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## **Indictment and Deviation therefrom Trial on Merits**

*Prosecutor's resolution on charge is the main document determining the subject of trial of a criminal case on its merits.*

*The defendant shall be tried within the scopes of indictment presented by the prosecutor. The problems arise where it is established that the factual circumstances differ from those stated or the incriminated crime requires different qualification. In this case factual and legal deviation from the indictment takes place and this complicates decision making in judicial practice.*

*Purpose of the article is to analyze legal outcomes of deviation from the indictment and development of practical recommendations.*

**Key words:** *charge, deviation from indictment, action, In the procedural sense, action in the material sense, re-qualification, principle of correspondence.*

### **1. Introduction**

Subject of trial on the merits in criminal procedure is determined by the prosecutor's decree on charge. Regarding that onus of proof rests on the prosecution party, the prosecutor has to prove, within the scopes of the charge, that the defendant has committed the incriminated crime. Normally, in adversarial criminal trial the judge shall not go beyond the subject of trial and make final decision within the scopes of the charge. Charge includes, together with the qualification of crime, the factual circumstances of incriminated action, i.e. the facts and circumstances that, according to the prosecution's evaluation, is the specific crime<sup>1</sup>. In the judicial practice problem shows up where there is a discrepancy between the circumstances stated by the prosecution and factual circumstances of action established as a result of examination of evidences by the court, i.e. where factual deviation from the charge takes place. This is the case where the court establishes that the defendant has committed the crime he/she is tried for but the method, time, place of object damaged by the crime is different. The cases where the legal deviation from the charge at trial takes place as well, in particular, where the court establishes that the crime elements are different from those specified in the charge. The question is, whether the judge may go beyond the charge scopes and adjudge guilty or re-qualify the stated action and adjudge the defendant for committing of crime not specified in the charge.

In relation to the above issue practice formed in Georgia is non-uniform. Some judges, in case of deviation from the charge, avoid re-determining of the crime as less severe one and adopt acquit-

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<sup>1</sup> Supreme Court of Georgia: Guidance on the form of judgment on criminal case, its reasonability and adequate wording. Tbilisi, 2015, 52 (in Georgian).

tal judgment<sup>2</sup>. In addition, there are the decisions where the judge does not agree with the accusations of the prosecution party and finds the defendant guilty of committing the similar crime in qualitative and material-legal respect and of similar gravity (or lesser offence)<sup>3</sup>. Moreover, in judicial practice there are the cases where the defendant was acquitted with respect of the charged crime and was adjudged for qualitatively and material-legally different crime. For example, the defendant was accused of extortion, committed by the group, for the purpose of gaining significant property, more than once, as well as unlawful deprivation of liberty, for the purpose of facilitation of committing of the other crime, in collusion with the group, against two persons, with threat of violence dangerous for their health and lives. The court acquitted the defendant with respect of all accusations and redefined the crime as the one provided by Article 376 of Criminal Code of Georgia. The judge stated in the judgment that based on the evidences examined at the hearing only the fact of presence of the accused at the location of crime was established reliably, that the crime of great severity has taken place in the defendant's presence and that he/she had reasonable time to inform police about the crime and he/she failed to do so and that there were no reliable evidences provided by the prosecution at the trial that the defendant has participated, in any form, in the alleged crime and hence no such evidences were examined<sup>4</sup>.

This work is an attempt of defining of the function of indictment and offers the reader solutions of this problem in some cases of violation from the indictment.

## **2. Indictment and its Function**

Effective criminal procedure legislation, unlike the previous one, does not provide for such procedural document as an "indictment". Such document was issued by the prosecutor, in case of existence of the relevant basis, upon completion of preliminary investigation and delivered a copy thereof to the defendant (Section 7, Article 24 of the earlier version of Criminal Procedure Code of Georgia). Article 409 of the same Code provided definition and structure of the bill of indictment.

