serious can be proposed in the following form: statement by a prosecuting official requiring change of accusation for more grievous and submission of a new version of accusal to the court in a documented form → preferment of amended charges to the accused person and clarification of their essence → announcing court adjournment and allowing due time necessary for the defence counsel to prepare for the defence against the new charge → continuation of the trial within the framework of the renewed charge. The indispensable conditions for compliance of the proposed procedure with the principles of fair litigation should include: a) initiation of changes in accusal towards a more serious sentence exclusively by the prosecuting attorney; b) creation of sufficient guarantees to secure the respondent’s right to defence against the new charge.

The proposed procedures for the prosecutor to alter accusal for more serious charges directly in the course of court proceedings, with the right to present supplementary evidence to the court, can be viewed as follows: 1) the criminal case remains under control of the court; its settlement by non-judicial authorities is excluded; 2) the case progress is an ongoing process, the timeframe of the proceedings is significantly reduced; 3) the right of access to trial is not limited; 4) procedural economy is evident: no supplementary investigative and prosecutorial activities are needed any more, or re-trial of a case; 5) the public prosecutor’s right to free assessment of proofs is realised to a greater extent; the objectivity of his/her position under the case is advanced; 6) the court is not involved in exercise of accusatory function; the principle of adversarial system in litigation is not infringed; 7) the objectivity and impartiality of jurisdiction is secured to a greater extent.

## **4 Conclusion**

The given research brings the authors to the conclusion that the introduction of the prosecution change procedure in litigation, aimed to pass a heavier sentence (under control of the court) seems to be more optimal and efficient, as compared to the procedure involving return of a criminal case to the prosecutor in accordance with Article 237 of the CCP RF. The proposed procedural mechanism merits serious attention of the legislator and requires detailed scientific elaboration with regard for experience of successful application of

algorithms for resolving such issues in the criminal procedure legislation of other states with well-established legal system.

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