Refusal of an Accused on the Right of Hearing a Case on Merits

ANALYSIS OF LEGISLATION AND PRACTICE OF PLEA BARGAIN

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A Brief Summary

By expressing consent to enter into a plea bargain, an accused refuses to exercise many rights including: the right to remain silent; the right not to incriminate oneself; the right of hearing a case on merits; the burden of prosecution to prove the guilt of the accused; the right of examination and cross-examination of witnesses; the right to obtain supporting evidence; the right to be presumed innocent until proved otherwise by a court decision; the right to appeal the decision of the court on a case considered on merits etc. A plea bargain is an internationally recognized mechanism for a quick and efficient administration of justice, although considering the fact, that the aforementioned requires refusal on number of rights of an accused, the legislation shall determine the mechanism to avoid improper application of the plea bargain and practice should be periodically studied to determine whether simplified justice systems are being used for appropriate purposes.

The application of the plea bargain in Georgia has been the subject of repeated scrutiny and criticism until 2013. Both local and international reports have highlighted serious problems with the plea bargain in Georgia, which has led to heavy appraisals for the judiciary. The problems of the plea bargain were related to weak legislative safeguards and the mass use of the plea bargain for such illegal purposes as: filling the state budget, improperly influencing the accused during the investigation, and so on. In response, there is only a formal and weak controlling role of the judicial authorities against the unlawful use of the plea bargain.

Since 2013, a number of amendments have been made to the legislation and the practice of applying the plea bargain has significantly changed. However, research has shown that positive changes are likely to be largely due to changed political will, as in a number of areas, the amendments did not affect the lack of legislative safeguards.

The limited powers of a judge to impose a sentence less than the minimum sentence prescribed by law or any other sentence without a plea bargain is still valid. In addition, the judge is not able to fully assess the fairness of the punishment provided by the plea bargain, as the prosecution will not provide the court with the necessary information. Even now, judges rarely refuse to prosecution to approve plea bargain or request amendments to it. The aforementioned indicates that the reduced number of penalties

used in plea bargains is not the result of legislative safeguards and the strengthened role of the judge, but at a given moment, the result of the prosecutor's office political will.

The prosecutor's office is still advantageous position compared to the accused: It retains broad discretionary powers – to unilaterally make a decision on plea bargain and determine its conditions – which are not balanced respectively; the Prosecutor's Office does not substantiate the existence of public interest in deciding the issue of plea bargain. After 2014, the legislation specified the criteria for public interest in concluding a plea bargain, but the amendment was not reflected in practice. Consequently, the specification of the issue of public interest by law did not serve the purpose of preventing a disparate approach to the conclusion of plea bargains either. In order to balance the discretionary powers of the prosecutor's office, the courts need to examine comprehensively the voluntariness of the accused to conclude a plea bargain in practice.

Compared to 2014 the number of plea bargains has significantly reduced which presumably was caused by abolishment of a plea bargain model envisaging agreement on the punishment without pleading guilty. The aforementioned legislative amendment created more guarantees for the innocent accused in terms of preventing giving contest to plea bargain. In this regard, it was also important to increase the proof standard by legislation, although the survey shows that the standard of arguing to be applied in practice has different understanding and application both by the prosecution and court which is reflected on the number of plea bargains since it makes possible to convict a person with a lower standard.

Most plea bargains are concluded at hearing cases on merits, which does not contribute to speedy adjudication. Interviews prove that the aforementioned is caused not by the need of the prosecution to obtain evidence, but by delaying negotiation process between the parties.

In conclusion, despite the improved practice of application of plea bargain, there is still a need to increase the relevant legal safeguards, which should contribute not only to manual reduction of the number of the plea bargains, but also to prevention of illegal use of plea bargain mechanism, to conclusion of true plea agreements, to ensure fairness and protect the rights of the accused.

Main Findings

The analysis of the legislation related to plea bargain revealed the following main findings:

- The role of a judge in legislation - to exercise effective control over the lawfulness and fairness of the terms of a plea bargain - is still significantly limited. In particular, a judge may not, without the approval of a plea bargain, impose a sentence less than the minimum limit of the sentence prescribed by the Criminal Code or other sentence;
- The prosecution has no obligation to explain/substantiate a decision to refuse to enter into a plea bargain, which grants it excessive discretion and does not prevent the use of a variety of approaches;
- The legislation does not provide for the obligation to draft a protocol on the offer of a plea bargain, which gives the accused less safeguards of self-defense.
- The legislation does not fully and clearly regulate cases where a judge refuses to approve a plea bargain. It is unclear at what stage the case can be returned to the prosecutor and on what grounds.

Main findings related to the application of plea bargain in practice:

- Certain actors refer to a different approach of the prosecution when concluding a plea bargain, further aggravated by the lack of sufficient legislative safeguards;
- Since 2014, the number of plea bargains has significantly decreased. Nearly 90% of the pre-2014 rate ranges from about 63% to 70% in 2014-2019;
- The policy of prosecutor's office of imposing a sentence on a plea bargain is no longer strict: unlike 2016-2017, cases of imposing exceptionally large fines are not recorded in 2018-2019; in recent years, the amount of penalties transferred to the budget based on plea bargain has decreased dramatically; as a result of the plea bargain, conditional sentences and fines are generally applied to the convicts;
- In order to balance the prosecution's predominant role, a comprehensive study of voluntariness of the accused to enter the plea bargain is necessary. The abovemen-

tioned shall be implemented through review whether the accused had other choice beyond plea bargain, while considering other external factors;

- There is often a plea bargain at the stage of hearing a case on merits, which fails to meet the main purpose of the plea bargain - to provide speedy adjudication;
- There is a high rate of plea bargain in case of serious criminal cases and it exceeds the number of plea bargain used in case of less serious crimes, which raises questions about the adequacy of respective consideration of the public interest by the prosecution when concluding a plea bargain; The number of verdicts in which the judge outlined the public interest in concluding a plea bargain is very low (5%);
- The cases of judges refusing to approve a plea bargain are very few, in addition, the court decisions do not generally discuss the fairness and lawfulness of the sentence, which points to the weakness of proper judicial control over plea bargaining;
- The Prosecutor's Office does not collect and submit information about the property and other personal characteristics of the accused to the court, which makes it difficult for a judge to thoroughly check the fairness of the terms of the plea agreement;
- According to the 6 months' data of 2019, the acquittal rate has increased to 10%, which is a significant improvement compared to the situation before 2014. The aforementioned creates better conditions for the prevention of entering plea bargain by an innocent accused;
- The situation has not improved significantly in terms of use of preventive measures. The courts still use the most severe measures of restraint – detention and bail, which creates a possibility for an accused to agree to a plea bargain in order to avoid a strict restraint measure;
- Court decisions related to plea bargain are often not properly substantiated: the evidences are insufficiently discussed, the problem with the pattern of decisions is revealed, indicating a lack of consideration of the individual circumstances of the case, etc.;
- There is no unified database of statistical information on the use of plea bargains and the statistics are incomplete, making it difficult and/or impossible to conduct an in-depth and comprehensive study of the use of plea bargaining.

Methodology

The goal of the study of the plea bargaining was to identify the cause of the multiplicity of cases completed with the approval of the plea bargain, to identify gaps in the institution of plea bargaining, and to develop specific recommendations for eliminating them through analysis of legislation and study of practice.

Both quantitative and qualitative research methods were used in the survey. The survey used statistical information on the application of the plea bargain, and the qualitative method provided a more in-depth study of the practice and identified potential problems.

The survey uses analysis of legislation, secondary data, and interviewing practitioners (in-depth interviews, focus groups), which has enabled us to gain more detailed information on practical issues from various parties involved in the process. In-depth interviews were conducted with 13 first-instance judges of criminal cases. The focus groups were conducted with 10 lawyers of the Georgian Bar Association, 10 lawyers of the LEPL - Legal Aid Service and 8 prosecutors.

The survey analyzes the recommendations of the Council of Europe on plea bargaining and generally denial of rights, the practice of the European Court and the UN human rights protection instruments and other international documents.

In order to study the practice of plea bargaining, court decisions both on approval of plea bargain and refusal to enter the plea bargain were requested from Tbilisi, Kutaisi, Batumi, Gori, Telavi and Zugdidi City/District Courts on the basis of random sampling. Courts were selected based on their size, workload and territorial jurisdiction. Various statistical data was requested from the Tbilisi and Kutaisi Courts of Appeal. Kutaisi City Court did not provide court decisions on plea bargains[1]. In total, 182 judgements[2] and 9 rulings[3] from 2016 to 2019[4] on refusal to approve the plea bargain, were analyzed.

[1] Letter No. 7184-2 of May 27, 2019 of the Kutaisi City Court.

[2] Tbilisi City Court - 50 judgements; Batumi City Court - 118 judgements; Telavi District Court - 9 judgements; Gori District Court - 5 judgements.

[3] Batumi City Court - 2 rulings; Zugdidi District Court - 6 rulings; Telavi District Court - 1 ruling.

[4] 2016 - 49 judgments; 2017 - 57 judgments; 2018 - 45 judgments; 2019 - 31 judgements.

CHAPTER 1
Application of Plea Bargain in Practice

1.1. Availability of the statistical data on plea bargain application

In order to thoroughly study the state of the accused in the criminal justice system and the state policy regarding application of plea bargaining, the following statistical data should be available: Data on the number of plea bargains; Statistics of plea bargaining by crime category; Statistics of plea bargaining by type of crime; Data on sentences used in plea bargains, by type and severity of sentences; Information on the amount of penalties imposed; Information on the conclusion of a plea bargain according to the stages of consideration of the case; Data on the court's approval of the plea bargain; Statistical information on the grounds for refusing to approve a plea bargain; Other statistics related to the use of the plea bargain.

The survey confirms that statistics on the use of plea bargain in Georgia are incomplete. In addition, collection of this incomplete data is only possible through the collection of information from different agencies. Separate data can only be processed by studying a limited number of court decisions. All of the abovementioned makes it difficult or impossible to research the practice of using the plea bargain in the country.

Especially noteworthy are the institutions that do not process information on use of plea bargain. For example: Tbilisi City Court and Prosecutor's Office of Georgia. Other agencies process the information in an incomplete manner. LEPL – National Bureau of Enforcement under the Ministry of Justice of Georgia did not respond to the request on public information.[5]

[5] Letter of July 15, 2019 FOI07/19-006. As of August 21, 2019, the letter was not answered.

The report of the Prosecutor General of Georgia submitted to the Parliament of Georgia does not include data on use of plea bargain[6]. In addition, the Prosecutor's Office does not process information in case requested according to the rules prescribed by the General Administrative Code of Georgia[7]. It is noteworthy that before the amendments to the Law of Georgia on the Prosecutor's Office establishing the agency as an independent body, the reports submitted by the Chief Prosecutor of Georgia to the Prosecutor's Council contained some important information on the use of plea bargains. Accordingly, it can be concluded that access to information related to the use of plea bargains has been impaired since the reform of the prosecution system.

Only Kutaisi City Court has declined to issue court decisions within the scope of the study. The fact that the problem of access to judicial decisions was not observed at other courts studied within the framework of the survey should be positively assessed.

Since the statistical information needed to evaluate the use of plea bargain in Georgia is incomplete, the statistical information presented in this study is based on various sources, which in some cases creates incomplete picture on issues related to plea bargaining.

[6] Report on the Activities of the Prosecutor's Office of Georgia in 2018 sent to the Parliament of Georgia by letter N13/34567 on 14 May 2019: http://bit.ly/32J21FV

[7] Letter N13/42398 of the Prosecutor's Office of Georgia dated June 12, 2019, in which the Prosecutor's Office reported that the Prosecutor's Office of Georgia did not record the data on plea bargains.

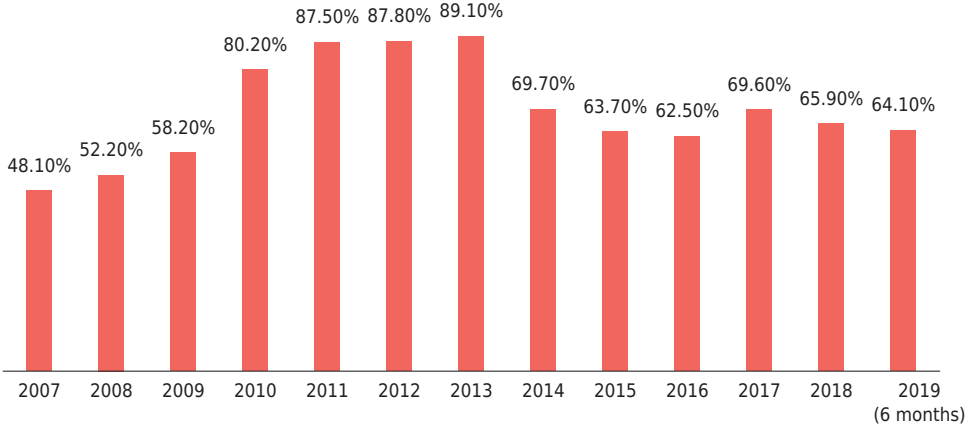
1.2. Statistical data on plea bargain application

1.2.1. General indicator of plea bargain application

According to the statistical data published by the Supreme Court of Georgia[8], the number of cases heard by plea bargain at the first instance courts are following:

DIAGRAM N1

Proceedings under plea bargain in the Courts of First Instance of Georgia



According to the data published by the Supreme Court of Georgia, more detailed information on the cases heard by the first instance courts under plea bargain is as follows:[9]

- In the first three months of 2019, the Courts of first instance proceeded 3241 criminal cases, of which 2067 (63.8%) have been processed under plea bargain.
- In 2018 the Courts of first instance proceeded 14879 criminal cases; of which 14521 ended with judgement and 9573 (65.9%) ended with plea bargain.