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<sup>2</sup> Adequate example is judgment of 11 February 2013 of Criminal Department of Mtskheta District Court where the judge has acquitted a person accused for intentional homicide of two or more persons, though the defendant's action apparently included elements of using of excessive force in self-defense/ Later this judgment was cancelled by the decision of 14 May 2013 №1/B-117-13 of Tbilisi Court of Appeal and the defendant was found guilty of committing of offence according to Article 122 of Criminal Code of Georgia (Intentional grave or less grave bodily injury by exceeding the limits of self-defense).

<sup>3</sup> See Judgment of 23 March 2007 on case №1/7129 of Tbilisi City Court, where the court has redefined the action, in particular, acquitted the defendant in relation to the alleged robbery and instead, found him guilty of fraud; see also judgment of 05 May 2015 of Tbilisi City Court on case №1/6856-14, where the judge has redefined the alleged crime provided for by Article 108 of Georgian Criminal Code (intentional homicide) as the offence specified in Article 113 of Criminal Code of Georgia (murder by exceeding the limits of self-defense) as the court regarded the prosecution failed to provide clear, persuasive and concerted set of evidences reliably demonstrating that the defendant has committed intentional homicide. At the same time, the court made conclusion that the consistent evidences excluding any doubt, examined at hearing reliably establishes that the defendant has committed homicide exceeding the limits of self-defense.

<sup>4</sup> See judgment of 11 August 2014 on case №1/6720-13 of Tbilisi City Court; see also similar judgment of 11 August 2014 on case №1/1182-14 of Tbilisi City Court.

Indictment included brief written description of the imputed crime and the basis for bringing of the suspect to the court. The latter document, together with the defendant's identity and legal determination of the crime committed by him/her, contained the circumstances of crime: place, time, method, motif, outcomes, list of evidences of the defendant's guilt, aggravating and mitigating factors. Before completion of preliminary investigation and issuance of the bill of indictment the formal procedural document about the charge was the resolution on bringing of a person to court as the defendant, issued by the investigator, with the prosecutor's approval or by the prosecutor (Article 282 of old Criminal Procedure Code). Such resolution should have contained the identity of the defendant, formulation of indictment, i.e. description of the incriminated action, specifying the place, time, method, means of crime, as well as the outcomes of committing of such action, evidences sufficient for reasonable belief that the mentioned crime was committed by the person in question and the article, section and subsection of criminal procedure code providing for such crime. Unlike the bill of indictment the resolution on bringing to court of a person as a defendant did not include the complete list of evidences. The above prosecutor's decision relied upon certain set of evidences sufficient for reasonable belief that a person has committed the crime while the bill of indictment was issued only if the prosecutor regarded that there was the basis for submission of the case to the court and its trial on the merits. Though a person was brought to the court as a defendant, the prosecutor was entitled to return the case to the investigator for additional investigation, as well as terminate criminal persecution (Article 413 of previously effective criminal procedure code). Thus, the bill of indictment provided full description of the evidences collected as a result of performed preliminary investigation and circumstances significant for the criminal case and such indictment, together with the case, was submitted to the court for hearing on merits and the court studied the case information and performed judicial inquiry.

As we are well aware, the effective criminal procedure legislation is based on the pure adversarial principle, where the judge considering the case on merits is not equipped with the investigation, instruction (inquisition) authorities. Before the hearing on merits, the judge is unaware in the evidences collected as a result of investigation. In addition, he/she does not actively study the evidences whether independently or with participation of the parties. He/she makes final decision on guilt of the defendant or absence thereof on the basis of assessment of the evidences gained, submitted to the court and investigated by the parties and does not perform the judicial investigation. Thus, in the conditions of adversarial criminal trial, such procedural document as the bill of indictment is unacceptable and moreover, it is dangerous, in the sense that it can impact neutrality of the judge providing trial on merits and therefore, in accordance with the effective legislation, only prosecutor's resolution on recognition of a person as a defendant and pre-trial list of evidences submitted by the parties and approved by the judge (including the list of evidences that are not disputable by the parties) shall be sent to the judge. Thus, in Georgia, in contemporary criminal procedure the main document determining the guilt is a decree adopted by the prosecutor and the indictment as such could be interpreted in both, formal and material sense. In formal sense the indictment is a prosecutor's procedural decision on commencement of a person's criminal prosecution and bringing of a person to the court as a defendant. In material sense, the indictment is information on incriminated

