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## Compliance with the Adversarial Principle During Deviation From Charges : A Case Study of Georgia

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### Abstract

In accordance with the first part of Article 9 of the Criminal Procedure Code of Georgia (CPCG), from the moment of commencement of criminal prosecution, criminal proceedings are conducted based on the adversarial principle and the equality of arms. Part two of Article 25 of the same Code states that the collection, presentation, and examination of evidence fall within the competence of the parties, and the court does not participate in this process, except in rare cases. This paper addresses the following issue of whether a court, on its own initiative, may qualify a claim and find a person guilty of an action that the prosecution does not dispute at all. Specifically, when the court independently intervenes in the qualification of the claim, does it violate the principle of adversarial and equality of arms, thereby interfering with the competence of the parties. How should such actions by the court be understood, and, in general, does the court have the right to find a person guilty of an offense that the prosecution has not disputed throughout the entire process? The study examines both the approach of the European Court on this matter and the practice of national courts regarding the reclassification of the claim, particularly what the court considers a deviation from the charge and the possibility range of the reclassification of the claim. The article also includes a discussion of applicable legal norms and judicial practice and provides conclusions.

**Keywords:** Guilt, Deviation From Charges, Equality, and Adversarial of Parties

## **Introduction**

Conforming to the first part of Article 9 of the Criminal Procedure Code of Georgia, from the moment criminal prosecution is launched, criminal proceedings are conducted on the basis of equality and adversarial rights of the parties. The Criminal Procedure Code of Georgia, adopted on October 9, 2009, entered into force on October 1, 2010, and introduced numerous novelties, the most important of which is that criminal procedure legislation has become adversarial. Part two of Article 25 of the same Code states that the collection, presentation, and examination of evidence falls within the competence of the parties, and the trial does not participate in it, except in exceptional cases. In judicial practice, there are cases where the accused is found guilty not for the action that is being appealed, but for another offense under the Criminal Code. In such instances, the court delivers a judgment of guilty for something other than the case at hand, not for the action disputed by the prosecution, but for a completely different act. This raises the question of whether the principle of equality and adversarial proceedings between the parties, which designates that the judge acts as an arbitrator and listens to the parties, is upheld. The principle dictates that the judge should act as an arbitrator, listening to the parties, rather than the court, on its own initiative, delivering a conviction for an offense that was not contested by the accused throughout the trial.

Ultimately, this creates circumstances in which the court convicts the accused under a legal provision that the prosecution did not dispute. The court's reclassification of the charge on its own initiative and the conviction of a person under an article that was not contested by the parties throughout the trial can be perceived as introducing an element of inquisitiveness by the court. Meanwhile, research into this issue has examined the circumstances in which the reclassification of a charge by the court may constitute a violation of the adversarial principle and equality of arms, as well as how and to what extent the court should be permitted to re-qualify disclosed charge.

## **Role of Trial in the Process of Adversarial Principle and Equality of Arms in Deviation From Charges**

Article 259 of the Criminal Procedure Code of Georgia obliges the judge to pronounce a judgement that is legal, reasonable, and fair. In accordance with the first part of this article, a judgement is legal if it is made in compliance with the requirements of the Constitution of Georgia, international treaties of Georgia, other normative acts, including this Code and other laws of Georgia, ensuring that the applicable norms were used in the criminal proceedings. A court's judgment is reasonable if it is based on cumulative evidence examined beyond a reasonable doubt during the trial. All conclusions and decisions contained in the court judgment must be

sufficiently substantiated. Additionally, a court's judgment is fair if the imposed punishment corresponds to both the convicted person and the severity of the crime committed.

When making a judgment, the court consistently decides a number of important issues. One significant issue is whether the accused committed an act provided for by criminal law (Article 260 of LGCC), as specified in the indictment. However, question arises when, at the end of the trial, the judge states that all the prosecution's claims have not been proven, yet the accused's actions contain signs of another crime. In such cases, the court requalifies the actions under a different article, one for which the defense has not even presented evidence. Under these circumstances, another question arises, whether the adversarial principle and equality of arms are not violated and whether the judge introduces an element of inquisitiveness on their own initiative.