[8] Statistics published by the Supreme Court of Georgia are available through the Court's website: http://bit.ly/2Wbok4K

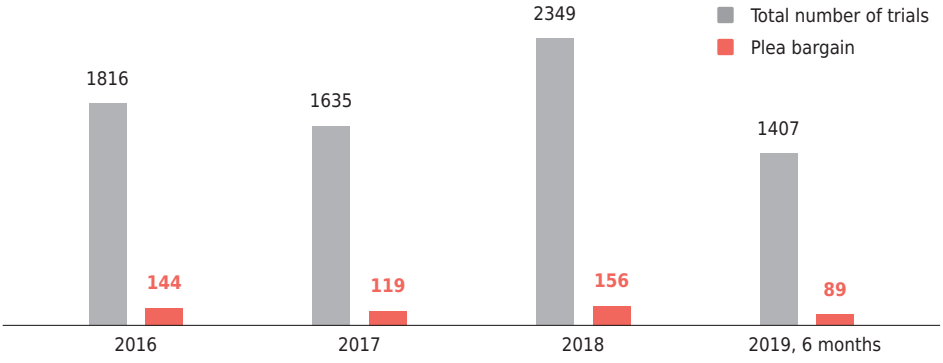
[9] Statistics published by the Supreme Court of Georgia are available through the Court's website: http://bit.ly/2Wbok4K

- In 2017 the Courts of first instance proceeded 13834 criminal cases; of which 13437 ended with judgement, among them 9355 (69.6%) ended with plea bargain.
- In 2016 the Courts of first instance proceeded 14848 criminal cases; of which 14398 ended with judgement, among them 8992 (62.5%) ended with plea bargain.
- In 2015 the Courts of first instance proceeded 13898 criminal cases; of which 13519 ended with judgement, among them 8605 (63.7%) ended with plea bargain.
- In 2014 the Courts of first instance proceeded 15390 criminal cases; of which 15026 ended with judgement, among them 10476 (69.7%) ended with plea bargain.
- In 2013 the Courts of first instance proceeded 13794 criminal cases; of which 13314 ended with judgement, among them 11858 (89.1%) ended with plea bargain.
- In 2012 the Courts of first instance proceeded 9120 criminal cases; of which 8992 ended with judgement, among them 7897 (87.8%) ended with plea bargain.
- In 2011 the Courts of first instance proceeded 14584 criminal cases; of which 14539 ended with judgement, among them 12718 (87.5%) ended with plea bargain.
- In 2010 the Courts of first instance proceeded 16909 criminal cases; of which 16641 ended with judgement, among them 13345 (80.2%) ended with plea bargain.
- In 2009 the Courts of first instance proceeded 15911 criminal cases; of which 15592 ended with judgement, among them 9073 (58.2%) ended with plea bargain.
- In 2008 the Courts of first instance proceeded 17978 criminal cases; of which 17639 ended with judgement, among them 9207 (52.2%) ended with plea bargain.

Statistics of Tbilisi and Kutaisi Courts of Appeal on proceeding under plea bargain is as follows:[10]

DIAGRAM N2

Trials under plea bargain in Tbilisi and Kutaisi Courts of Appeal



1.2.2. Plea bargain application according to crime category

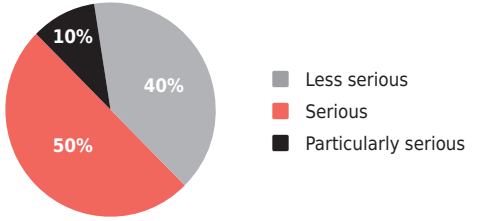
According to the court decisions studied within the framework of the survey, the statistics of use of plea bargain by crime categories are as follows:[11]

[10] Letter No. 663-2/10 of Kutaisi Court of Appeal of July 24, 2019; Letter No. 1/5932 of the Tbilisi Court of Appeal of July 25, 2019. The data published on the Supreme Court of Georgia website: http://bit.ly/2Wbok4K was used for the number of cases reviewed by the courts of appeal in 2016, 2017, 2018 and six months of 2019.

[11] The data is processed by random sampling as a result of examination of 182 court decisions rendered by different courts of Georgia in different years, among them 2016 - 49 judgments; 2017 - 57 judgments; 2018 - 45 judgments; 2019 - 31 judgements.

DIAGRAM N3

Plea bargains by crime categories
according to 182 judgements of the first instance courts in 2016-2019



DiagramAccording to the information provided by the Tbilisi Court of Appeals, the court has been processing information on the use of plea bargain according to the categories and types of crime since 2018. Thus according to the data of 2018 and 6 months of 2019 out of 181 plea bargains approved by the Tbilisi Court of Appeals: 31 plea bargains were approved for less serious crimes; 105 – for serious crimes; 45 – particularly serious crimes.[12]

According to the information provided by the Kutaisi Court of Appeals, the court does not collect/systematize detailed information on approved plea bargains.[13]

1.2.3. Plea bargain application according to crime type

According to the court decisions studied within the framework of the survey, the statistics of cases processed by the courts of first instance under plea bargain by crime type are as follows:[14]

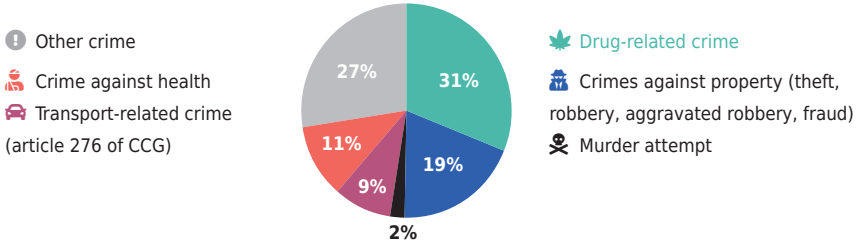
[12] Letter No 1/5932 of the Tbilisi City Court of 25 July 2019.

[13] Letter No 663-2/10 of the Kutaisi Court of Appeal of July 24, 2019.

[14] The data is processed by random sampling as a result of examination of 182 court decisions rendered by different courts of Georgia in different years, among them 2016 - 49 judgments; 2017 - 57 judgments; 2018 - 45 judgments; 2019 - 31 judgements.

DIAGRAM N4

Plea bargains by crime types
according to 182 judgements of the first instance courts in 2016-2019



According to the information provided by the Tbilisi Court of Appeals, the court has been processing information on the use of plea bargain according to the categories and types of crime since 2018. Thus according to the data of 2018 and 6 months of 2019 out of 181 plea bargains approved by the Tbilisi Court of Appeals: 27 plea agreements were approved for crimes against humanity; 83 - economic crimes; 54 - on crimes against public security and order; 11 - crimes against the state; 5 - crimes against the judiciary; 1 - crime against military service.[15]

According to the information provided by the Kutaisi Court of Appeals, the court does not collect/systematize detailed information on approved plea bargains.[16]

1.2.4. Plea bargain conclusion stages

Based on the court decisions studied within the framework of the survey, we have calculated the rate of approval of plea bargains by the courts of first instance according to the stages of hearing. It should be noted that in most cases (104 out of 182 cases) court decisions did not indicate at what stage of the hearing the plea agreement was approved. Based on 78 decisions the following data of plea bargain approval according to the stage of case hearing was indicated:[17]

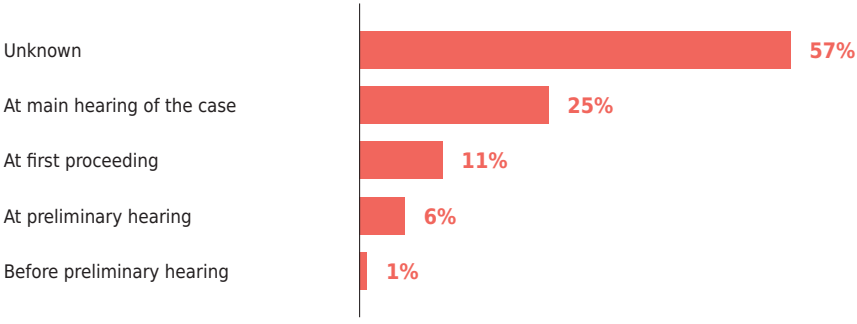
[15] Letter No 1/5932 of the Tbilisi City Court of 25 July 2019.

[16] Letter No. 663-2/10 of Kutaisi Court of Appeal of July 24, 2019.

[17] The data is processed by random sampling as a result of examination of 182 court decisions rendered by different courts of Georgia in different years, among them 2016 - 49 judgments; 2017 - 57 judgments; 2018 - 45 judgments; 2019 - 31 judgements.

DIAGRAM N5

Stages of concluding plea bargains according to 182 judgements of the first instance courts in 2016-2019

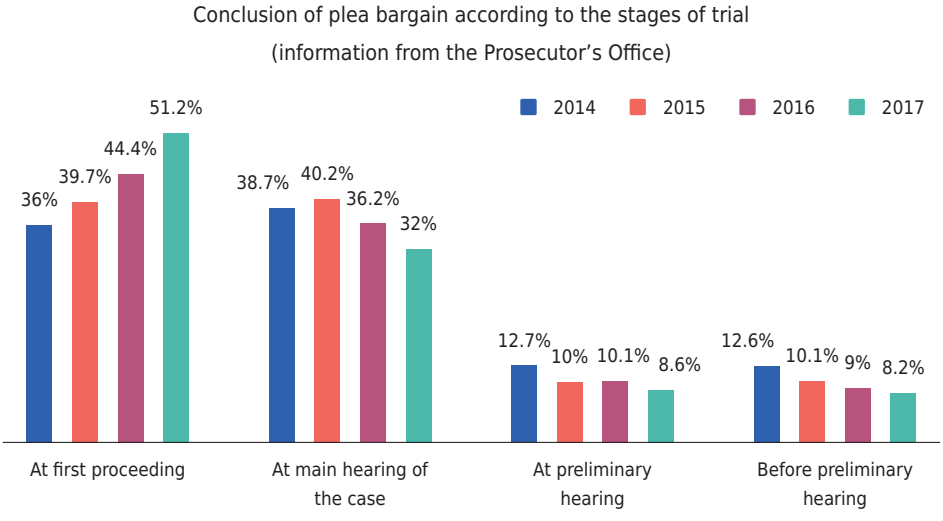


Statistical data on stages of plea bargain conclusion is available in the report of the Prosecutor General of Georgia of February 2018.[18] In response to the request of the data of the abovementioned period and later, the Prosecutor's Office of Georgia informed us that it does not process data on plea bargain.[19]

[18] The website of the Prosecutorial Council of Georgia is available on a total of Four reports from the Chief Prosecutor of Georgia for the Prosecutorial Council are available on the website of the Prosecutorial Council of Georgia: November 27, 2015 - May 30, 2016; November 28, 2016; July 19, 2017; February 6, 2018. Available at: http://bit.ly/366FaGH

[19] Reciprocal letter of the Prosecutor's Office of Georgia No 13/42398 of June 12, 2019 following public information request by the Institute for Development of Freedom of Information on: "Statistics on concluding plea bargain according criminal investigation and proceeding stages (first proceeding, preliminary hearing, from first proceeding to preliminary hearing, main hearing of the case) in 2016, 2017, 2018 and first quarter of 2019 separately".

DIAGRAM N6



The analysis of the data for 2014-2017 shows that the plea bargain is mainly concluded at the first filing session, when the issue of preventive measures for the accused should be decided. The rate of conclusion of plea bargain at the stage of hearing the case on merits is also high.

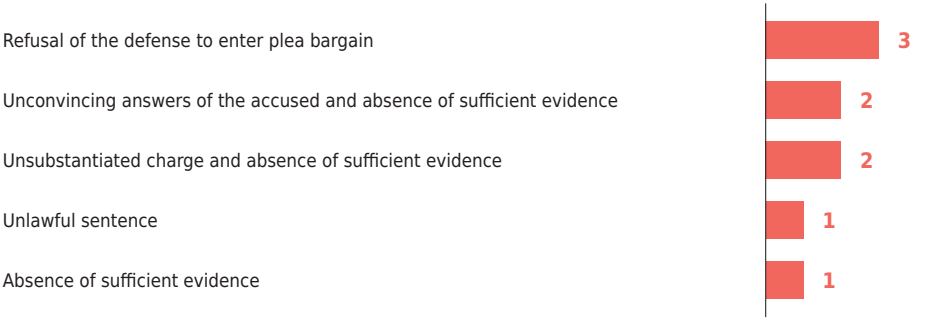
The situation is not substantially changed in 2018 and 2019. Results of the interviews with the judges prove that the rate of conclusion of plea bargains at the stage of hearing the case on merits is still high. Although accurate statistics are not available for the period, judges interviewed give approximate figures: 30-40% of the plea bargains out of cases proceeded under plea bargain are concluded at the stage of hearing the case on merits. Some judges point out that plea bargain today is not a mechanism for the speedy and simplified adjudication.

1.2.5. Refusal on approval of plea bargain

According to the court decisions studies within the framework of the survey, the following indicator was revealed on the grounds of refusal on approval of plea bargain by the courts of the first instance.[20]

DIAGRAM N7

Refusal to enter plea bargain according to judgements of the first instance courts in 2016-2019



Information on refusal on approval of plea bargain was requested from Tbilisi City Court and Tbilisi Court of Appeals, Kutaisi City Court and Kutaisi Court of Appeals Batumi City Curt, Telavi District Court, Zugdidi District Court and Gori District Court. Only two courts, Kutaisi City Court and Telavi District Court, out of abovementioned units provided information on refusal to approve plea bargain.

[20] The data is processed by random sampling, as a result of examination of decisions on approval or rejection of plea bargains by different courts of Georgia in different years. Courts have provided 191 decisions in total, 182 of which relate to the approval, and 9 – to rejection of the plea bargain.