action (actions), i.e. information about “*action in procedural sense*”. For more clarity, it is significant to distinguish between “*action in procedural sense*” and “*action in material sense*”. Action in procedural sense implies the historical event described in the indictment and differing from the other similar actions with some details and describing the factual circumstances of committing certain crime(s) by the defendant<sup>5</sup>. In the procedural sense, single action includes the set of actions, specified in the indictment, relevant with respect of the criminal law that can be assessed legally as a specific crime (i.e. action in material sense) or crimes. In procedural context, for the action it is characteristic that the components of a crime (crimes) are not static, as these may be modified or changed by the court’s assessment. The court is not limited to the legal assessment of the action specified by the prosecution. The court is authorized to change the crime category for the defendant’s benefit and adjudge a person for less severe crime, if the elements of the crime specified in the indictment contain elements of such crime. Thus, the court assesses not the “*action in material sense*” but rather “*action in procedural sense*” that fully determines the subject of procedure.

As for the function of prosecution, primarily, it is informing of the defendant on the substance and bases of the charge. Thus, it is one of significant instruments for informing of the defendant. In addition, as specified above, the indictment determines the subject and scopes of trial on merits of a criminal case. It would be reasonable to provide more detailed discussion of each of the functions of indictment.

## 2.1. Informing of the Defendant

In accordance with Subsection “a”, Section 3, Article 6 of the European Convention on Human Rights, everyone, charged with criminal offence shall be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. In accordance with Section 1, Article 38 of Georgian Criminal Procedure Code, Upon detention, or if a person is not detained, immediately upon his/her recognition as the accused, also before any interrogation, the accused shall be notified, in the language that he/she understands, of the offence defined by the Criminal Code of Georgia in the commission of which he/she is reasonably suspected. The accused shall be handed over a copy of his/her detention report, or if he/she is not detained, – a copy of a decree to prosecute as the accused. Thus, both, European Convention on Human Rights and effective criminal procedure law obligate the prosecutor to notify the accused about charge against him/her at the earliest stage of legal procedures to allow him/her proper protection at the trial. As mentioned above, the copy of resolution on recognition as an accused specifying the incriminated action, place, time, method, means, instrument of committing thereof, as well as the outcomes of such action shall be delivered to a person recognized as an accused. Decree on charge shall specify also the evidences collected as a result of investigation, sufficient for reasonable belief that the mentioned crime was committed by the accused. In addition, the decree shall specify the

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<sup>5</sup> For more details see: Kühne H.-H., *Stafprozessrecht, Eine systematische Darstellung des deutschen und europäischen Strafverfahrensrechts*, 8. Auflage, Heidelberg 2010, 396-397; Roxin C., *Schünemann B., Strafverfahrensrecht*, 26. Auflage, München 2009, 128-129; Beulke W., *Strafprozessrecht*, 11. Auflage, Heidelberg u.a. 2010, 331-332; Bauer W., *Der prozessuale Tatbegriff*, NStZ 2003, 174.

the article, paragraph and sub-paragraph of the Criminal Code of Georgia that refers to that crime (Paragraph 3, Article 169 of Criminal Procedure Code of Georgia). Hence, the decree on indictment is the primary means for notification of the accused about the charge. In addition, it should be taken into consideration that the decree on indictment is not an only formal source of information about accusation. In addition, the defendant may get familiarized with the evidences collected by the prosecution and he/she may obtain the copies of evidences and materials of criminal case (Paragraph 13, Article 38 of Criminal Procedure Code of Georgia). In addition, the accused is entitled to get familiarized with the information that the prosecution intends to submit to the court as the evidence. The accused may get familiarized with all acquitting evidences (Par. 1, Article 83, CPCG). Nevertheless, the prosecutor's decree on accusation still remains the primary instrument for the defendant's notification and the most important procedural document, in this respect.