On one hand, Article 259 of the Criminal Procedure Code obliges the judge to deliver a legal, reasonable, and fair judgment, guided by the Constitution of Georgia and other legal acts. On the other hand, the judge is limited by several principles, including the adversarial principle and equality of arms. The adversarial principle is guaranteed even during court examination of the case.<sup>1</sup> The adversarial principle and equality of arms are pivotal principle to criminal proceedings and serve as the foundation of the Criminal Procedure Code.<sup>2</sup> When interpreting the Code of Criminal Procedure in light of the adversarial principle and equality of arms, the role of the court is regarded as that of a mediator. The court does not participate in searching for evidence, nor does it have the right to examine evidence on its own initiative. It is restricted by the form of the accusation, meaning that if charges/part of the charges are dropped, the proceedings are terminated accordingly. The commentary on the code also discusses the submission #608 of the Supreme Court of Georgia, dated September 17, 2014, which declares that the court is limited by the scope of the complaint and cannot go beyond its requirement, even if the complaint is not properly established. An example is a case where a party challenges only the legality of a punishment. If the court, while examining the fairness of the punishment, finds mitigating circumstances that justify the convicted person's full exemption from serving the sentence, the court cannot make a decision "sua sponte" (on its own motion) and unilaterally extend or narrow the scope of the complaints.<sup>3</sup>

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<sup>1</sup> *Tumanishvili G.*, Criminal process (review of the general part), Tbilisi, 2014, 74.

<sup>2</sup> *Laliashvili T.*, Criminal legal process of Georgia, Tbilisi, 2015, 119.

<sup>3</sup> *Mezvrishvili N, Tumanishvili G, Kvachantiradze D, Liparteliani L, Dadashkeliani G, Guntsadze Sh., Fafashvili L, Toloraya L*, Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 85.

A decision by the Constitutional Court of Georgia affirms that the adversarial principle is based on equal opportunities for both parties to obtain evidence that facilitates a just outcome.<sup>4</sup> However, in 2015, the Constitutional Court also stated that a judge cannot disregard constitutional imperative principles when adjudicating a case, even if the parties do not focus on them. This is necessary to ensure a fair trial and a just decision.<sup>5</sup> A decision by the Constitutional Court of Georgia affirms that the adversarial principle is based on equal opportunities for both parties to obtain evidence that facilitates a just outcome. The same ruling references an (friend-of-the-court) opinion prepared by the Venice Commission, which acknowledges that “the existence of an adversarial model recognizes exceptions to the rule, and, notwithstanding the demands of the parties, the court must consider a number of issues, regardless of whether they are appealed by any party”.<sup>6</sup> Common courts justify their decisions based on this interpretation by the Constitutional Court when they must go beyond the scope of an appeal or cassation complaint in favor of the defense.<sup>7</sup> Evaluating the decisions made by the Supreme Court of Georgia and studying the explanations contained in these judgments suggests that the adversarial principle and equality of arms serves to ensure a fair trial and a just decision.

When hearing a criminal case, respecting the adversarial principle and equality of arms is as vital as the role of the judge. According to the current Code of Criminal Procedure, the judge’s role is limited to that of an arbitrator, which is justified to some extent. However, it is very difficult and significant for a judge to maintain balance. On the one hand, expanding judicial powers must not lead to violation of the adversarial principle and equality of arms; on the other hand, restricting judicial powers must not result in convicting an innocent person or undermining a fair decision. Notably, when courts of general jurisdiction go beyond the scope of an appeal or cassation complaint, and acquits a person of the charges despite prosecution appeal, they justify this by referring the principles of a fair trial and the prevention of unlawful conviction. Courts also cite paragraph 7 of Article 31 of the Constitution of Georgia, which stipulates that a conviction

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<sup>4</sup> Decision of the Constitutional Court of Georgia dated September 30, 2016 No. 1/8/594. The case of Georgian citizen Khatuna Shubitidze against Parliament of Georgia, II, 27.

<sup>5</sup> Decision of the Plenum of the Constitutional Court of Georgia dated September 29, 2015 №33/1/608,609 Case of introducing a constitutional submission to the Supreme Court of Georgia on the constitutionality of Part 4 of Article 306 of the Criminal Procedure Code of Georgia and the constitutional submission of the Supreme Court of Georgia on the constitutionality of subparagraph “g” of Article 297 of the Criminal Procedure Code of Georgia.