According to the information provided by the Kutaisi City Court, as of May 27, 2019, the Kutaisi City Court has not decided to reject the plea bargain. The same court approved the plea agreements with the amended conditions: In 2016 - 37; in 2017 - 8, in 2018 and 2019 no plea bargain with changed conditions was approved.[21]

According to the information provided by the Telavi District Court, out of the 1129 case hearings in 2014-2019, 107 plea bargains were approved with amended conditions, and 7 were not approved.[22]

The Batumi City Court provided incomplete information on the refusal to approve plea bargains in various years, which does not allow analysis of the data. For example, according to the data: in 2013 – the court did not approve 2 plea bargains out of 723 cases; in 2015 the court did not approve 1 case out of 795; in 2016 – in 1 case out of 732 the plea bargain was not approved. Batumi City Court did not provide the same data for 2017-2019.[23]

According to a letter from the Tbilisi City Court, statistics on the use of plea bargaining are not recorded and processed in court.[24]

As for the data of the courts of appeals, according to the information provided by the Kutaisi Court of Appeals, in 2016 the court approved 3 plea bargains with amended conditions out of 40; in 2017 3 plea bargains out of 35; in 2018 – 7 plea bargains out of 41; in 6 months of 2019 – 1 plea bargain out of 23.[25] Tbilisi Court of Appeals did not provide the abovementioned data.[26]

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[21] Letter No 7184-2 of May 27, 2019 of the Kutaisi City Court.

[22] Letter No 328 of May 27, 2019 of the Telavi District Court.

[23] Letter No 618 of May 31, 2019 of the Batumi City Court.

[24] Letter No 1-01135/13591 of May 27, 2019 of the Tbilisi City Court.

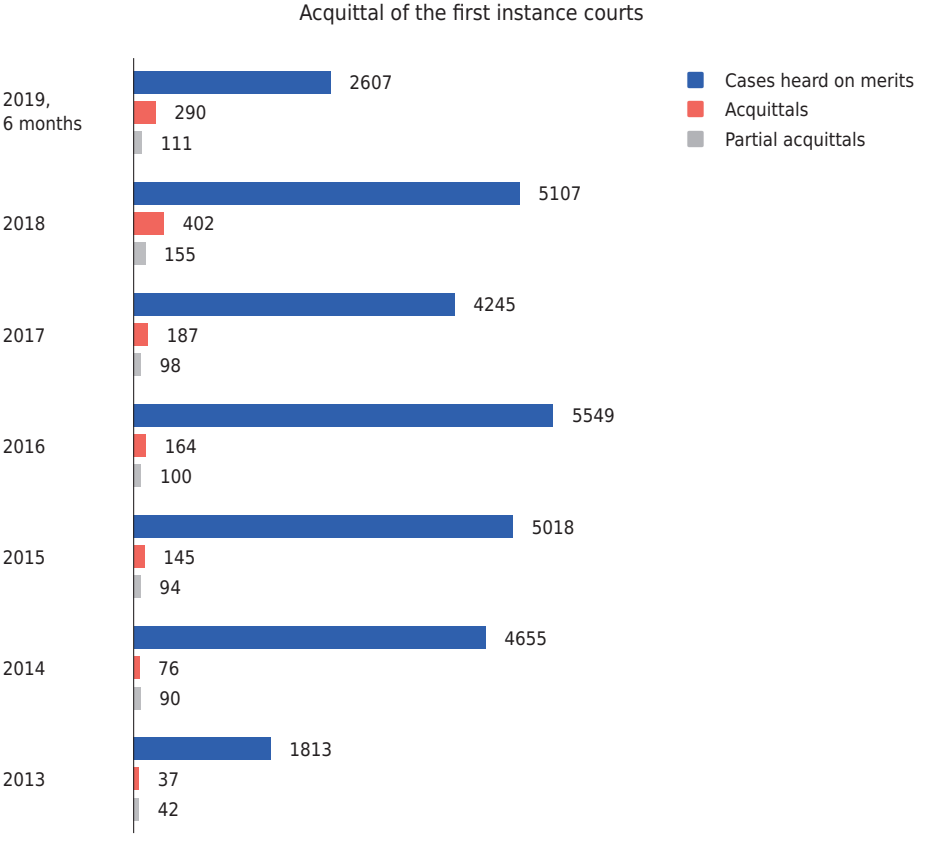
[25] Letter No. 663-2/10 of Kutaisi Court of Appeal of July 24, 2019.

[26] Letter No 1/5932 of the Tbilisi City Court of 25 July 2019.

1.2.6. Statistics of acquittals

According to the statistical data published by the Supreme Court[27], the rate of acquittals is as follows:

DIAGRAM N8

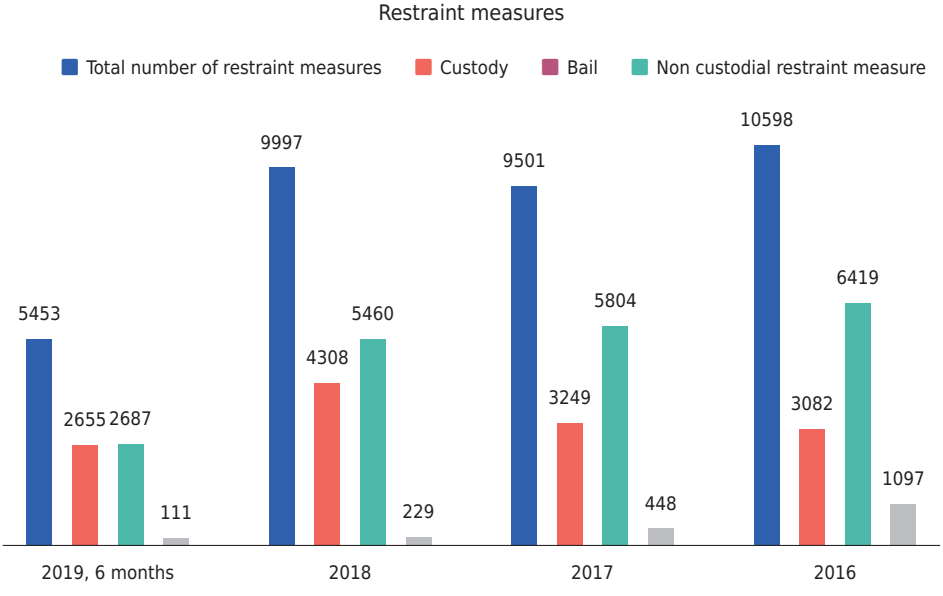


[27] Data published on the website of the Supreme Court of Georgia: http://bit.ly/2Wbok4K

1.2.7. Statistics of the restraint measures applied

According to the data published by the Supreme Court of Georgia, data on restraint measures applied by courts are as follows:

DIAGRAM N9



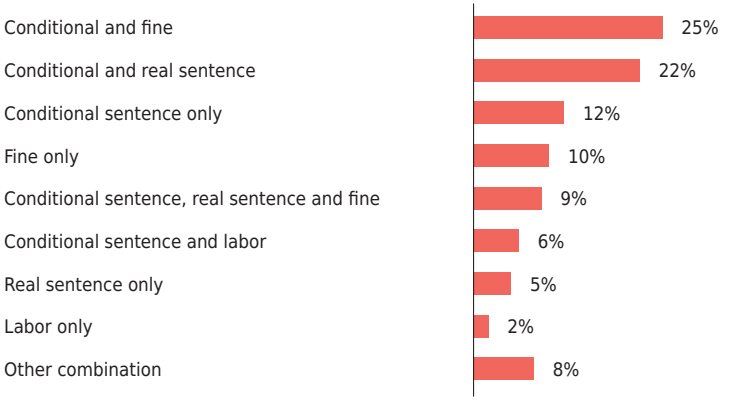
1.2.8. Sentences envisaged by plea bargain

The following sentences were used in 2016-2019, out of 182 judgements on approval of plea bargain against 204 accused:[28]

[28] When processing the statistics of the sentences used, the types and amounts of sentences specified in that particular plea bargain were taken into account, not the amount of sentences ultimately determined against the convicts in the past.

DIAGRAM N10

Sentences imposed under plea bargain according to court judgements in 2016-2019



Of the 204 accused, 154 (75%) were sentenced to conditional sentence independently or in combination with other sentences. The actual sentence was imposed only on 83 (41%) of the convicts independently or together with other sentences.

As for the use of penalties, according to the decisions studied from 2016 to 2019, 105 (51%) of the accused were sentenced to penalty, either independently or with other sentences, as basic or additional punishment. The amount of the fine imposed during this period amounted to 488 500 GEL and the average amount of the fine was 4652 GEL.

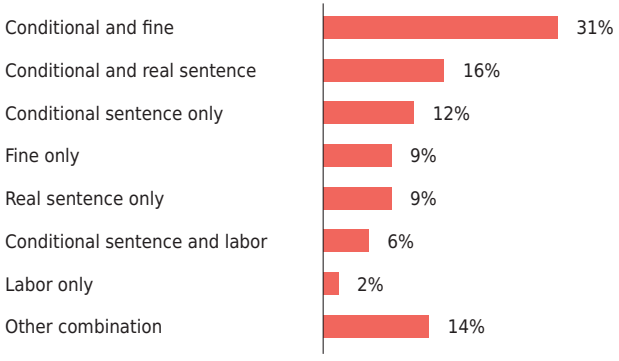
In 2018-2019 in 47 (55%) cases out of 86 plea bargains with accused penalty was used as a measure of punishment. The fine imposed during this period amounted to 138,000 GEL and the average penalty amounted to 2936 GEL. The abovementioned is much lower than the data of 2016-2017, during which the average amount of the fine imposed by the plea bargain was 6043 GEL.

In addition, in 2016-2017 the minimum amount of fine was 500 GEL and the maximum was 30,000 GEL. In 2018-2019, the minimum fine was 1000 and the maximum was 10 000 GEL.

The percentage of sentences used in 2018-2019 is as follows:

DIAGRAM N11

Sentences imposed under plea bargain according to court judgements in 2018-2019



Data on the use of penalties in plea bargains for 2014-2017 are provided in the report of the Chief Prosecutor of Georgia.[29] According to the Prosecutor General's report, the rate of use of fines in plea bargains is as follows:

DIAGRAM N12

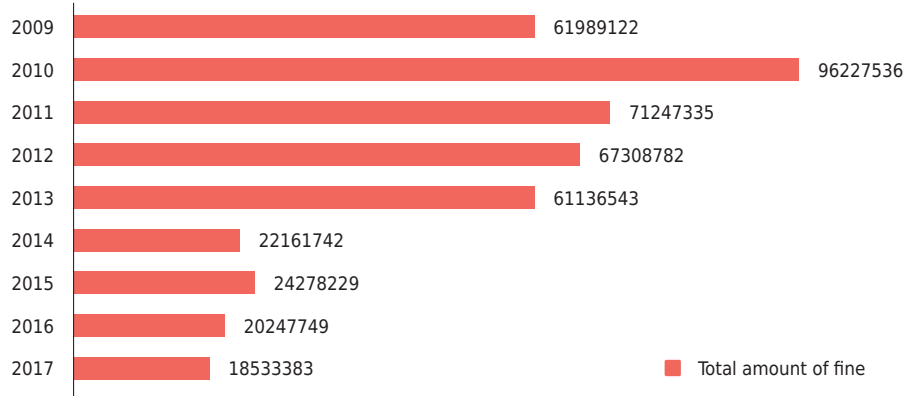
Fines imposed under plea bargain in 2014-2017 according to the report of the Prosecutor's Office

[29] Report of the Chief Prosecutor of Georgia, February 2018, p. 17. Available at: http://bit.ly/2Wc4oyt

According to the report of the Prosecutor General of Georgia,[30] total amounts of penalties transferred to the budget under the plea bargain for 2009-2017 are as follows:

DIAGRAM N13

Amount of fine under plea bargain transferred to State budget in 2009-2017 according to the report of the Prosecutor's Office



1.2.9. Data on plea bargain application in some European countries

In order to better analyze the situation in Georgia, it is interesting to review the statistics on the use of plea bargaining in European countries. Statistics are available for part of the European countries only and is related to the number of cases of positive settlement of plea bargaining in these countries in different years.[31] The report of the Parliamentary Assembly of the Council of Europe's Committee on Legal Affairs and Human Rights[32] is based on the aforementioned statistical data, on basis of which a resolution on the need for minimum standards for trial waiver was adopted in 2018.[33]

[30] Report of the Chief Prosecutor of Georgia, February 2018, p. 17. Available at: http://bit.ly/2Wc4oyt

[31] The Disappearing Trial, Fair Trials, page 4.

[32] CoE Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on Deal making in criminal proceedings: the need for minimum standards for trial waiver systems: http://bit.ly/2BDJb7t

[33] CoE Parliamentary Assembly, Resolution 2245 (2018), Deal making in criminal proceedings: the need for minimum standards for trial waiver systems: http://bit.ly/35XUTaZ

It should be noted that in order to compare countries regarding the practice of plea bargain application, there is a need for a comprehensive research of legislation in force regulating plea bargain, practice, policy of criminal justice and other data of each country, which is not the subject of the present survey. Nevertheless, a general overview of the practice of using a plea bargain in certain European countries is provided by the open source data on the criminal situation in the country concerned and cases of conclusion of a plea bargain in the light of this. Review of the data is interesting since the European Council Parliamentary Assembly found problematic the speed of dissemination of plea bargain in criminal justice and frequency of their application based on the data of the European countries, which later became the basis of adoption of a resolution on introduction of plea bargain minimal standard.

Statistics on the use of the plea bargain are presented from the report of the international organization Fair Trial.[34] Annual data on crime of respective year is presented from the website www.numbeo.com, unifying different type of statistical information of countries of the world.

Country	Reporting Period	Plea Bargain %	Crime Data
Poland	2015	43	32.99
Croatia	2014	4.6	28.90
Czech Republic	2014	0.07	33.88
Estonia	2014	64	29.07
Hungary	2014	0.23	37.52
Serbia	2014	4	39.28
Spain	2014	45.7	32.42
Georgia	**2019**	**64.10**	**20.16**

[34] The Disappearing Trials: http://bit.ly/2BFPQOg

The table shows data from European countries in 2014-2015, which decreased over the following years. For example, according to the 2016 report of the Estonian Prosecutor's Office, in 2015 the number of plea bargains in Estonia decreased by half compared to the previous year and amounted to 33%.[35] In 2017, the total number of cases that ended without hearing on merits was 37%.[36] As for Georgia, the rate of plea bargaining in 2019 is much higher than in many European countries in 2014-2015.