To ensure that the decree of indictment performed the function of informing, it shall provide full information about the charge to the accused. In addition, it should be taken into consideration that excessive detailing of the indictment and thorough description of the factual circumstances may complicate proving for prosecution at the trial. If the prosecution fails to properly prove all circumstances specified in the decree of indictment, this may result in acquitting of the person who has committed the crime by the court. Such risk is even higher in case of purely adversarial criminal procedure, where the court does not perform the investigation and study the evidences independently. Therefore, for the purely adversarial procedures, less detailed version of the decree on indictment is adopted. Such decree shall contain at least, so called "*obligatory elements*" and "*factual characteristics*"<sup>6</sup>.

Requirement of the "*obligatory elements*" implies that the decree on indictment shall contain reference to the factual circumstances relevant for existence of the key crime elements. In addition, the decree of indictment shall contain information about the facts that demonstrate the defendant's participation in the specific crime<sup>7</sup>. Hence, specifying that the defendant has committed the action of theft, the crime, specified by Par. 1, Art. 177 of Criminal Code of Georgia is insufficient. The decree shall contain the facts of committing the elements of the offence specified in Par. 1, Art. 177 of Criminal Code of Georgia (factual circumstances demonstrating committing of the objective and subjective elements of the action).

Information dealing with the key elements of the corpus delicti of incriminated offence provided in the decree on indictment shall provide sufficient details and this is the significant requirement of the "*factual characteristics*" of the indictment<sup>8</sup>. The prosecution shall specify the factual circumstances in the indictment so that it was possible to determine not only the specific elements of

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<sup>6</sup> Given criteria of accusation were developed by the judicial law of US Federal Supreme Court. See *Geisler M.*, Die Ausgestaltung des Anklageprinzips nach amerikanischem Strafverfahrens- und Verfassungsrecht, Berlin 1998, 59.

<sup>7</sup> See decision of US Federal Supreme Court on case: *Hamling v. United States*, 418 U.S. 87 (117-118); *United States v. Pearce*, 275 F.2d 318, 324 (1960), *United States v. Carll*, 105 U.S. 611, 23 L Ed. 1135.

<sup>8</sup> See decision of US Federal Supreme Court on case: *Russel v. United states*, 369 U.S. 749, 82 S.Ct. 1038, 8 L Ed. 2d 240 (1962); *McNamara R.B.*, Constitutional Limitations on Criminal Procedure, Sephards/McGraw-Hill, Colorado Springs (Colorado) 1982, 110-113.

the offence but to find out, which actions of the defendant are subject to trial. For example, in case of prosecution for the crime provided for by Article 108, to ensure that the decree performs the function of informing, it would not be sufficient to state that the defendant has intentionally killed his neighbor for vengeance. Factual circumstances shall be detailed so that the defendant was able to protect himself properly. Therefore, the decree on indictment shall specify the location, time of the crime, subject of crime and the identity of the victim. Circumstances characteristic for the incriminated action shall be formulated so that accurate individualization was possible and the danger of confusion with the other crime elements was excluded<sup>9</sup>. In addition, it should be taken into consideration that there is no need to specify all details and factual circumstances characterizing the actions. The main thing is that the contents of the decree on indictment provided to the defendant sufficient information of against what he/she will have to protect himself/herself at the trial.