<sup>6</sup> There’s: paragraph:17

<sup>7</sup> Decision №398AP-23 of the Criminal Chamber of the Supreme Court of Georgia dated July 11, 2023.

must be based on incontrovertible evidence. Consequently, at the conclusion of a case, a judge is typically limited to assessing whether the accused committed the alleged in the indictment. This is a straightforward legal determination. However, the situation changes if the judge states that the accused did not commit the crime as charged but instead committed an entirely different act, one that the prosecution did not dispute, and subsequently finds the person guilty. Under the adversarial model, which upholds the principle of prosecution, a judge's role should be confined to assessing the evidence obtained by the prosecution and evaluating the charges accordingly. In such cases, if a judge independently determines what action the accused performed based on the evidence examined, they effectively step beyond their role as an arbiter and make a decision in favor of one party. In the adversarial model, the judge listens to and evaluates the evidence presented by the parties; they do not actively participate the process or independently determine the nature of the accused's action. Instead they based their decision solely on the evidence examined in the case.

In conclusion, the role of the judge in protecting the adversarial principle and equality of arms is limited to ensuring equal opportunities for both parties in presenting and examining evidence and fulfilling the function of an arbitrator. This role is reflected in the study and evaluation of evidence presented by the parties and in rendering a final verdict of either guilt or acquittal. Notably, a judge must maintain a neutral stance when delivering a judgment and must not interfere with or violate the adversarial principle and equality of arms.

### **Possibility of Deviation of Charges Conforming to the Practice of the European Court**

In accordance with subparagraph (b) of paragraph 3 of Article 6 of the European Convention on Human Rights, everyone accused of a criminal offense has the right to have adequate time and facilities for the preparation of their defence. The European Court of Human Rights, in the cases of *Dallos v. Hungary* and *Pélistier and Sassi v. France*, provided an explanation regarding Article 6, Paragraph 3, subparagraphs (a) and (b) of the European Convention. The court noted that these clauses are interrelated in the sense that the accused's right to be informed of the nature and basis of the charges against them must be considered in conjunction with their right to prepare for a defense.<sup>8</sup> In *Kamasinski v. Austrian*, the court explained that “the details of the crime play a decisive role in criminal proceedings as they formally

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<sup>8</sup> Supreme Court of Georgia. Right to a fair trial (criminal aspects) – Article 6, 64. <[https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-ufleбата-centri/samartliani-sasamartlo-ganxilvis-upleba\(sixli\).pdf](https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-ufleбата-centri/samartliani-sasamartlo-ganxilvis-upleba(sixli).pdf)> [04.07.2024]. See also Philip L., How to Apply to the European Court of Human Rights. 359.

inform the suspect of the factual and legal basis of the charges against him from the moment of written notification.”<sup>9</sup>

The duty to provide information to the accused rests entirely on the prosecution. Simply disclosing information without actively informing the defense is inconsistent with this requirement.<sup>10</sup> In the event of a reclassification of the circumstances of the case during proceedings, the accused must be given the opportunity to exercise their right to defense in a timely and effective manner (*Pélessier and Sassi v. France*[GC], § 62; *Block v. Hungary*, § 24). Additionally, reclassification of the crime must be sufficiently foreseeable to the accused if it concerns an element intrinsic to the accusation. (*De Salvador Torres v. Spain*, § 33; *Sadak and Others v. Turkey* (no. 1), §§ 52 and 56; *Juha Nuutinen v. Finland*, § 32).<sup>11</sup> From an analysis of the decisions taken by the European Court, it can be concluded that the accused must be fully and comprehensively informed about any amendment to the charge against them, including any revisions to the basis of the charge. They must also be provided with adequate time and facilities to prepare their defense in light of new information or allegations.<sup>12</sup> Information relating to the charge, including any legal qualifications that the court may assign to specific acts, must be presented in the indictment before the trial. If an amendment occurs at a later stage, the accused should be clearly informed about the amendment of the charge. Simply pointing out the abstract possibility that the court may reach a different conclusion regarding the classification of the crime is insufficient (*I.H. and Others v. Austria*, § 34).<sup>13</sup> The reclassification of the crime must be reasonably foreseeable to the accused if it relates to an element characteristic of the charge (*De Salvador Torres v. Spain*, § 33; *Sadak and Others v. Turkey* (no. 1), §§ 52 and 56; *Juha Nuutinen v. Finland*, § 32).<sup>14</sup> Deficiencies in informing the accused of the charge can be corrected through appeal if the defendant has the opportunity to prove before a higher tribunal that the charge was amended and to contest their conviction in relation to the legal and factual aspects on which it was

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<sup>9</sup> Supreme Court of Georgia. Right to a fair trial (criminal aspects) – Article 6, 64. <[https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/samartliani-sasamartlo-ganxilvis-upleba\(sisxli\).pdf](https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/samartliani-sasamartlo-ganxilvis-upleba(sisxli).pdf)> [04.07.2024].