1.3. Analysis of court decisions on plea bargain

The analysis of the studied court decisions revealed a number of important trends that illustrate the practical aspects of the use of plea bargains.

1.3.1. Reasonableness of court decisions

The court decision should be reasoned reflecting and assessing the major legal grounds of the outcome.[37] The written judgment of the court serves the purpose of ensuring the parties with the reasonableness, legality and fairness of the decisions taken. Besides, the judge not only notifies the parties but also the public about the outcome of the case with the judgement. General and abstract reasoning, with poor arguments and the facts in conformity with the law, threaten the credibility of such decisions.

The judgements studied give very little account of the actual circumstances of the case and are mainly confined to dry legislative texts. Also, the judgments of different judges the use of identical phrases and sentences is observed, indicating to use of templates. The Court delivers specific conclusions without extensive and lengthy discussion and subsumption. The problematic reasoning of the decision is also partly illustrated by the fact that the use of international instruments has become less frequent. In particular, only 19 (10%) out of the studied judgments referred to international standards. Insufficient reasoning of the evidences in the court judgements indicate the insufficient substantiation discussed in more details below.

[35] Prosecutor's Office of Estonia (2016): http://bit.ly/2p01ote

[36] Activities of the Prosecutor's Office 2018: http://bit.ly/3440PNT

[37] Article 259 of the Criminal Procedure Code of Georgia refers to the criteria of lawfulness, reasonableness and fairness of the judgment.

1.3.2. Proof standard used in court decisions

Interviews with the judges shows a biased approach of the judges to proof standard when making judgement without hearing a case on merits. Although studied court decisions do not allow to confirm or exclude the biased approach, the problem is the fact that the majority of judges neglect the standard of proof in the judgment and do not indicate to the specific evidence upon which judgement on conviction was adopted without hearing the case on the merits. This makes it impossible to conclude with what standard of proof the court was guided in delivering a judgment without hearing the case on merits.

Before rendering a judgement, the judge must make sure that there is sufficient and trustworthy evidence to prove the allegation and if the sentence outlined in the plea bargain is legal and fair.[38]

According to paragraph 11^1 of Article 3 of the Criminal Procedure Code of Georgia sufficient evidence for delivering a judgement of conviction without hearing a case on the merits is necessary to convince an objective person that the accused has committed an offence, taking into account the fact that the accused acknowledges the offence, does not contest the evidence provided by the prosecution and relinquishes the right to have the case heard on merits by a court. Although when considering the plea bargain evidences are not examined orally, it is important for the judge to indicate what fact is supported by specific evidence.

When analyzing the court's decisions, it was found that the judge only lists the evidence presented by the prosecution, in some cases very grossly, making it difficult to assess the standard of proof sufficient to render a judgement without main hearing. There were also several cases where the judge did not specify in the judgement what evidence was considered to substantiate the judgement of conviction. In particular, where the courts refrain from listing in detail the evidence, they indicate that the judge *"read the criminal case materials and heard the explanations of the trial participants, concluding that the evidence gathered in the case and other materials in the case were sufficient to substantiate the charges against the accused."* Sometimes, the judgments

[38] Article 213 of the Criminal Procedure Code of Georgia.

do not at all refer to the standard of proof sufficient to render a judgment without hearing a case on merits, and in 3 cases the judge used the definition and elements of the standard beyond a reasonable doubt in assessing the evidence.

In only one judgement did the judge attempt to evaluate and substantiate the evidence. In one decision, the judge has thoroughly reviewed and evaluated the evidence presented by the prosecution, which is an exemplary case in terms of substantiating the decision made during the approval of the plea bargain.

Eleven of the interviewed judges explain that they followed the standard of beyond a reasonable doubt when examining the legality of the plea bargain. The judges stated that they considered the existence of at least two direct, trustworthy evidence to be sufficient totality of evidences, along with the confession of the accused. One of the judges noted that there had been cases in his practice where the prosecutor's office had provided insufficient evidence to the court, which were not approved by the judge. Such cases occurred when the accused had confessed in the case and the case included the testimony of one victim, but the court did not approve such plea bargains, and therefore the prosecution ceased to apply to the court to approve the plea agreement with such evidence.

One of the judges stated that s/he only approves the plea bargain if there was at least two direct evidence in the case. However, s/he adds that there were cases where several evidence were presented in the case, none of which were direct evidence and, nevertheless, s/he had jointly developed belief of conviction of the accused. According to the explanation of the judge, indirect evidence may also support a judge's belief in the correctness of a accused's confession. According to the same judge, s/he has never in practice refused to approve the plea bargain because of insufficient evidence. However, there have been cases where s/he did not approve the plea bargain because s/he did not agree with the qualification of the crime.

One of the judges explained that the burden of proof for concluding a plea bargain was slightly different from the standard beyond a reasonable doubt. There must be at least one direct evidence, indirect evidence and confession. In addition, the accused/defense should not dispute the evidence. Reliability of the evidence is also important. According to the same judge is the parties do not dispute the evidences and confession is added, then totality of evidences is present.

Another judge explained that there was a case of failure to prove a bargain due to on the lack of evidence, in which the case included only the confession of the accused and the protocol of his investigative experiment. The said judge explains that it is often the case that a plea bargain is concluded with the following totality of evidence: a set of direct evidence, a confession of the accused and indirect evidence.

1.3.3. Assessment of legality and fairness of sentences in the court decisions

Along with checking the existence of sufficient evidence to render judgement without main hearing, the judge determines whether the sentence requested is lawful and fair.[39] Given that a judge does not change the terms of a plea bargain on his own initiative[40], checking the fairness and legality of a sentence is of particular importance, as only the judge is the only neutral subject to assess the circumstances taking into account every condition.

Mainly, judges only generally point out that the sentence stated in the prosecution's motion is lawful and fair, although the reasoning is not supported by the relevant factual circumstances and evidences. Article 53 of the Criminal Code, which determines general rules for the imposition of a sentence, states that the court shall take into account the mitigating and aggravating circumstances of the offender's responsibility when imposing the sentence. In particular, motive and goal of the crime, the unlawful intent demonstrated in the act, the character and degree of the breach of obligations, the modus operandi and unlawful consequence of the act, prior history of the offender, personal and financial circumstances, and conduct of the offender after the offence, in particular, the offender's desire to indemnify the damage and reconcile with the victim. However, in practice, the judgements studied do not include these criteria when imposing the sentence.

[39] Paragraph 3 of Article 213 of the Criminal Procedure Code of Georgia.

[40] Paragraph 6 of Article 213 of the Criminal Procedure Code of Georgia.

Mostly, judicial decisions that deal with the assessment of the fairness and lawfulness of sentence do not involve deliberation in this respect and are confined to the dry reference of legislative enactment. Moreover, in 54 (30%) cases, the judge did not mention the issue of the lawfulness and fairness of the sentence in the judgement. In 31 (17%) cases, the judge only referred to the lawfulness of the sentence and did not discuss it in the context of fairness of the sentence.

In some judgments, in addition to evaluating the sentence as fair and lawful, the judge also stated that s/he took into account aggravating and mitigating circumstances, but did not describe what specific facts were taken into account when considering those circumstances. In some judgments, more reasoning regarding the indicators of fairness and lawfulness of the sentence are presented. In particular, judges sometimes state that the sentence is lawful and fair considering the accused's confession and repentance, marital status, non-conviction, and the absence of aggravating circumstances.

The absolute majority of the sentences, which imply a fine, the solvency of the accused is not discussed. In only one judgment in which the accused was sentenced to pay a fine, the judge indicates that, given the defendant's financial capacity, the sentence stated in the motion is lawful and fair.

It is interesting to note, that plea bargaining with the accused, which depends on the will and initiative of the prosecution, is the only way for the court to impose a sentence less than the minimum sentence prescribed by respective article of the Criminal Code or any other sentence. However, out of 182 judgments, only in 46 (25%) of the cases the possibility envisaged by Article 55 of the Criminal Code was used.

The fact that the evaluation of fairness of the sentence provided for by the plea bargain is incomplete, is confirmed by the results of the qualitative inquiry. Six of the judges interviewed stated that the parties did not provide the court with sufficient information to verify the fairness of the sentence. One of the judges noted that the prosecution never provided information on financial capacity and other personal characteristics; the defense is also passive; it is rare that a lawyer a present personal characteristics to the court. According to the recommendation of the above mentioned judge, the mechanism envisaged for juveniles may be introduced in the Criminal Procedure Code, when the judge receives full information about the accused from the individual evaluation report.

One of the judges explained that the prosecution does not substantiate the particular circumstances under which the sentence is determined, there is no information on that in the case. The judge also notes that s/he nonetheless approves the plea bargain, since upon hearing the case on merits s/he will have to impose a more severe sentence on the accused.

On the question, based on what information/evidence is the fairness of the sentence evaluated, one of the judges responds that s/he concludes about the situation of the accused from the factual circumstances; the financial capacity is assessed according to the statements of the accused/defense, the nature of the action, the personality of the accused, whether it is the first crime committed etc. is taken into consideration.

One of the judges noted that as a rule, some documentations are presented in the case. The prosecution generally substantiates, but never specifically state, why the sentence is determined. The case may provide general information that the accused cooperated in the investigation, general information about the public interest.

Another judge notes that the prosecution uses reasonable amounts of fine; There are cases of a plea bargain without fines; However, according to the same judge, the financial capacity is not clarified and information is not presented to the court.

One of the judges notes that it would be good for the prosecution to justify why it chose a specific sanction. According to the same judge, the accused shall himself/herself state about his/her situation, which could serve as a basis for imposing a lenient sentence. The judge also notes that there are cases where the accused wishes to enter into a plea bargain even in the event of unfair sentencing, saying that s/he is deprived of his income, but that his/her relatives will pay the fine instead. The judge notes that earlier there were fines of 100,000 and 200,000 GEL that was the problem at the time, but now there are minor fines and it would not be appropriate for the accused to refuse to approve the plea bargain even if the court fails to assess the fairness of the sentence because the judge will have to impose a more severe sentence in case of hearing the case on merits.

1.3.4. Judicial control over the procedural rights of the accused

When reviewing a plea bargain, along with abovementioned circumstances the judge shall determine whether all of the procedural rights of the accused are protected which they enjoy in case of rendering the judgement without hearing the case on merits.[41] Mostly, the court notes that it received convincing responses from the accused regarding to the circumstances envisaged by the law. It may not be possible for a judge to describe in the judgment how convincing the defendant's answers were, since it is related to the visual observation of the judge and the conduct of the accused. However, interestingly several judgements (16 verdicts in total) describe how the judge was convinced of the reliability of the proceedings, which adds credibility to the court's decision. In particular, the judges indicate, that *"in order to find out whether the accused actually understood the rights, safeguards and conditions listed above, the court was convinced by asking questions to the accused directly. This obligation of the court was not a formal act to define rights and get a consent. The accused responded adequately and convincingly to all questions raised by the court under the Code of Procedure. The court discussed all the important issues with the participation of a lawyer in an open court session."* Definitions of this type can mainly be found in the decisions made by the Batumi and Tbilisi city courts.

It should be noted that most judges do not pay attention to the role of the victim and his/her participation in the proceedings. Only in 12 (7%) of judgements of the verdicts on plea bargain studied within the framework of the survey did the court examine the topic of consultation of the prosecution with the victim. Also, there are very few decisions assessing/describing what public interest/criteria were considered by the prosecutor to decide entering into a plea bargain with the accused. Only 10 (5%) cases did the judges refer to the public interest. It is noteworthy that all of the above decisions, which refer to the victim's role and public interest, were made by the Tbilisi City Court.

[41] Paragraph 2 and 3 of Article 212 of the Criminal Procedure Code of Georgia.

1.3.5. Analysis of decisions to refuse to approve a plea bargain

The analysis of the decisions to refuse to approve the plea bargain has again shown the significance of the Court's role in reviewing the plea bargain and the guaranteeing protection of the defendant's rights. Despite examining a small part of the judgments, which may not give a complete picture of the practice of the courts, there are some interesting trends in the attitude and approach of judges.

The refusal to approve the plea bargain was based on both the lack of evidence, the lack of substantiation of the charge, and the unconvincing answers of the accused to the questions asked by the judge.

Diagram N7 shows quantitative information on motives for refusing to approve a plea bargain.

In the context of decisions to refuse to approve a plea bargain, the practice behind post-litigation procedures is interesting.

According to paragraph 1 of the Article 213 of Criminal Procedure Code a court may, after reviewing a motion to render a judgement without a main hearing, deliver a decision to render judgement without a main hearing, to return the case to the prosecutor or to hear the case on the merits in accordance with this law. The norm refers to the judge making three types of decisions, but examining the judgments has shown that in case of refusal to approve the plea bargain, sometimes (two cases were observed) judges refer to the extension of the pre-trial hearing, which does not fall into the above-mentioned categories of court decision. Also, in two cases, the judge did not refer to the future prospects of the proceedings at all and did not mention the return of the case to the prosecutor or the continuation of the hearing on merits.

Out of the other five cases, in four events the case was returned to the prosecutor, and in one case, the judge decided to continue hearing the case on merits.

Interestingly, in majority of cases (five cases) the judge did not approve the plea bargain at the first hearing of the defendant, while in the remaining four cases the stage of the case was not identified. Accordingly, the Court's approaches to the further proceeding of the case were analyzed only from the judgements of the first hearing, since

the decision to return the case to the prosecutor or to resume the hearing on merits is, to some extent, influenced by the stage of the proceeding at which the plea bargain is discussed, which was unknown in four cases.