## **2.2. Identification of the Subject and Scopes of Trial on Merits**

Regarding the principles of charging in the criminal procedure, the court considers the criminal case only within the scopes of formulation specified in the decree of indictment<sup>10</sup>. The court is not authorized to discuss such other action committed by the defendant that is not contained in the decree of indictment. Hence, one of the key functions of indictment is stating of the subject and scopes of hearing on merits. The subject of trial basically consists of two elements. In particular, these are the subjective and objective elements. Subjective element of the indictment covers the defendant's person, in relation to whom the final court decision shall be made. The court may make decision on criminal responsibility of a defendant specified in the decree of indictment only. Objective element of the indictment covers the action committed by the defendant against the law. The legally effective court's judgment shall confirm or reject this. These two elements of the indictment are closely linked with one another as the criminal action to be considered by the court is always an event related with the specific person. Thus, at the trial, only the "action in the procedural sense" specified in the indictment shall be considered by the court, with participation of the parties.

Defining of the subject of trial has one more implication. As the decree on indictment provides individualization of the incriminated action to be considered by the court and the final decision of the court is in relation to this action, the effective court decision excludes criminal prosecution or trial of the acquitted or the convict for the same action (in the procedural sense) in the future. This results from the constitutional principle of prohibition of the repeated conviction (Par. 4, Art. 42 of the Constitution of Georgia). Thus, one and the same subject of trial, after the decision made by the

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<sup>9</sup> See: *Jakobs G.*, Probleme der Wahlfeststellung, GA 1971, 257, 258. *Puppe I.*, Die Individualisierung der Tat in Anklageschrift und Bußgeldbescheid und ihre nachträgliche Korrigierbarkeit, NStZ 1982, 230.

<sup>10</sup> See: *Laliashvili T.* Criminal Procedure of Georgia, General Part, Tbilisi, 2015, 103 (in Georgian); Supreme Court of Georgia, Supreme Court of Georgia: Guidance on the form of judgment on criminal case, its reasonability and adequate wording. Tbilisi, 2015, 52; *Tumanishvili G.*, Criminal Procedure, Overview of General Part, Tbilisi, 2014, 67 (in Georgian).

court of final instance cannot be subject of the repeated trial (exclusion is revision of the sentence upon discovery of the new facts).

### 3. Factual and Legal Deviation from the Actions Stated in the Indictment

In criminal procedure of the Continental Europe, where so called instruction-investigation principle is adopted, the judge, within his/her competence, performs the judicial investigation and the law entitles him/her to make factual and legal amendments to the indictment, based on the outcomes of investigation of the evidences. Hence, within the scopes of criminal procedure of the above system the outcome may differ from that of the factual and legal circumstances stated in the indictment as a result of examination of evidences at the hearing on merits. In such case, the judge, in compliance with the procedure provided for by the law, makes corrections to the indictment and make condemnatory judgment. Unlike this, in the purely adversarial procedure the “*principle of correspondence*” is adopted, implying that to pass the condemnatory judgment, the factual and legal circumstances stated in the decree of indictment shall correspond to the outcomes of investigation of evidences. On one hand, the mentioned principle ensures proper protection of the defendant. In particular, the defense party shall be sure that defense strategy shall cover only on the basis and within the scopes of the indictment. On the other hand, the accused shall be protected from the unexpected trial on the basis of factual and legal circumstances different from those derived from the hearing on merits. In addition, the principle of correspondence ensures trial of the defendant only within the scopes of the indictment stated by the prosecution to protect him/her from the repeated criminal prosecution for one and the same crime. It should be noted that at the earlier stages of development of the adversarial judicial procedures, to adopt the condemnatory judgment the judge required from the prosecution to prove at the trial each word of the circumstances specified in the indictment with grammatical accuracy. It is notable that the judge requested not only coincidence of the circumstances relevant for existence of the elements of crime specified in the indictment but also correspondence to the outcomes of investigation of the evidences of those facts that normally are not of legal significance for establishing of guilt. In this respect, the example is one of US cases *State v. Harris*, made in 1841. A person was brought to the court for theft of a pair of shoes. The court of the first instance made condemnatory judgment and this judgment was later cancelled by the court of superior instance. The court stated that the reason of cancellation was the fact that the court of the first instance could not prove the fact of theft of a pair of shoes by the defendant as both shoes were for one and the same foot and they did not compose a pair, as specified in the indictment. Similar decision was made in the case *Brown v. Peoble (1872)*, where a person was accused for faking of the signature of a person named “Otha Carr”. At the hearing on merits it was established that the falsified signature was of “Oatha Carr”. Though the difference was only one letter, the condemnatory judgment was not adopted as there was no correspondence between the factual circumstances stated in the bill of indictment and the outcomes of examination of evidences. Such interpretation of the principle of correspondence results from the perception of the adversarial judicial procedures in that period where the criminal procedure was identified with the sports competition requiring strict com-