<sup>10</sup> *Mattoccia v. Italy*, [2000] ECHR, 65; *Chichlian and Ekindjian v. France*, [1999] ECHR, 71

<sup>11</sup> Supreme Court of Georgia. Right to a fair trial (criminal aspects) – Article 6, 65-66. <[https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/samartliani-sasamartlo-ganxilvis-upleba\(sisxli\).pdf](https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/samartliani-sasamartlo-ganxilvis-upleba(sisxli).pdf)> [04.07.2024].

<sup>12</sup> *Mattoccia v. Italy*, [2000] ECHR, 61. see also: *Bäckström and Andersson v. Sweden*, [2006] ECHR.

<sup>13</sup> *I.H. and Others v. Austria*, [2013] ECHR, 34.

<sup>14</sup> *De Salvador Torres v. Spain*, [1996] ECHR, 33. see also: *Sadak and Others v. Turkey*, [2001] ECHR, 52, 56; *Juha Nuutinen v. Finland*, [2007] ECHR, 32.



based (*Dallos v. Hungary*, §§ 49- 52; *Sipavičius v. Lithuania*, §§ 30-33; *Zhupnik v. Ukraine*, §§ 39-43; *I.H. and Others v. Austria*, §§ 36-38; *Juha Nuutinen v. Finland*, § 33).<sup>15</sup>

### **Possibility of Deviation of Accusation in Accordance With the Criminal Procedure Code**

Timely and fair trial of a case is ensured in accordance with the first paragraph of Article 31 of the Constitution of Georgia. The right to a fair trial gives a person the opportunity to go to court for effective protection of their rights.<sup>16</sup> Correspondingly, the parties have the right to submit assignment and complaints and to formulate their requirements.<sup>17</sup> Stable and fair legislation is a serious guarantee of the protection of rights declared in the constitution.<sup>18</sup> In the Criminal Procedure Code of Georgia, there is no provision allowing the court to combine the functions of prosecution and defense. Only the prosecutor has a monopoly on the prosecution. The function of the prosecutor is to press charges against the person who committed the crime and conduct investigative actions to confirm the charges.<sup>19</sup> Consequently, the prosecutor establishes the extent of the charges and the scope of the actions that must be taken in court to consider the case on its merits. However, according to some lawyers, deviation from the charge does not limit the judge from pronouncing a guilty verdict if such deviation is not significant and does not lose the function of informing and protecting the prosecution<sup>20</sup>. Nevertheless, what constitutes a significant

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<sup>15</sup> *Dallos v. Hungary*, [2001] ECHR, 49-52; *Sipavičius v. Lithuania*, [2002] ECHR, 30-33; *Zhupnik v. Ukraine*, [2005] ECHR, 39-43; *I.H. and Others v. Austria*, [2013] ECHR, 36-38; *Juha Nuutinen v. Finland*, [2007] ECHR, 33. see citation: Supreme Court of Georgia. Right to a fair trial (criminal aspects) – Article 6, 65-66. <[https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/samartliani-sasamartlo-ganxilvis-upleba\(sisxli\).pdf](https://www.supremecourt.ge/uploads/files/1/pdf/adamianis-uflebata-centri/samartliani-sasamartlo-ganxilvis-upleba(sisxli).pdf)> [04.07.2024].

<sup>16</sup> Constitution of Georgia first paragraph of Article 31, Legislative Herald of Georgia, 24/08/1995.

<sup>17</sup> Decision of the Constitutional Court of Georgia dated December 24, 2014 №3/2/577 case of Human Rights Education and Monitoring Center (EMC) (NNLE) and Georgian citizen Vakhushti Menabde against the Parliament of Georgia, II-4.