Out of the five plea bargains discussed at the defendant's first hearing, in four cases the case was returned to the prosecutor, and in one case, the pre-trial hearing was resumed by a judge. There was also an occasion where, under the same circumstances, when deciding to reject the plea bargain, the judge returned the case to the prosecutor in one case, and in the other case, the decision was taken to extend the pre-trial hearing. In particular, in two cases at the first hearing of the defendant, the judge did not approve the plea bargain on the ground that the charge was unfounded, the evidence was not substantiated and the motion was in breach of the requirements of procedural law. In one case, however, the judge returned the case to the prosecutor, and in the other, the judge decided to continue the pre-trial hearing.

In part of the decisions (three judgments), the judge notes that the parties were instructed in specifying the terms of the plea.[42]

It is interesting that in one case, at the hearing of the case, the accused once again agreed to a plea bargain with him, though the lawyer stated that the case did not have sufficient evidence to convict his client. Accordingly, his advice was that the accused would refuse to enter into a plea bargain, but the defendant nevertheless consented to the plea bargain. The court did not approve the plea agreement, explaining that the lawyer was also a signatory to all the documents prepared in relation to the plea bargain, so neglecting the will and position of the lawyer could be assessed as a violation of the right to a fair trial. This approach of a judge is correct and grounded, as the lawyer is obliged to act in the best interests of the accused. Therefore, if the accused does not properly understand the charges and the consequences of the plea bargain, the lawyer must defend true and genuine interests of the accused. Accordingly, consideration of a lawyer's position by a judge may be regarded as a decision in favor of the best interests of the accused.

[42] In one case, the judge instructed to change the terms of the sentence and in two cases - to start discussing the qualifications of the charge against the accused.

CHAPTER 2
Review of the Georgian Legislation on Key Aspects of Plea Bargain

2.1. Review of the plea bargain regulating legislation and identified gaps

The institute of plea bargaining has been effective in criminal justice since 2004. The main purpose of the introduction and functioning of this mechanism was to fight corruption and organized crime. In particular, by co-operation with the accused, law enforcement agencies were able to effectively fight crime. In addition, one of the tasks of introduction of the institute was to provide speedy and efficient adjudication.

The initiators of the institute of plea bargain indicated that the plea bargain ensured the establishment of a principle of transitional justice that was successfully applied in the United States and many European countries. According to the authors of the project, criminal proceedings would be simplified for accused who cooperate with the prosecution, admitted the crime and provide investigative authorities with true information and/or evidence of other more serious crime or a crime committed by a person of higher rank, which would contribute to the detection of crime.[43]

[43] Explanatory note on the draft law on the implementation of anti-corruption measures, 2004: https://bit.ly/2Ywv24L

The history of reform and development of plea bargain in criminal justice comprises four main stages:

1. Amendments to the Criminal Procedure Code of February 13, 2004, which established the institute of plea bargain in Georgia;
2. Several legislative amendments made before 2009 that regulated certain issues related to plea bargain;
3. In 2010 a new Criminal Procedure Code was adopted, which did not, however, substantially change the norms of the plea bargain, although some regulations were put in place for the participants. In particular, the victim was deprived of the status of a party, which affected the degree of their participation in the plea bargain process. The victim's right to conclude a plea bargain was limited to the obligation to be notified. The law also required the prosecutor to consult with the victim before concluding a plea bargain;
4. Legislative amendments made in 2014 that removed the possibility of a plea bargain on the sentence, meaning that it was impossible to conclude a plea bargain without pleading guilty. Thus, under the effective Criminal Procedure Code, the basis of a plea bargain is merely an agreement on a charge whereby the accused pleads guilty and agrees to the sentence with the prosecutor.

Given that by a plea bargain the accused waives the constitutional right to prove his innocence in court, in exchange for a reduced sentence, the law must provide appropriate guarantees to ensure that the conviction of an innocent person is minimized.

To ensure transparency of the plea bargaining process and to exert pressure on the accused in any form, the law provides for appropriate safeguards, including:

- The existence of sufficient evidence to reach a verdict without hearing the case on merits;
- Informing the defendant of his/her rights and the legal consequences of the plea bargain;
- Mandatory defense of the accused;
- Obligation to reflect the plea bargaining process in the relevant protocol, etc.

These safeguards were further enhanced by the 2014 legislative amendments, which created greater opportunity to defend the accused, in particular:

- Agreement on sentence as one form of plea bargain has been abolished;
- Issue of the drafting a protocol of plea bargaining was regulated;
- In order to enter into a plea bargain, a set of evidence that is sufficient to render a judgment without a main hearing has been determined;
- An additional ground for appealing a plea bargain was introduced, such as - lack of sufficient evidence to render a judgment without hearing the case on merits;
- An exhaustive list of circumstances to be considered by a prosecutor in a plea bargain has been determined and exemption from punishment of an accused because of torture, threat of torture and degrading or inhuman treatment has been prohibited, etc.

According to Article 209 of the Code of Criminal Procedure, plea bargaining is the basis for a court to adjudicate a case without hearing on merits, where the accused pleads guilty and agrees with the prosecutor on sentence, mitigation or partial removal of charges. Together with these conditions, it is possible for the accused to agree with the prosecutor to collaboration and/or to indemnification of damages.

Prior to the 2014 amendments, the legislation provided for two types of plea bargains - plea bargain on charges or plea bargain on sentence. In case of agreement on the sentence, the accused did not plead guilty, but was required to cooperate with the investigation. In case of plea bargain on charges, the accused pleaded guilty and/or cooperated with the investigation. Thus, pleading guilty was not a necessary precondition for the conclusion of a plea bargain. However, after the amendments to the Criminal Procedure Code, the plea bargain on sentence was abolished, meaning that it was impossible to enter plea bargain without pleading guilty.

Plea bargaining is not limited by crime categories, so it can be applied to all types of crimes. The only exception, where the law requires consideration of the crime nature is specified in the Criminal Procedure Code Article 218 paragraph 8, according to which, accused/convicted persons accused of torture, threat of torture, degrading or inhuman treatment, are prohibited to be fully released from a sentence when entering a plea bargain.

Both the accused/convict and the prosecutor can offer a plea bargain. However, prior written consent of the superior prosecutor is required to enter into a plea agreement. In addition, plea bargaining can be concluded with the accused at any stage of the criminal proceedings. At each stage, the judge will determine the possibility of concluding a plea bargain with the parties.

According to Article 210, paragraph 3 of the Criminal Procedure Code, when requesting a reduction of a sentence, or when making a decision to mitigate or partially remove the charges against the accused, the prosecutor shall take into account the public interest, which he/she shall determine based on the legal priorities of the State, the crime committed and the gravity of the potential sentence, the nature of the crime, the degree of culpability, public danger posed by the accused, personal characteristics, record of conviction, collaboration with the investigation, and the assessment of the conduct of the accused with respect to the indemnification of damages caused as a result of the crime. Until 2014, the prosecutor was in fact free in assessing what the public interest in entering into a plea agreement was. Therefore, the introduction of greater clarity and foresight into the legislation, which thoroughly identified all the circumstances in which a plea bargain could be concluded, could be positively assessed.[44]

The plea agreement with an accused involves several steps:

[44] According to paragraph 3 of Article 210 of the Criminal Procedure Code of Georgia, "When requesting a reduction of a sentence, or when making a decision to mitigate or partially remove the charges against the accused, the prosecutor shall take into account the public interest, which he/she shall determine based on the legal priorities of the State, the crime committed and the gravity of the potential sentence, the nature of the crime, the degree of culpability, public danger posed by the accused, personal characteristics, record of conviction, collaboration with the investigation, and the assessment of the conduct of the accused with respect to the indemnification of damages caused as a result of the crime."

The first stage relates to the initiation of a plea bargain by the prosecution or an offer by the accused/convict to enter into a plea bargain.

It is noteworthy that the accused/convict has the right, without the initiative of the prosecutor, to file a plea bargain to the prosecution. However, the legislation does not provide the official announcement review procedure and possibility for written reasoning of approval or rejection of the claim, where the public prosecutor discuss interest, through which it would or would not be appropriate for the accused/convicted enter a plea bargain. This leaves unanswered the statement of the person who wishes to conclude a plea bargain, which raises doubts about the selective administration of justice.

Three of the judges interviewed point to the prosecutor's biased practice of concluding plea bargains, which they consider problematic. The rest of the judges affirm the prosecution's biased approach to concluding a plea bargain, but note that the individual situation of each case and the accused should be taken into account, which may make it impossible to establish uniform practice in the prosecutor's decision to enter a plea agreement. In contrast, judges who consider biased practice to be problematic take into account the individual situation of the case and the accused and consider that the biased practice of concluding plea bargaining is problematic. According to one judge, "the approach to plea bargaining may not be uniform in all cases, but there must be some logic."

Attorneys also point to a variety of approaches to concluding a plea bargain. They note that "on the basis of a lawyer's appeal the prosecution does not substantiate why it refuses to enter into a plea bargain. As a rule, the prosecution's response only indicates that the prosecution at this stage does not consider it appropriate to conclude a plea bargain, while there have been facts of concluding a plea bargain with prosecution for more severe cases. One lawyer notes that "some lawyers have more opportunities to negotiate with the prosecution. Therefore, it is very important for the judge's involvement to increase in terms of determination of the sentence. There are risks of corruption and nepotism and the abovementioned is necessary to neutralize it. The lawyer should not need to beg the prosecutor about the conditions, I will explain to the judge and justify and s/he will decide the fairness of the conditions." Another lawyer also notes that "the prosecution does not determine the terms and conditions of the plea bargain on an individual basis."

On the contrary, prosecutors argue that the hierarchical system of decision making on plea bargaining, which exists in the prosecution, is intended to ensure a uniform approach to plea bargaining. This is why prosecutors explain the need to maintain this hierarchical system, even though most judges and lawyers cite one of the reasons for delaying the plea bargaining process as the hierarchical decision-making system.

According to common practice, in the case a plea bargain is initiated by the prosecution, the prosecutor drafts a plea bargain offer protocol, by means of which the accused is warned about the consequences of a plea bargain and is told that if a plea bargain is entered into, the court will decide on conviction without directly and orally examining the evidence and the accused will not be exempt from civil or other liability. The accused will also be explained to the type and amount of punishment expected to be sentenced in the case of plea bargaining. A plea bargaining protocol is not an instrument strictly regulated by law, so drafting the document largely depends on the individual decision of the prosecutor.

The interviews with lawyers' revealed that the problem is the unequal opportunities for the accused/defense compared to prosecution to negotiate the terms of the plea bargain, indicating that the terms of the plea agreement are often determined by the prosecution individually rather than by negotiating with the defense. According to one lawyer, "During the negotiation process we have no problem with getting involved in the case, there is no problem of engagement and having access to the case materials, but it is often the case that the prosecutor has set up conditions and formally solicits a lawyer. [Prosecutor] tells the accused that if you agree with this condition, I will appoint a lawyer, if you do not, you will not sign a plea agreement. In such cases, upon engagement of a lawyer, s/he [lawyers] has rarely, but ever, been able to make the prosecution change the terms of the agreement." In order to provide the court with sufficient information on the negotiation process between the parties, it would be advisable to introduce a plea agreement term suggestion protocol through legislation and practice.

Regardless of who initiates the plea bargain, it is important to have a documented consent of the accused, which is a written application in investigative and judicial practice. The application, signed by the defendant and his/her lawyer, should indicate that the defendant agrees to enter plea bargain, plead guilty, s/he received qualified legal assistance, and the defendant understands the expected legal consequences of the plea

agreement.[45] According to Article 211 paragraph 2 of the Criminal Procedure Code, the said written statement must be attached to the prosecutor's motion.

The legislation provides for a mandatory form of written communication between the accused and the prosecutor, which is drafted as a protocol to the plea bargain.

The protocol of the plea bargain should include the process of negotiation between the accused and the prosecutor from the moment the plea agreement is offered to preparation of the motion on rendering a judgement by the court on hearing the case on merits.

The protocol of the plea bargain should reflect the negotiation process and should be fully and timely available to the defense. Accordingly, the protocol of the plea agreement will be provided to the accused and lawyer. They have the right to comment on the protocol of the plea bargain which is attached to the protocol.

The purpose of the documentation of the negotiation process for concluding a plea bargain is to make clear to the court later the actions that preceded the plea bargain.

After the parties have agreed to a plea bargain, the prosecutor shall file a written motion for the court to render the judgement without main hearing of the case.

The judge shall consider the prosecutor's motion according to the place of investigation or the territorial unit where the first hearing of the accused was held.

As a result of documenting the offer of plea bargain and the plea bargain protocol, the judge has some idea of the true will of the accused. The preparation of such documents minimizes the likelihood that the accused will be deceived by the prosecutor or that he or she will not enjoy the right to appropriate defense. In the event that the context of the offer and negotiation of the agreement is not in accordance with the text of the plea bargain submitted to the court, the question arises as to whether the said agreement corresponds to the true will of the accused. Thus, if the negotiation process and the outcome differs from the final text of the plea bargain, that is, the motion to conclude a plea bargain contradicts the negotiation protocol, the judge must find out the reason

[45] Comments to the Criminal Procedure Code of Georgia, as of October 1, 2015, c. Edited by G. Giorgadze, 2015, 635.

for the discrepancy. The burden of proving that the accused is not deceived lies with the prosecutor. The 2011 ruling of the Supreme Court of the United States on Missouri v. Frye suggested that the prosecutor and the court should take certain actions that would help the defendant avoid a less favorable terms and conditions of a plea bargain.[46] With the goal the formal offer's processing should be documented according to the authors, which will prevent further misunderstandings and falsifications and give the accused an opportunity to respond to the plea bargain.