pliance with the game rules and no deviation should remain without punishment<sup>11</sup>. With time, the approach to the principle of correspondence has changed and currently, in adversarial judicial procedures it is not applied so strictly. Currently, in the countries of general law, the courts' attitude towards identification of the circumstances different from those stated in the bill of indictment as a result of examination of evidences is more liberal. Currently dominates so called functional approach to the principle of correspondence established in 1935 by the decision of US Federal Supreme Court in the decision on case of *Berger v. United States*, where the matter was as follows: Berger, together with seven other persons, was accused for planning of distribution of the false money. At hearing it turned out that actually two episodes of preparation for the crime have taken place. And Berger has participated in one of them only. Consequently, Berger was recognized guilty by the court of first instance for participation in one of two episodes of crime. The defense party appealed against the court decision to the Supreme Court and required cancellation of the condemnatory judgment, stating that the court was not able to fully prove the crime stated in the bill of indictment, failing to prove that Berger participated in both episodes of the crime. Factual circumstances specified in the bill of indictment did not fully coincide with the facts revealed at the hearing on merits. The defense party regarded that the court of superior instance would acquit the accused. Federal Supreme Court did not share the legal considerations of the party of defense and stated that ***“Discrepancy between the circumstances stated by the prosecution and facts established at trial per se does not exclude condemnatory judgment. Condemnatory judgment shall be excluded where the fundamental rights of the accused are violated by deviation from the indictment. Violation of such rights takes place where the indictment has lost the function of “informing” and “protecting” of the defendant. Hence violation of the defendant’s fundamental rights shall be established, on one hand, where to the subject of consideration on merits are added such factual circumstances other than the indictment comprising unexpected event for the accused (the accused was not informed about it) or prevents his/her proper defense. On the other hand, the defendant’s fundamental rights will be violated where the defendant, in the ongoing process, in case of taking of the new factual circumstances into consideration, would not be able to prove the reality other than provided for by the initial indictment”***.<sup>12</sup> In the above case, Federal Supreme Court regarded that deviation from the indictment was insignificant and it have not resulted in violation of the defendant's human rights. Significance of deviation from the indictment depends, in each specific case, on assessment of each circumstance. For example, deviation from the indictment, where as a result of examination of evidences at the trial reveals slight difference in time of committing of the crime is not regarded as significant deviation. If the indictment stated that the crime was committed on 1<sup>st</sup> September but at the trial it was established that the crime was committed on 3<sup>rd</sup> September, such deviation does not violate the defendant's fundamental rights and does not deprive the indictment the functions of “informing” and “protection”. Though, deviation will be significant if the

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<sup>11</sup> See *Pound R.*, The Causes of Popular Dissatisfaction With the Administration of Justice, 29 Reports of the ABA, 1905, 395, 406.