<sup>18</sup> Decision of the Constitutional Court of Georgia dated April 18, 2002 №1/126,129,158 case of Georgian citizens Bachua Gachechiladze, Vladimir Doborjginidze, Givi Donadze and others against the Parliament of Georgia

<sup>19</sup> *Tumanishvili G.*, Criminal process (review of the general part). Tbilisi, 2014,67

<sup>20</sup> *Maglagelidze L.*, Understanding principle of accusation of immutability according to the practice of the Georgian and European Court of Human Rights. Journal of German-Georgian Criminal Law, 76-79 <<https://www.dgstz.de/storage/documents/pEc1W1kEc5a4XPTs4pJ1ufJPdQr8ws6pCOCUhb6C.pdf>> [04.07.2024].

deviation and what can be considered meaningful is a matter of evaluation and always sparks discussion.

The Code of Criminal Procedure contains no provision allowing the judge, on their own initiative, to decide issues within the competence of the prosecutor. The Constitutional Court of Georgia declared the following in its decision made on September 30, 2016: when the law does not give the judge clear instructions for resolving an issue, and even when a legal norm is established that is contrary to the Constitution, it is the constitutional obligation of a law enforcement officer to follow constitutional norms. If a determination is made contrary to the requirements of the Constitution or by ignoring them, it results in an incorrect interpretation of the law that contradicts the legal order protected by the Constitution. If an unconstitutional norm or a definition incompatible with the Constitution forms the basis for a legal resolution of a disputed issue, such a decision itself contradicts the Constitution. Common courts have the power to interpret the law while enacting justice. The content of general legal norms is determined and developed precisely by resolving specific cases. At the same time, common courts are limited both by the constitutional framework and by the legal framework established by the legislature.<sup>21</sup> The Criminal Procedure Code of Georgia obliges the judge to act only as an arbitrator, not to assume the functions of the parties, and to make decisions based on the evidence presented. While the Code of Criminal Procedure obliges the judge to consider petitions within the limits of their request, it also requires their verdict to be reasonable and based on cumulative evidence excluding reasonable doubt, as examined during the trial (Part 3 of Article 259 of CPCG). This raises the question: if the evidence examined during the trial confirms that the accused committed actions other than those specified in the charge, can the judge, on their own initiative, reclassify the crime from the article specified in the accusation to another article, thereby violating the adversarial principle and equality of arms? According to part 1 of Article 9 of Criminal Procedure Code of Georgia (CPCG), when initiating prosecution, the criminal procedural process is carried out based on the adversarial principle and equality of arms. According to the same code, criminal prosecution begins the moment a person is arrested or found guilty. According to the first part of Article 17 of Criminal Procedure Code of Georgia (CPCG), a person will be charged if there is reasonable suspicion that they have committed a crime, and according to the second part of the same article, charges against a person may only be brought by a prosecutor. The obligation to inform the accused is established by part 1 of Article 38 of

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<sup>21</sup> Decision of the Constitutional Court of Georgia dated September 30, 2016 No. 1/5/675,681 Case of Rustavi2 Broadcasting Company LLC and Georgia Television Company LLC against the Parliament of Georgia



the Criminal Procedure Code of Georgia, which states: “upon detention, or if a person is not detained, immediately upon their recognition as the accused, also before any interrogation, the accused shall be notified, in a language they understand, of the offence defined by the Criminal Code of Georgia for which they are reasonably suspected. The accused shall be handed over a copy of their detention report, or if not detained, - a copy of a decree to prosecute as the accused”.

Part 3 of Article 169 of the same Code directly determines what should be included in the decision on the charge, namely: a) The name, surname, and patronymic, as well as the date of birth and personal number of the accused; b) The formulation of charges - a description of the incriminated action, indicating the location, time, way, means, and instrument used in its commission, as well as its consequences; c) The evidence obtained as a result of the investigation, which is sufficient to establish probable cause that the given crime was committed by the accused.

According to subparagraph (b) of part 3 of Article 169 of CPCG, the wording of the charge is formulated by the prosecutor in the indictment decree, which contains a description of the illegal and guilty action as alleged by the prosecution, including details of its manifestation, location, time, way, means, instrument, and consequences.<sup>22</sup> After being informed of the charges, the accused will know what the state is accusing them of. The purpose of this process is to inform the accused of the essence and grounds of the accusation. To fully achieve this function, it is vital to provide the accused with comprehensive information about the accusation.<sup>23</sup> When commencing a criminal prosecution, it is necessary to determine the scope of the charge and give a correct legal assessment of its implications.<sup>24</sup> The right to receive information about charges is one of the fundamental rights of the defense.<sup>25</sup> Part 1 of Article 260 of CPCG establishes the issues to be resolved by the court when rendering a judgment, one of which is “whether the accused has committed an action defined in the criminal law.” In accordance with this article, the court is obliged to determine whether the accused has committed a crime under the criminal law. This article states that a judge

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<sup>22</sup>Decision №230AP-13 of the Criminal Chamber of the Supreme Court of Georgia dated June 24, 2014.