Finally, the Court, after examining the relevant circumstances, makes one of the following decisions:

- To render a judgment without hearing the case on merits, if the plea agreement reached between the parties is approved, indicating that the judge considers the evidence presented to convict the accused sufficient and assesses lawfully and fairly the terms and conditions of the plea bargain;
- To return the case to the prosecutor. The judge makes this decision when there is insufficient evidence to render a judgement without hearing the case on merits or finds that the prosecutor's motion is in breach of the requirements of law of Criminal Procedure Code. The judge is entitled to make such a decision at any stage of the proceedings. However, if the judge does not approve the plea bargain, due to the severity of the sentence, the return of the case to the prosecutor depends on the stage at which the motion to render the judgement without main hearing was submitted. If the case was heard at a pre-trial hearing, if the plea bargain is rejected on the grounds of severity of sentence, the case is returned to the prosecutor. And, if the topic was raised at the hearing of the case on merits, the case is not returned to the prosecutor, the judge proceeds the main hearing of the case and renders judgement of conviction or acquittal.[47] Before returning the case to the prosecutor, the court proposes that the parties, during the judicial review of the motion, to amend the terms and conditions of the plea bargain, which must be agreed with the superior prosecutor. If the court does not find the amended terms of the plea bargain acceptable, it will return the case to the prosecutor.

[46] http://bit.ly/2PfksOF

[47] Comments to the Criminal Procedure Code of Georgia, as of October 1, 2015, c. Edited by G. Giorgadze, 2015, 643-644.

- To hear the case on merits. The judge makes such a decision when the plea bargain is discussed at a main hearing and the court refuses to approve it, citing the severity of the sentence.[48]

If the judge finds that the evidence presented is not sufficient to for conviction, returning the case to the prosecutor means giving the prosecution an additional chance. Besides, the legislation does not specify whether additional evidence will be obtained and a new motion filed after returning the case the prosecutor. Legislation has left unanswered questions about the process and terms of the proceedings after the case is returned to the prosecutor.

It should also be borne in mind that due to insufficient evidence, the case may be returned to a prosecutor at any stage of the proceedings. If a plea bargain is heard at a pre-trial or main hearing, then the evidence is already exchanged between the parties, so the parties are bound by evidence that they have mutually exchanged in accordance with the law. In the case of a return of a plea bargain to a prosecutor, with a few exceptions, it is not possible to obtain and submit additional evidence in the case. Thus, at this stage, the purpose of returning the plea bargain to the prosecutor is quite unclear and questions arise as to its practical purpose and feasibility. In such a case, hearing the case on merits is also illogical, since if the court finds that there is insufficient evidence under the relevant standard which equals a standard beyond a reasonable doubt, it is advisable to terminate the prosecution. Whereas, when the court refuses to approve the plea bargain, citing insufficient evidence at the stage of hearing the case on merits, the judge may, instead of returning the case to the prosecutor, refuse to approve the motion and render an acquittal.[49]

[48] Comments to the Criminal Procedure Code of Georgia, as of October 1, 2015, c. Edited by G. Giorgadze, 2015, 643-644.

[49] Application of the Plea Bargain in Georgia, Coalition for an Independent and Transparent Judiciary, 2013, 7-9.

Review of public information and court decisions revealed that courts generally rarely refuse the prosecution to approve a plea agreement. In cases where the courts refuse to approve a plea bargain to the prosecution, the grounds for refusal vary and the number of cases where the court does not approve the plea bargain due to insufficient evidence are even fewer. For example, in 2013-2019 Kutaisi City Court has never refused to approve a plea agreement[50] and out of the 9 judgments studied, the court did not approve only 3 plea bargains because of insufficient evidence.

The results of the interviews with judges show that there is a biased understanding of the standard of proof for both the court and the prosecutor's office. Also, some of the judges interviewed cited cases where the prosecution's motion to approve the plea bargain was insufficiently supported by evidence. Accordingly, information obtained from various sources indicates that there is a problem of lack of evidence in practice.[51]

Another exception, when the case can be handed to the prosecutor is referred to in the Criminal Procedure Code, Article 213, paragraph 5, according to which, If a prosecutor's motion for rendering judgement without a main hearing is reviewed before a preliminary hearing and the court considers that a plea bargain has been entered into as a result of torture, inhuman or degrading treatment or other violence, threats, deception or any other illegal promise, it shall transfer the case to a superior prosecutor. The superior prosecutor shall task another prosecutor with the conduct of prosecutorial activities.

The defendant may at any time refuse to enter into a plea bargain before rendering a judgment without hearing the case on merits.

[50] Letter No. 7184-2 of May 27, 2019 of the Kutaisi City Court.

[51] For more details on the question of the sufficiency of evidence, see section 1.3.2. below. Analysis of the Georgian legislation on the sufficiency of the evidence is presented on page 40.

Finally, if a judge approves the plea bargain, the judgment will be effective immediately upon announcement, with special rules and conditions laid down by law for appeal. In particular, according to paragraph 3 of Article 215 the Criminal Procedure Code, a convict shall have the right to appeal a plea bargain within 15 days of the judgment being given if:

- *the plea bargain has been entered into by coercion, threat, violence, intimidation or deception;*
- *the right of defense of the accused has been restricted;*
- *the plea bargain has been entered into in such a way that there was insufficient evidence;*
- *if the court hearing the case has ignored the substantial requirements provided for by the Criminal Procedure Code.*

The prosecution also enjoys the right to appeal the plea bargain. If the convict violates the terms and conditions of the plea bargain, the prosecutor is entitled to file a complaint to a higher court within one month of the violation being revealed.

2.2. The role of the judge in concluding a plea bargain

The judge has a crucial role in the process of approving the plea bargain. It is true that, according to the Criminal Procedure Code, the role of a judge in concluding a plea bargain is limited, but whether the bargain reached between the parties will ultimately be approved depends on the judge's decision. However, before making a decision, the judge will find out:

- *whether the accused has exercised the rights and safeguards provided by law;*
- *whether the charge is substantiated, whether there is sufficient evidence;*
- *whether the sentence specified in the motion of the prosecutor fair and lawful.*

The judge examines these issues using various mechanisms.

Whether the accused has exercised the rights and safeguards provided by law - clarifying this is an important safeguards for the accused to report to a neutral judge if any of his or her rights were violated.

According to paragraph 2 of Article 212 of the Criminal Procedure Code the court shall be obliged, before approving a plea bargain, to make sure that:

- the plea bargain has been entered into without torture, inhuman or degrading treatment or other violence, threat, deception or any unlawful promise;
- the plea bargain has been entered into voluntarily and the accused voluntarily pleads guilty;
- the accused is fully aware of the legal consequences of the plea bargain, including the legal consequences of conviction;
- the accused had the opportunity to receive qualified legal aid;
- the accused is fully aware of the nature of the offence of which he/she is accused;
- the accused is fully aware of the sentence foreseen for the crime to which he/she pleads guilty;
- the accused is aware of all the statutory requirements and plea bargain requirements with respect to a guilty plea;
- the accused is aware that if the court does not approve the plea bargain, any information provided by him/her to the court during the review of plea bargain may not be used against him/her in the future;
- the accused is aware that he/she has the right to: a defense; reject a plea bargain; have the case heard on the merits by the court;
- the accused agrees with the factual grounds of the plea bargain with respect to the guilty plea;
- the plea bargain contains all the conditions of the agreement reached between the accused and the prosecutor;
- the accused and his/her defense lawyer are fully familiar with case materials.

According to paragraph 3^1 of the Article 213 Criminal Procedure Code, a court shall not approve a plea bargain if it considers that it did not receive convincing answers from the accused to the circumstances above.

This indicates, on the one hand, how the judge should ensure that all of the rights of the accused are protected (this should be done by asking the accused questions) and, on the other hand, defines the results and the judge's response mechanisms if the judge does not receive convincing answers from the accused (in this case, the judge should not approve the plea bargain).

Since the judge determines is the rights of the accused were protected based on the answers to the questions, it is important that the rights are interpreted in a non-technical, non-legal and understandable manner for the accused. And when answering the questions asked by the judge, attention must be paid to how convincing and credible the position of the accused can be.

According to the results of a qualitative research conducted by the Human Rights Education and Monitoring Center in 2019,[52] as for the questioning of the accused and the examination of his/her true will, the judges indicate that they do not face any barriers to legislation, as it provides a comprehensive set of issues that the judge needs to examine prior to approval of the plea bargain. The judges note that it is difficult to study and test the will of the accused in practice, especially if the parties say that there has been no pressure on the accused and this is not visualized either. Therefore, most of the judges interviewed explain to the accused the essence of concluding the plea bargain in details and try to explain in a simplest and most comprehensible manner the issues upon which they require convincing answers.[53]

According to the Georgian Young Lawyers Association's 2018 Criminal Trial Monitoring Report 2018, covering the reporting period from February 2017 to February 2018, the situation of explanation of the rights provided by the legislation by judges is significantly worsened compared to the previous reporting period (September 2016 to February 2017). Specifically, in 60 cases (20%), the judge did not explain to the accused that unless the court approves the plea bargain, it would be inadmissible to use any

[52] During the period from February 27 to March 29, 2019, 18 in-depth interviews were conducted with city and appellate courts judges in criminal cases in Tbilisi, Mtskheta, Rustavi and Kutaisi, as well as three focus groups with private lawyers and lawyers of nongovernmental organizations in Tbilisi and Kutaisi.

[53] The Role of the Judges in the Criminal Justice System - The Results of a Qualitative Study, Human Rights Education and Monitoring Center (EMC), 2019, 17.

information against him/her that s/he would provide during the discussion of the plea bargain. Also, in 44 (14%) cases the judge did not explain to the accused that his or her complaint of torture, inhuman or degrading treatment did not preclude the approval of a plea bargain in accordance with the legislation.[54]

Is the charge is substantiated or is evidence is sufficient - Before approving a plea bargain, a judge should also examine whether the evidence presented is sufficient to render a judgement without hearing of the case on merits.

The standard of proof required to reach a judgement without main hearing was raised by legislative amendment in 2014 and equaled the standard of proof beyond a reasonable doubt, thereby eliminating the legislative gaps in the matter. However, as the case study has shown, there is a mixed understanding of the standard of proof required for a rendering a judgment without hearing a case on merits among judges and prosecutors, which is discussed in more detail in Section 1.3.2.

As to the legislative regulation, according to paragraph 3 of the Article 11[1] Criminal Procedure Code in order to deliver a judgement of conviction without hearing a case on the merits sufficient evidence that would convince an objective person that the accused has committed an offence is required, taking into account the fact that the accused acknowledges the offence, does not contest the evidence provided by the prosecution and relinquishes the right to have the case heard on merits by a court.

Prior to the 2014 legislative amendment, the prosecutor was required to provide the court with sufficient evidence for a reasonable assumption to substantiate the charges that the defendant had committed the crime. This contradicted the standard of evidence established for conviction, since paragraph 13 of Article 3 of the Criminal Procedure Code unequivocally states a judgement of conviction should be based on totality of evidence, which confirms the charges beyond reasonable doubt. Accordingly, proof standard for a plea bargain was defined as sufficient evidence to render judgement of conviction without hearing of the case on merits which would convince an objective person of the culpability of the person considering the fact that the accused pleads

[54] Criminal Trial Monitoring Report in Tbilisi, Kutaisi, Batumi, Gori and Telavi Courts, Monitoring Report No. 12, Georgian Young Lawyers' Association, 2018, 72.

guilty, does not dispute the evidence presented by the prosecution, and refused to exercise the right of hearing the case on merits.[55]

Thus, the said standard is equivalent to the standard beyond a reasonable doubt, but unlike the standard of rendering a judgment without main hearing of the case, in given event together with the totality of evidence, which would convince an objective person of the culpability of the person, the accused must plead guilty, should not dispute the evidence presented by the prosecution and refuse to exercise the right of hearing the case on merits.

One of the authors points out that it is not possible to meet the standard beyond a reasonable doubt because of factors such as: The court does not assess the credibility of the witness (interrogation of witnesses), the admissibility of evidence and the victim's vulnerability.[56] Accordingly, the standard of proof required for the approval of a plea bargain differs from the standard of beyond a reasonable doubt not in terms of the amount of evidence sufficient, but in terms of the inability to verify the degree of its credibility.

Is the sentence set forth in the motion of the prosecutor fair and lawful - according to the Criminal Procedure Code, the judge has a lever and a mechanism to verify the conditions of the plea bargain, including the fairness and lawfulness of the sentence and not to approve the plea bargain, if danger of misuses and dishonesty of the plea bargain is observed.

Although a judge is not entitled to independently change the sentence offered by the prosecutor, the court may offer different conditions to the parties if it considers that the sentence is not fair and lawful.

Interestingly, according to the initial version of the law, if the judge considered the sentence requested by the prosecutor to be severe, s/he had the right to mitigate the sentence. By the December 29, 2006 legislative amendment, the judge was deprived of the right to mitigate the sentence and only the possibility of amendment under the agreement of the parties stayed in force.

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[55] Explanatory note on the Draft Law of Georgia on Amendments to the Criminal Procedure Code of Georgia, 2014: https://bit.ly/2LPPOui

[56] Samantha Joy Cheesman, University of Szeged, Comparative Perspectives of Plea Bargaining in Germany and the USA, page 114: http://bit.ly/361HaQs

A judge's broad discretion to impose a sentence upon hearing the case on merits, without a plea bargain has also been restricted. In particular, Article 55 of the Criminal Code granted the judge the right to apply, if there was a particularly mitigating circumstance, considering of the offender's personality, to have a sentence less than the minimum sentence or other, lenient sentence envisaged by the relevant article of the Criminal Code. The aforementioned act has undergone several amendments, which gradually restricted the judge's ability to freely determine the sentence.

By legislative amendments of 13 February 2004, when the Institute of Procedure was introduced in the country, second paragraph was added to the Article 55 of the Criminal Code in order to actively apply it in practice, according to which, if the prosecutor applied to the court with a motion to render a judgement without hearing, court was authorized to impose no more than half of the sentence imposed by the relevant article of the Criminal Code. At the same time, the Code of Criminal Procedure stipulates that, in special cases, when through cooperation of the accused with investigative authorities the official and/or the person (s) who committed the most serious crime was identified and essential conditions were created with the direct support of the accused to open the case, the court was empowered to release the accused from criminal responsibility.