<sup>12</sup> See decision of US Federal Supreme Court on case: *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).



indictment states that the crime was committed in 2010 while examination of evidences at trial shows that the defendant has committed the incriminated offence in 2013 and not in 2010. It is also recognized that insignificant deviations in relation to the location of the crime will not be regarded as significant deviation from the indictment<sup>13</sup>. The same approach dominates with respect of the other characteristics of the objective elements of the action, as there is no requirement that the circumstances specified in the bill of indictment were precisely confirmed at trial on merits. It is sufficient that the circumstances stated in the indictment were confirmed at least with qualitative significance. For example, if the indictment specified the fact of distribution of the narcotic substance “cocaine” while at the trial it was proved that the defendant was distributing narcotic substance “heroin”, this cannot be regarded as significant deviation from the indictment and this does not exclude condemnatory judgment<sup>14</sup>. Unlike the above example, the deviation from the indictment is substantial where examination of evidences at the trial opens the factual circumstances that apparently change the content of the incriminated action stated in the indictment, without even a hint in the bill of indictment. In this respect, one of the decisions of US Federal Supreme Court is of interest<sup>15</sup>, where a person has allegedly received certain amount as a bribe from the organization and at the trial it turned out that the defendant had not taken any bribe, in reality, the organization was paying life insurance premium to the insurance company for the benefit of the defendant. The court regarded that such deviation is a substantial one.

As mentioned, requirement of so called accusation principle operating in the criminal procedure is to try the defendant for the crime stated in the bill of indictment. The prosecutor shall persuade the court, based on the evidences and their examination that the defendant has committed the incriminated offence. Otherwise, the defendant shall be acquitted in relation to the accusation. Even if instead of incriminated offence committing of such other crime is evidenced at the trial that is categorized differently from the one initially stated in the indictment, the defendant normally shall be acquitted, unless the crime stated in the indictment contain elements of the offence of relatively less severity that are proved at the trial and at the same time, the crime proved at the trial is not part of the “action in procedural sense”. Thus, legal deviation from the action stated by the indictment is mostly substantial deviation and at the same time, circumstance preventing condemnatory judgment. For example, if the defendant is accused of intentional damaging of the other person’s property but, as a result of examination of the evidences, the fact of robbery is proved, due to substantial deviation from the indictment imposing criminal responsibility on him/her shall be excluded. The situation is different if the defendant is accused of intentional homicide in aggravating circumstances and at the trial intentional homicide without aggravating circumstances is proved. To prevent unjust acquittal, the criminal procedure legislation does not restrict the judges in making condemnatory judgments and recognition of the person guilty in committing of intentional homicide. Deviation from the in-

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<sup>13</sup> See also: *Herrick P.F.*, Underhill’s Criminal Evidence, A Treatise on the Law of Criminal Evidence, The Bobbs-Merrill Company Inc., Indianapolis, New Yourk, 6<sup>th</sup> ed., 1973, 88, 89.

<sup>14</sup> See decisions of US Federal Supreme Court on case: *United States v. Laite*, 418 F.2d 576 (1969); *United States v. Knuckles*, 581 F.2d 305 (1978); *United States v. Schrenzel*, 462 F.2d 765 (1972); *United States v. Sheikh*, 654 F.2d 1057 (1981).

<sup>15</sup> *United States v. Lippi*, 193 F. Supp. 441 (1961).

dictment and impossibility of proving that the defendant has committed homicide in the aggravating circumstances do not prevent recognition of the latter's guilt and his/her trial as the intentional homicide proved by the court (key elements of intentional homicide) includes all elements of qualified corpus delicti. Thus, in the given case one should start from the assumption that a person is automatically accused of committing of the crime specified in Article 108, together with the one specified in Article 109 of Georgian Criminal Code. It is impossible to commit homicide in the aggravating circumstances specified in Article 109 of Georgian Criminal Code so that not all key elements of the crime specified in Article 108 were completed. The situation is the same where the case deals with the accused completed and judicially evidenced uncompleted crime. For example, if a person is accused of the intentional homicide but at the trial the fact of death resulting from the defendant's actions is not confirmed and only attempted intentional homicide is evidenced, such deviation from the indictment will not cause acquittal. It should be taken into consideration that the accused completed crime automatically includes the wrongness content of the same but uncompleted crime, attempted crime or the preparation of the one is the punishable stage of the crime and the crime cannot be completed so that the action did not achieve the stage of attempt. Hence, if the accused preparation of completed crime or the attempted one is punishable according to the criminal code<sup>16</sup>, and the court fails to prove completed crime, proved attempt of committing of the same crime shall be used subsidiarily for issuance of condemnatory judgment<sup>17</sup>.