<sup>23</sup> *Tumanishvili G.*, Accusation and deviation during consideration of a criminal case on the merits, *Journal of Law*, # 1, 2016, 278.

<sup>24</sup>*Fafiashvili L., Tumanishvili G, Akubardia I, Gogniashvili N, Ivanidze M.* Criminal procedural law of Georgia, Tbilisi, 2017, 81.

<sup>25</sup> *Akubardia I.*, Some aspects of the Georgian model of competitiveness, *German-Georgian Journal of Criminal Law*, 11-14. <<https://www.dgstz.de/storage/documents/xANipn7d9monSqwAEtyMTmrGNSVfCx6JSjFQHnRW.pdf>> [25.07.2024].

must generally determine whether a person has committed a crime, rather than specifically determine the act with which the person is accused. However, this does not grant the judge unlimited power to reclassify an act to a charge not originally brought against the accused. In such cases, the judge must consider the fundamental principles of the criminal procedure code.

An analysis of the norms of the criminal procedure code indicates that the Criminal Procedure Code does not directly allow the judge to assume the powers of the prosecutor and qualitatively reclassify the charge under a different article. However, based on the Constitution of Georgia and international acts, the judge has the right to reclassify one action committed by the accused into another act. Nonetheless, the function of the arbitrator must not be overlooked. The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to ensure simplicity in procedure.<sup>26</sup> The right to be informed of the accusation is such a fundamental part of criminal process that states are obliged to protect it.<sup>27</sup>

In the case of “United States v. Cruikshank”, the court elucidated that the defendant has a constitutional right to be informed of the charges against them.<sup>28</sup> The U.S. Supreme Court, “in *Russell v. United States*”, explained that the indictment must set forth in detail the elements of the offense committed.<sup>29</sup> In *United States v. Hess*, the U.S. Supreme Court stated: “Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied by a statement of the facts and circumstances sufficient to inform the accused of the specific offense, coming under the general description, with which [they] are charged.”<sup>30</sup> In *Hamling v. United States*, the U.S. Supreme Court explained: “An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which [they] must defend, and, second, enables [them] to plead an acquittal or conviction in bar of future prosecutions for the same offense.”<sup>31</sup> New Zealand’s Criminal Procedure Act 2011, Article 133, regulates the amendment of

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<sup>26</sup> *United States v. Debrow* (1953), 346 U.S. 374, 376, 74 S. Ct. 113, 115, 98 L. Ed. 92, 96 (headnote 3), citing Rule 2, Federal Rules of Criminal Procedure.

<sup>27</sup> *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); also see: *Rabe v. Washington*, 405 U.S. 313 (1972).

<sup>28</sup> *United States v. Cruikshank*, 92 U.S. 542, 544, 558 (1876);

<sup>29</sup> U.S. Supreme Court decision in *Russell v. United States*, 369 U.S. 749 (1962) <https://supreme.justia.com/cases/federal/us/369/749/> (346 U.S. at 346 U. S. 376-378);

<sup>30</sup> *United States v. Hess* (1888), 124 U.S. 483, 487, 8 S. Ct. 571, 31 L. Ed. 516, 518.

<sup>31</sup> *Hamling v. United States* (1974), 418 U.S. 87, 117, 94 S. Ct. 2887, 2907, 41 L. Ed. 2d 590, 620[25],

charges. Under this provision, a charge may be amended by the court at any stage before the verdict or decision is delivered, either on the court's own motion or upon application by the prosecutor or the defendant.<sup>32</sup> Article 134, 136, and 136A provides procedure for amending or adding charges before and during trial while ensuring that the defendant is not misled or prejudiced in their defense.<sup>33</sup>

### **Analysis of Georgian Judicial Practice When Examining the Issue of Deviation From Charges**

According to the practice established by the Supreme Court of Georgia, the classification of an act can be changed both by the court of first instance and by the court of appeal. However, when the qualification is changed, the reclassification must be applied to a qualitatively similar crime and not to a completely different offense. The practice includes the decision of the Chamber of Criminal Cases of the Supreme Court of Georgia dated June 12, 2015, №2k-7ap.-15. However, some lawyers do not share this decision of the Supreme Court and believe that the court should have completely acquitted the person.<sup>34</sup> The Cassation Chamber discussed the correctness of the qualifications established in the decision of June 12, 2015, №2k-7ap.-15, by the judgment of the Gori District Court and the Court of Appeal.