By legislative amendments of 20 December 2005, third paragraph was added to the Article 55 of the Criminal Code, according to which the court was authorized to impose no more than two thirds of the maximum sentence envisaged by the relevant article or paragraph of the article of the Criminal Code in the event of cancellation or shortening of an investigation.

Finally, as a result of the amendments to the Criminal Code on 28 April 2006, Article 55 was formulated to prohibit a judge from imposing a lenient sentence than that provided by law unless a plea bargain has been concluded between the parties. Thus, according to the current version of the legislation, the court may impose a sentence less than the lowest limit or other lenient sentence under the Criminal Code if a plea bargain is concluded between the parties. At that time, however, the judge is dependent on the prosecutor's motion, as s/he cannot go beyond the conditions set by the prosecution.

The explanatory note to the draft amendment states that the purpose of the amendment was not to set limits to the proceeding authority or a judge. However, the explanatory note states that the then existing rules of punishment made it impossible

to render fair judgments and, in most cases, brought a wide choice of judgments to judicial officers. According to the initiators of the draft law, it was necessary to take into consideration the fact that under the same conditions, the punishment for the same crime should not have been chosen in such a way that the maximum punishment could be applied to one person and the minimum to other person. Therefore, the authors of the draft law considered such an approach to violate the principles of equality and fairness and considered the introduction of a regulation that did not allow variation.[57]

All interviewed judges find it problematic that a judge is not authorized to apply less sanction in case severe punishment is provided by the law or to impose conditional sentence in case of serious crime. Judges believe that increasing the role of the judge in this section would address many of the challenges in practice in concluding plea bargains. Among them, increasing the role of a judge in the determination the sentence under a plea bargain would solve the problem today, when a judge has to make a difficult choice: A) not approve the plea bargain, consider the case on merits and thereby render the accused more unfavorable than the prosecution may offer the accused in the case of co-operation, or B) to approve the plea bargain, even though the terms of the plea bargain are not fair to the judge. All the interviewed lawyers underline the same problem and support the increase of the role of the judge.

The problem of the judge's limited role was highlighted in the research of the NGO Coalition for an Independent and Transparent Judiciary back in 2013, when they negatively assessed the broad discretion of the prosecutor and the passive role of the judge, who has no right to interfere in the negotiation process and to change the terms of the bargain, based on which the accused has to agree on clearly cabal conditions.[58] According to the same research, according to the judiciary, the role of the court in concluding a plea bargain is very limited, which they believe is related to legislative gaps. Although the judge is reviewing the terms of the plea bargain, s/he cannot make any changes. Therefore, the refusal to approve the plea agreement may worsen the accused's situation.[59]

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[57] Explanatory note on the Draft Law on Amendments to the Criminal Code of Georgia, 2006: http://bit.ly/2PgSvWW

[58] Application of the Plea Bargain in Georgia, Coalition for an Independent and Transparent Judiciary, 2013, 4.

[59] Application of the Plea Bargain in Georgia, Coalition for an Independent and Transparent Judiciary, 2013, 9.

Such unanimity does not arise as to whether the judge should be able to change the terms of the plea bargain himself/herself or if should only be possible upon agreement of the parties. The majority of judges consider that a judge should not interfere in the agreement of the parties in such a way as to modify or determine the terms of the agreement. However, they also note that there will be no need for the intervention of a judge in case judge's role in determining the sentence upon hearing the case on merits is increased and the judge is granted the power to impose a lighter sentence than the minimum sentence provided by law or to apply conditional sentence even in case of serious crimes by his/her own initiative. According to the judges, such an increase of the judge's role would have the following result: the accused, who finds the offer of the Prosecutor's Office unfair, will not agree to this condition and will therefore refuse to enter into a plea bargain in the hope that the judge will use a fair approach to determine the sentence as a result of hearing the case on merits.

According to the results of a qualitative research conducted by the Human Rights Education and Monitoring Center in 2019, few judges think it would be advisable for a judge to amend the plea bargain conditions instead of rejecting it. Especially if the judge sees that the conditions offered to the accused are not fair. One of the judges interviewed in the study thinks that if the judge will be able to sentenced less than the minimum sentence envisaged by law, this could reduce the use of the plea bargain, as if the accused expects a lenient sentence, s/he may refuse to participate in the plea bargain. However, the judges also note that such an approach is somewhat contradicts the essence of the plea bargain. Most judges, however, do not consider it advisable for a judge to be able to amend a sentence.[60]

According to the same study, some of the lawyers agree with a small group of interviewed judges who believe that they should be able to make some amendment to the plea bargain because, in their view, if the judge does not agree with the prosecutor's opinion on sentencing, the only solution is to refuse to approve the plea bargain which

[60] The Role of the Judges in the Criminal Justice System - The Results of a Qualitative Study, Human Rights Education and Monitoring Center (EMC), 2019, 17-19.

results in hearing the case on merits. In such case, the accused might expect a more severe sentence.[61]

According to the GYLA's report, judges mostly are not interested in how fair and lawful the sentences imposed by the parties are. To confirm this, the organization provides statistics showing that out of 303 plea bargaining sessions monitored under the reporting period, the judge approved 298 (98%) plea bargains, and only in seven (2%) of the cases stated during the trial that they considered the sentence imposed on the accused fair and just. In addition, the organization's report also noted positive trends when the judge referred to the parties that the proposed plea bargain would not be approved due to incorrect qualifications and/or insufficient awareness of the accused. The judges also thoroughly studied the measure/form of the sentence and received further detailed information from the accused during the trial whether he or she agreed to the sentence.[62]

The results of the qualitative research of EMC are also indicated by the diverse experiences and approaches of judges. Some of the judges interviewed note that they have not yet refused to approve the plea bargain. Some had a case where they did not approve the plea bargain, reason for which was an unfair sentence according to their statement.[63]

The legal safeguards in the above cases indicate that judges have several opportunities and grounds to reject a plea bargain and return the case to the prosecutor or make a decision on hearing the case on merits. However, further engagement of the court, which means elimination of the practical and legislative shortcomings, will facilitate the full functioning of the institute of plea bargaining.

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[61] The Role of the Judges in the Criminal Justice System - The Results of a Qualitative Study, Human Rights Education and Monitoring Center (EMC), 2019, 18-19.

[62] Criminal Trial Monitoring Report in Tbilisi, Kutaisi, Batumi, Gori and Telavi Courts, Monitoring Report No. 12, Georgian Young Lawyers' Association, 2018, 74-75.

[63] The Role of the Judges in the Criminal Justice System - The Results of a Qualitative Study, Human Rights Education and Monitoring Center (EMC), 2019, 17.

CHAPTER 3
International Standards on Plea Bargaining

3.1. Main requirements for plea bargain by international standards

The right to a fair trial is recognized by both national law and many international documents. The plea bargain denies a number of aspects of the right to a fair trial in exchange for a speedier adjudication and a more lenient sentence for the offender. Accordingly, the conclusion of a plea bargain has important legitimate aims, but at the same time contains dangers of misuse, coercion or deception of the accused.

The plea bargain is a relatively new institution in criminal litigation. Therefore, the main international and regional tools, which protect the right for a fair trial, as well, prohibits torture and ill-treatment - International Covenant on Civil and Political Rights and Fundamental Freedoms and the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - clearly set standards for the protection of the right to a fair trial and the prohibition of torture, but they do not specifically highlight the simplified mechanism for hearing a criminal case and requirements set to it. However, notwithstanding the foregoing, the applicable and recognized international standards set forth the essential and main requirements for the application of the plea bargain.

As a result of research of the relevant international documents, we can identify the following key issues relevant to a plea bargain:

3.1.1. The purpose of introducing a plea bargain

The introduction of the plea bargain institute is envisaged under the recommendation of the Committee of Ministers of the Council of Europe to Member States Concerning the Simplification of Criminal Justice, adopted in 1987. This recommendation is issued to address the increasing number of criminal cases referred to the courts, and particularly those carrying minor penalties and the problems caused by the length of criminal proceedings.[64] The Council of Europe's recommendation, on the one hand, is to acknowledge the legitimacy of the plea-bargaining mechanism, which was later shared by the European Court, and on the other hand, the purpose of its introduction should be taken into account when discussing the feasibility of concluding a plea bargain in case of serious crimes.

3.1.2. Procedural safeguards to balance the risks associated with entering into a plea bargain

The Recommendation of the Committee of Ministers of the Council of Europe on the plea bargain sets out the following basic requirements: A. The "guilty plea" procedure must be carried out in a court at a public hearing; B. There should be a positive response by the offender to the charge against him; C. Before proceeding to sentence an offender under the "guilty plea" procedure, there should be an opportunity for the judge to hear both sides of the case.[65]

More detailed procedural safeguards for the conclusion of a plea bargain are provided by the European Court ruling in the case of Natsvlishvili and Togonidze v. Georgia, where the Court used the following basic criteria to assess the legality of a plea bargain:

- The bargain has to be accepted by the accused in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner;
- The content of the bargain and the fairness of the manner in which it has been reached between the parties has to be subjected to sufficient judicial review.[66]

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[64] Recommendation No. R(87)18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice: http://bit.ly/2N6PghX

[65] Ibid.

[66] Natsvlishvili and Togonidze v Georgia No. 9043/05, 29/04/2014, para 92.

On the basis of these two criteria, the European Court considered the following circumstances in assessing the legality of concluding a specific plea bargain:

- It was the first accused himself who asked the prosecuting authority to arrange a plea bargain and could not be said to have been imposed by the prosecution;
- The accused expressed his willingness to repair the damage;
- The accused was granted access to the criminal case materials;
- The right of defense of the accused was properly ensured;
- The two lawyers ensured that the first applicant received advice throughout the plea-bargaining negotiations with the prosecution;
- A lawyer represented the accused during the judicial examination of the agreement;
- The Judge exercising control over the plea bargain enquired of the accused and lawyer as to whether he had been subjected to any kind of undue pressure during the negotiations with the prosecutor;
- The accused explicitly confirmed on several occasion, before the judge, that he had fully understood the content of the agreement, had had his procedural rights and the legal consequences of the agreement explained to him, and that his decision to accept it was not the result of any duress or false promises;
- A written record of the agreement reached between the prosecutor and the accused was drawn up. The Court finds this factor to be important, as it made it possible to have the exact terms of the agreement, as well as of the preceding negotiations;
- In examining the scope of judicial control, the European Court paid particular attention to the circumstance that the court was not according to applicable domestic law, bound by the agreement reached between the parties and was entitled to reject that agreement depending upon its own assessment of the fairness of the terms contained in it and the process by which it had been entered into;
- Not only did the domestic court had the power to assess the appropriateness of the sentence envisaged by the plea bargain, it had the power to reduce it;

- The court inquired whether the accusations against the first applicant were well founded and supported by prima facie evidence;
- As an additional safeguard, the European Court took into account the fact that the court examined the plea bargain during a public hearing.[67]

3.1.3. Examination of the voluntariness to enter a plea bargain

The confession of guilt by the accused and the "aware" and "voluntary" refusal to hear the case on merits are essential elements of a plea bargain.[68] Internationally recognized standards provide for the voluntary standard for pleading guilty and plea bargaining, but require a more in-depth explanation of what voluntarism means. International standards discussed below indicate that the court control over the examination of the accused entering the bargain in a voluntary manner should go beyond superficial inspection of awareness and voluntarism of the accused. The court must assess the criminal justice situation in general, in particular individual situation of the accused, behavior of the prosecutor and other factors.

The European Court, in the case of Natsvlishvili and Togonidze v. Georgia, took into account the following circumstances in determining the voluntariness of the accused: Plea bargaining is initiated by the accused; No evidence proving that the prosecution influenced the accused; Participation of the Lawyer in the negotiation process on the terms of the plea bargain; The scope of judicial control over the lawfulness of a plea bargain and other general factors.

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[67] Ibid, para 93-96.

[68] Pleading guilty may not be necessary criterium to conclude plea bargain if the case refers to a plea bargain model envisaging agreement on the sentence without pleading guilty. The model was effective in Georgia until 2014. It is noteworthy that the model of agreement on sentence does not comply with the Council of Europe's recommendation that sets pleading guilty as a necessary precondition for plea bargaining. As to the European Court's approach, it sets out safeguards for the defendant's rights without specifying the model of plea bargain.

Although the European Court did not set standard on the case Natsvlishvili and Togonidze v. Georgia to comprehensively examine the voluntary manner of the accused to enter a plea bargain, partly dissenting opinion about the case is still interesting.[69] One of the judges in the case disagreed with the majority's opinion and suggested that a number of factors should be taken into account when assessing the defendant's voluntary plea bargaining: In 2004, Georgia had a very high conviction rate (99%), making the defendant's chances of acquittal unrealistic if his case was heard on the merits. The situation in the judicial system left the defendant no other choice; The dissent also points to the treatment towards the accused when a representative of the Prosecutor's Office threatened the accused's family with refusing to sign a plea bargain and would resume the investigation against the accused. Also, the author of the dissent points outlines a number of factors that obviously put the accused in an unequal position in negotiating the terms of the plea bargain with the prosecution and which could affect the free choice of the accused: the transfer of the factory shares and of the monetary payments had occurred before the procedural agreement was struck; The fact that the applicant had been subjected to a deliberate stressful situation in his cell (he was detained in the same cell as the person charged with his kidnapping years ago and another person serving a sentence for murder).

In several other cases, the European Court has also assessed the legality of the defendant's waiver to the rights. As the plea bargain implies the defendant's refusal to a number of aspects of the right to a fair trial, the practice established in these cases is relevant to the application of the plea agreement as well.