The issue, whether the elements of the specific crime are completed together with the elements of the crime accused and hence, to what extent such accusation includes elements of the said crime, shall be established through analysis of each case. Together with the elements of the accused crime the elements of less severe crime will always take place simultaneously, where, by exclusion of the elements of such latter crime would exclude the elements of the incriminated offence.

In addition to the above, both, Continental European and Anglo-American judicial practice recognizes that even in case of proving of the independent crime elements different from the crime specified in the indictment in material – criminal law respect, the judge is authorized to issue the condemnatory judgment if the former action is **comparable and equivalent to the accused action, in legal-ethical and psychological respects**<sup>18</sup>. Legal-ethical comparability of the action other than the indictment implies approximately equal severity with the incriminated action and morally and legally comparable assessment based on general sense of justice. Additionally, for legal-ethical comparability it is significant that the action proved at the trial impinged the same or substantially similar legal values. Psychological comparability requires the defendant's mental attitude that, to certain extent, is similar to the incriminated actions proved as a result of examination of the evidences. Such mental attitude exists where the defendant's attitude and motivation to the legal values are of similar

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<sup>16</sup> *Simpson v. United States*, 195 F.2d 721, 723 (1972).

<sup>17</sup> On subsidiary between the crimes see: *Wessels J., Beulke W.*, *Strafrecht Allgebeiner Teil, Straftat und ihr Aufbau*, 37. Auflage, Heidelberg 2007, 307.

<sup>18</sup> See. *Wessels J., Beulke W.*, *Strafrecht Allgebeiner Teil, Straftat und ihr Aufbau*, 37. Auflage, Heidelberg 2007, 315; *State v. Keeler*, 710 P.2d 1279, 238 Kan. 358; *United State v. Lovely*, 77 F. Supp. 619, 621 (1948).

nature<sup>19</sup>. For example, the case where a person is accused of theft (Article 117 of Georgian Criminal Code) though this was not proved at the trial and instead, it was evidenced that he / she has knowingly purchased the other person's movable property that was gained in breach of the law (Article 186 of Georgian Criminal Code). In such case it is recognized that both actions are mutually comparable and equivalent in legal – ethical and psychological respect. In addition, encroachment of one and the same legal value (individualized and specified exactly by the indictment) takes place<sup>20</sup>.

Unlike the above cases, if at the trial, committing of the crime heavier than incriminated offence is proved, the judge is not a person authorized to adjudge the defendant for the heavier offence.

#### 4. Conclusion

In conclusion, it should be noted that violation from the indictment, as such, does not restrict the judge in making condemnatory judgment if the violation is not substantial and it does not deprive the bill of indictment the informing and protection functions. The judge may re-define the crime at the trial to the other, relatively less severe offence, elements of which are contained in the crime accused and also if elements of such crime stay within the scopes of “action in the procedural sense” stated in the indictment. It is significant that as a result of crime re-qualification the defendant was not sentenced to more severe punishment than stated by the indictment.

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<sup>19</sup> Compare: *Wessels J., Beulke W.*, *Strafrecht Allgemeiner Teil, Straftat und ihr Aufbau*, 37. Auflage, Heidelberg 2007, 315.

<sup>20</sup> See also: *Wolter J.*, *Tatidentität und Tatumgestaltung im Strafprozeß – Zur Begründung eines normativ-funktionalen Tatbegriffs-, Wahrheit und Gerechtigkeit im Strafverfahren*, Festschrift für Karl Peters aus Anlass seines 80. Geburtstages, *Wasserburg K., Haddenhorst W.* (Hrsg.), Heidelberg 1984, 144-145.