According to the decision of the Gori District Court dated January 31, 2014, the object was found guilty under subparagraph (a) of Part 2 of Article 178 of the Criminal Procedure Code of Georgia. Based on the decision of the Chamber for Criminal Cases of Tbilisi Court of Appeal dated November 26, 2014, an amendment was made: the charge regarding the object, initially presented under subparagraph (a) of Part 2 of Article 178 of the Criminal Code of Georgia, was reclassified as Part 1 of Article 154 of the Criminal Code. The Cassation Chamber declared that the appealed judgment, which classified the object's action under part 1 of Article 154 of the Civil Code of Georgia, was incorrect. According to the disposition of this article, obstructing a journalist in their professional activities, such as forcing them

<sup>32</sup> New Zealand Legislation, Criminal Procedure Act 2011, <https://www.legislation.govt.nz/act/public/2011/0081/latest/whole.html#DLM3360222> (17.03.2025).

<sup>33</sup> New Zealand Legislation, Criminal Procedure Act 2011, <https://www.legislation.govt.nz/act/public/2011/0081/latest/whole.html#DLM3360222> (17.03.2025).

<sup>34</sup> Maglagelidze L., Understanding principle of accusation of immutability according to the practice of the Georgian and European Court of Human Rights. Journal of German-Georgian Criminal Law, 76-79 <<https://www.dgstz.de/storage/documents/pEc1W1kEc5a4XPTs4pJ1ufJPdQr8ws6pCOCUhB6C.pdf>> [04.07.2027].

to disseminate information or refrain from disseminating it, is an act prohibited and punishable by criminal law. In accordance with the prosecutor's decree, the object was accused only of stealing a video camera from G.K., an operator LLC "M", worth 4,621 lari, belonging to the television company, on October 1, 2012, apparently for the purpose of misappropriation. The Cassation Chamber considered that "the Appeals Chamber went beyond the scope of the accusation when it discussed the presence of signs of a crime under Article 154 of the Criminal Code in the object's action and qualified its action under this article." The charge does not dispute that the object, by this action, interfered with the journalists' professional duties. Therefore, the Cassation Chamber was deprived of the opportunity to determine whether the object's action contained signs of a crime under Part 1 of Article 154 of the Criminal Code.<sup>35</sup> The Cassation Chamber found that the convicted person took possession of a video camera belonging to G.K. against his will, thereby preventing the victim from carrying out his professional activities, using the video camera, and continuing to film. As a result, the material reflecting the events that took place during the elections could not be shown in a timely manner as a news story. By this action, the object committed an offence under Part 1 of Article 360 (arbitrariness) of the Tax Code of Georgia, as arbitrariness derives from the content of the accused article (due to the circumstances of possession against the owner's will) and does not constitute a qualitatively different composition.<sup>36</sup> The Chamber of Criminal Cases of the Supreme Court of Georgia, by its decision on case №949AP-23 dated March 12, 2024, reclassified the act of an accused from Article 178 of the Criminal Code of Georgia to a crime provided for in part 1<sup>1</sup> of subparagraph (b) of Article 126 of the Criminal Code. It argued that the reclassification of the charge was sufficiently foreseeable for the accused, as the reclassification of the article was an integral element of the charge.<sup>37</sup> The decree in the given case incorporated the qualification of an act under Article 178, which is an offense not just of robbery, but of robbery with such violence that is not dangerous to life and health. Therefore, violence, as a separate act, was one of the constituent elements of the qualification, making it foreseeable for the accused/defense that they would be charged with robbery with violence. This means that violence was a defining feature of the action, making it foreseeable. In this case, the Cassation Chamber considered the

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<sup>35</sup> Decision on case №2k-7ap.-15 of the Criminal Chamber of the Supreme Court of Georgia dated June 12, 2015.

<sup>36</sup> Decision on case №2k-7ap.-15 of the Criminal Chamber of the Supreme Court of Georgia dated June 12, 2015.

<sup>37</sup> The verdict №949AP-23 of the Chamber of Criminal Cases of the Supreme Court of Georgia dated March 12, 2024.

foreseeability of the situation as a necessary element that must be included when the court changes the qualification of the action. Despite the practice established by the Supreme Court, some judges do not share this approach. A vivid example of this is the judgment rendered by the Rustavi City Court. According to the judgment of the Rustavi City Court, the action was reclassified from criminal homicide to unreported offence. The court considered that the examined evidence did not indicate criminal homicide but rather the failure to report an offence. Before the Tbilisi Court of Appeal considers the judgment of appeal of the Rustavi City Court, it must be noted that the mentioned articles are not even qualitatively related, nor do they even touch each other in any way. It was physically impossible for the party to foresee how an article designed to protect human life could be replaced by an article aimed at protecting the normal functioning of investigative and judicial bodies. In accordance with this logic, the defense obtained evidence under Article 376 of the Criminal Code. Referring to the practice of the Supreme Court on deviation from charge and the probability of increasing a person's responsibility, the Supreme Court explains that in such cases, the principle of adversarial proceedings and equality of arms is violated. The court cannot find a person guilty of an action that the prosecution does not dispute, nor can it go beyond the scope of the accusation.<sup>38</sup> In the decision of the Criminal Chamber of the Supreme Court of Georgia dated February 10, 2020, it can be observed that each factual circumstance set out in the decision on the charge must correspond to the elements of the article under which the person was found guilty. A correct assessment of the action is also pivotal in determining the extent of damage. If a charge includes element of a lesser crime that is not independently qualified within the charge, the court should qualify this episode under the appropriate article - without imposing a separate punishment. Otherwise, such episodes would fall under the general qualification as one of the elements of a crime, contributing to the overall illegal result but representing a less serious crime than the one charged. This does not create a necessary precondition for achieving the unlawful purpose. Separate qualification of the act is also pivotal for determining the damage caused, in particular for determining which crime caused the amount of damage. Such an approach to the issue is justified only for the purpose of mitigating the charge and cannot be applied to cases involving more serious crime. The court's argument that if an accusation against a person contains signs of a less severe crime described within a charge without independent qualification, this episode should also be qualified by the court under the appropriate article without imposing a separate punishment, should not be

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<sup>38</sup> Decision №647AP-18 of the Criminal Chamber of the Supreme Court of Georgia dated April 23, 2019.

accepted due to the absence of circumstances provided by Chapter 13 of Criminal Procedure Code of Georgia. Moreover, if an accusation against a person contains signs of a less severe crime described in one charge without independent qualification, the court should not aggravate the person's sentence. Instead a description of the accused actions containing signs of another crime should be provided, but the court should not go beyond the qualifications specified in charge, even if some actions are described in overall charge without independent qualification.

Finally, it should be noted that the above-mentioned practice established by the Supreme Court serves not only as prerequisites for the formal application of the law, which is certainly significant, but also as a prerequisite for the formal application of the law, which is certainly significant, but also as a principle ensuring that the foreseeability of a change in qualifications directly depends on the proportional relationship between proving, obtaining, and objecting to evidence. When the prosecution does not deny the commission of a specific crime or a qualitatively similar crime by the accused, and when the amended qualification is qualitatively far from the charge, the defense does not collect evidence in this direction. Due to the nature of adversarial proceedings, the issue of reclassification gains greater significance concerning the elements of the charge itself, rather than a qualitatively different article.

## **Conclusion**

During the study of the issue, it became apparent that both the European Convention and the legislation of Georgia allow for the possibility of deviation from charges. Notwithstanding this, a pivotal and noteworthy circumstance is that the reclassification of an act should be imposed only when it involves a crime of a less serious, qualitatively similar nature, one where the object of protection is the same as the original charged. Additionally, when the court reclassifies an act into a crime of a less serious but qualitatively similar nature, and this classification does not aggravate the legal situation of the accused but instead mitigates it, it should be regarded as a partial satisfaction of the prosecution's request. It should not be perceived as an interference with the functions of the prosecution or a violation of the adversarial principle and equality of arms. This is particularly relevant at the context of the fact that, after examining the evidence presented by both parties, the court hears closing arguments, during which the prosecution asks the court to find the accused guilty of committing the offense. If the court reclassifies the act as a qualitatively different act under an article of the Criminal Code that protects a different legal interest and involves a distinct claim against the accused, such an action by the court must be recognized as a violation of the adversarial principle and equality of arms.



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