In the case of Pishchalnikov v Russia the European Court discussed a case where investigative authorities failed to secure the defendant's right of defense on the grounds that accused himself had refused to exercise that right. In the present case, the European Court stated as follows: Where the accused, in the course of criminal proceedings, refuses to exercise any right, to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Sejdovic v. Italy,* no. 56581/00, §86).[70]

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[69] Partially Dissenting Opinion of Judge Gyulumyan, case of Natvlishvili and Togonidze v. Georgia, 9043/05

[70] Pishchalnikov v. Russia, App. No. 7025/04 (Sept. 24, 2009).

The court further explained that, before concluding that the defendant had indirectly refused to exercise his rights (as indicated by the respondent), the court should have found that he could reasonably determine what the result of his indirect expression would be (see *Talat Tunç v. Turkey,* no. 32432/96, 27/03/2007, 59, *Jones v. the United Kingdom,* no.30900/02, 9/092003).

The accused may knowingly and voluntarily refuse to hear the case on merits, however, such refusal shall not be illusory. UN Human Rights Committee (UNHRC) on the case Hicks v. Australia[71] discussed waiver to the right to have main hearing of the case along with other issues. The applicant was apprehended in Afghanistan in 2001. After his arrest, he was transferred to the Guantanamo Bay detention camp for several years without charge and was subjected to torture and ill-treatment. The applicant plead guilty in the charge of promoting terrorism against him. He was sentenced to seven years imprisonment and was transferred to Australia to serve the sentence. UNHCR concluded that held that Mr. Hicks had no choice but to agree to a plea bargain, therefore it was the Australian State's obligation to prove that it had made every effort to ensure that the plea agreement did not violate the requirements of the International Covenant on Civil and Political Rights. In the present case, it was clear that Mr. Hicks was aware of the terms of the plea bargain, knowingly waived his right to a hearing the case on merits, though his choice was illusory for the following reasons: The chance that his right to a fair trial would be ensured in the Guantánamo detention camp was in fact zero; By rejecting the plea bargain, the applicant had in fact agreed to an indefinite extension of his sentence in inhuman and degrading conditions.

International recommendations elaborated for the prevention of torture, inhuman and degrading treatment in criminal justice do not directly address plea bargains, however, they provide important standards for it. It is understood that the admissible testimony provided by the recommendation's inadmissible interrogation methods is also inadmissible in the context of the plea bargain. It is inadmissible to obtain a confession even in the context of a plea bargain by using the inadmissible interrogation methods provided by the recommendation.

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[71] UN HRC Communication No. 2005/2010 February 19, 2016: http://bit.ly/33Xqo2P

Interim report of the UN Special Rapporteur on Torture discusses techniques of in-person interviewing for investigative purposes. According to the report, confrontation and psychological manipulation are characteristic of interrogation systems. Techniques that are considered problematic include bullying, stimulating, misleading, delaying interrogation, degrading treatment to emphasize a person's individual characteristics or cultural identity, and more. Encouragement of a person to testify may be a promise of release or mitigation in exchange for pleading guilty. Misleading practices include the use of trickery or deception, including by presenting false evidence, confronting persons with false witnesses or leading one to believe that his or her co-defendants have confessed. These methods are improper because they ultimately deprive a person of his or her freedom of decision through the use of false representations.[72]

Interim report of the UN Special Rapporteur on Torture[73] states that national laws must provide for the exclusion of all evidence obtained in violation of safeguards designed to prevent mistreatment such as confessions or incriminating statements obtained in violation of one 's rights to be informed of his or her rights and legal status before questioning, or duly warned that his or her words may be recorded and used in evidence against him or her. Evidence should also be excluded when access to counsel is unduly delayed or denied, or involuntarily waived; whenever specific safeguards applicable to the questioning of vulnerable persons are infringed; and when persons are denied adequate breaks and periods of rest during interviews save compelling circumstances.

[72] UNGA A/71/298, 2016, Interim Report of the Special Reporter on Torture or other Cruel, Inhuman or Degrading Treatment or Punishment, para. 39,40: http://bit.ly/2PhK0un

[73] Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/71/298, para. 100: http://bit.ly/2PhK0un

CHAPTER 4
Influence of Legislation and Practices on the Plea Bargain Application

4.1. Factors affecting the plea bargain application

Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe[74] which became basis of adoption of a resolution by the Parliamentary Assembly on the need to introduce minimum standards for trial waiver systems[75] lists the risks involved in applying the plea bargain and the minimum safeguards adoption of which are recommended to the Member States.

The study revealed that a number of the risks listed in the Parliamentary Assembly of the Council of Europe's document are still characteristic of the plea bargaining mechanism in Georgia and require appropriate safeguards, which are discussed in detail in this chapter.

Until 2014, the legislation and practice of plea bargaining in Georgia has been the subject of severe criticism by local and international organizations[76] over and over. The practice of using plea bargaining in Georgia was assessed as a source of filling the state budget by influencing the accused.

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[74] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on Deal-making in Criminal Proceedings: the need for minimum standards for trial waiver systems: http://bit.ly/2BDJb7t

[75] CoE Parliamentary Assembly Resolution 2245 (2018), Deal-making in Criminal Proceedings: the need for minimum standards for trial waiver systems: http://bit.ly/35XUTaZ

[76] Transparency International Georgia - Plea Bargain in Georgia: http://bit.ly/2MFAOOO ; Coalition for Independent and Transparent Judiciary, Application of Plea bargaining in Georgia: http://bit.ly/31HVSZh; Georgian Young Lawyers' Association - Criminal Trial Monitoring Report in Tbilisi, Kutaisi, Batumi, Gori and Telavi Courts, Monitoring Report No. 12: http://bit.ly/2pLAbKG; Georgia in Transition, Assessments and Recommendations by Tomas Hammarberg in the capacity as EU Special Advisor on Constitutional and Legal Reform and Human Rights in Georgia, 2013: http://bit.ly/341OLg6

Thomas Hammarberg's 2013 report recommends refining the legislation regulating the plea bargain, plea-bargaining practices in terms of increase of the role of the judge and ensuring the free choice of the accused[77]. When discussing the use of a plea bargain, the report takes into account factors such as the approximate rate of 90% of plea bargaining at the time, absence of acquittals, and more.

Since 2013, a number of amendments have been made to the legislation regulating plea bargaining. The practice of using plea bargains has also changed. It is therefore important to assess the impact of legislative or practical changes to the use of plea bargains and whether the status of the accused is different in the current justice system. The study identified several important factors that unduly influence the protection of defendants' rights and the practice of using plea bargains.

4.1.1. The judge's limited role in determining the sentence

The power of a judge to exercise effective control over the plea bargain is limited in terms of several aspects:

1. Under Georgian law, a judge is not be entitled to impose a sentence less than the minimum sentence provided by law, unless a plea bargain has been concluded between the parties. Also, the judge has no right, on his/her own initiative, to impose a suspended sentence to a convict for a serious crime.

The Report of the Parliamentary Assembly of the Council of Europe among the risks inherent in the plea bargaining mechanism refers to the case, when the prosecution has the potential to abuse the plea bargaining mechanism, in particular, a prosecutor may threaten a defendant with an inappropriately harsh sentence if he or she does not confess, even in the absence of sufficient evidence. Accordingly, the Parliamentary Assembly recommends that the difference between the possible sentencing upon hearing the case on merits and the possible sentence of the plea bargain should not significant.[78] The limited role of a Georgian judge in sentencing, and the prosecutor's

[77] Georgia in Transition, Assessment and Recommendations by Thomas Hammarberg, September 2013, section 1.5.

[78] Council of Europe, Parliamentary Assembly, Deal-making in Criminal Proceedings: the need for minimum standards for trial waiver systems, para. 5.1. and 8.4: http://bit.ly/2BDJb7t

broad discretion to impose a punishment under a plea bargain without limit, to use a lenient sentence than the lowest limit of the sentence prescribed by law, precludes the prosecution from misusing the plea agreement in this way.

The limited role in sentencing prevents the judge from exercising effective control over the fairness of the punishment provided by the plea bargain. Such limited powers of a judge can be an important influence on the choice of the accused to waiver the right of trial, since it reduces the defendant's ability to engage in a negotiation process of plea bargain on an equal footing with the prosecution and to reach a fair sentencing agreement. A plea bargain should, in fact, be the result of an agreement between the parties and not a unilateral determination of the terms by the prosecution.

All judges interviewed highlighted the negative impact of the judge's limited role in sentencing on the plea bargaining process.

One of the judges stated that "a judge cannot apply Articles 55, 50, 63 and 64[79] of the Criminal Code of Georgia, so the defense is forced to agree to a plea bargain, knowing that in case of court hearing it will not be able to obtain better than the prosecution offers. I am convinced that if a judge had more authority to impose a sentence, the number of plea bargains in the country would not exceed 50%." According to the same judge, "when examining the issue of approval of a plea bargain, the judge shall inquire the financial capacity of the accused, however in some cases s/he has to compromise, since if s/he does not approve [plea bargain], the defendant will find himself/herself at a disadvantage, because if the case is heard on the merits, the accused will have to undergo a very severe sentence."

Another judge notes that "there are often cases when a defendant pleads guilty, but fails to reach an agreement with the prosecutor on sentencing, so the process is delayed. If a judge were able to determine the sentence, this would solve the problem and eliminate overcrowding. At the same time, the prosecution submit more real plea bargains to court. Increasing the role of the judge, on the one hand, will reduce the number

[79] Criminal Code of Georgia Article 50 (Fixed term imprisonment), Article 55 (Imposing more lenient sentences than prescribed by law), Article 63 (Grounds for imposing conditional sentences), Article 64 (Probation period), articles which impose limitations to the judges when determining a sentence.

of plea bargains in general, and on the other hand, the sentence that the accused will agree to will be fairer."

According to the same judge, "When the court does not have the opportunity to determine a conditional sentence, it delays the process as all the accused persons try to reach a plea bargain, knowing that the suspended sentence cannot be obtained through court trial. In order to negotiate with the Prosecutor's Office, the defense demands to postpone the hearing. In addition, by increasing the role of the judge, the accused will be in a more equal footing with the prosecution in negotiating the terms of the plea bargain. There are cases where the prosecutor's office does not stubbornly accept the less sentence offered, such cases have often been in relation to drug offenses (CC 260.3), and many times I have had to postpone the trial. If I had the opportunity to impose a conditional sentence and a lenient sentence, the process would not have been delayed. Increasing the role of a judge will reduce the number of plea bargains, but there will be no significant decrease, but an increase in the fair sentencing rate and reduced cases of delays and other positive consequences."

Another judge notes: "Whenever I consider that extra punishment (fine or community service) is not fair, I did not approve it, but I can do so if I know that in case of main hearing I will not have to impose a more severe sentence. The accused, who believes that s/he will receive a fairer trial, will not agree to a plea bargain." The same judge emphasized another aspect of the judge's limited role in sentencing. The judge states that "persons accused in drug related crimes tend to agree to plea bargain as a rule despite the fact that sanction envisages fine and refuse to hear the case on merits because the Law of Georgia on Combating Drug Related Crime envisages limitation of a number of rights. The accused may only avoid restricting such rights only by concluding a plea bargain. I think the judge should have the power to determine what rights the convict will be deprived of and for what period."

Another judge noted: "I do not approve a plea bargain only in case the convict will not be imposed a higher sentence in case of main hearing and if the plea bargain is not a concession for him/her"

Interviewed lawyers also point to the need to increase the role of the judge in sentencing. In their experience, "the accused even agree to enter a plea bargain when they find

the sentence offered by the prosecution unjust, but they know that if the case is heard on merits, the judge will have to impose a much tougher sentence." On the contrary, prosecutors interviewed do not find it expedient to increase the role of the judge in sentencing, explaining that the terms of the plea bargain are individual and depend on the degree of co-operation of the accused.

2. A judge cannot not properly inspect the financial capacity of the accused, which impedes his or her determination of a fair sentence.

Judges and lawyers clearly indicate that the financial capacity of the accused is not being inquired and assessed as to whether a person will be able to pay a plea bargain if convicted. All of the judges interviewed note that the Prosecutor's Office does not provide the court with information on the defendant's financial capacity. Focus groups conducted with lawyers also confirm the abovementioned. Lawyers further state that they themselves are trying to provide the court with information about the defendant's situation, but this does not relieve the prosecutor from the obligation to substantiate the fairness of the sentence.

The examined court decisions reveal cases where the sentence provided in the plea bargain is added to the sentence provided in the previous sentence, when the person is convicted of another crime which once again confirms that examination of the financial capacity of the accused remains as a problem. The sentence added on the basis of the preceding sentence is sometimes the amount of the unpaid fine by the convict. Also, the interviewed lawyers and judges say that it is not uncommon for convicts to fail to pay a fine, which exacerbates the legal status of the convict when determining their conviction for another crime.

4.1.2. High rate of application of the strictest measures of restraint

The report by the Parliamentary Assembly of the Council of Europe envisages recommendation regarding reduction of plea bargain application risk, according to which Member States are recommended to minimize the use of pre-trial detention against persons suspected of less serious crimes by making use of alternative measures.[80]

[80] Council of Europe, Parliamentary Assembly, Deal-making in Criminal Proceedings: the need for minimum standards for trial waiver systems, para. 8.7: http://bit.ly/2BDJb7t

According to statistics released by the Supreme Court of Georgia, the rate of the strictest restraint measures - custody and bail - is still very high. Application of other alternative restraint measure or leaving it without imposing a restraint measure does not occur.[81]

When asked whether the expected restraint measure affected a defendant's choice, most judges respond that they do not have the information and cannot assess whether the expected restraint measure had an effect on the choice of the accused to enter a plea bargain. In contrast, the two judges consider that the imposition of the expected preventive measure may be a factor in the defendant's agreement to a plea bargain, which is explained by the lack of alternative types of restraint measures. One judge explained that "the law should specify more diverse types of preventive measures. There are cases when I cannot impose surety bond, surety is presented, and there is grounds to leave the case without restraint measure, and only the possibility is application of bail. There were cases, then the accused had no property, I could not impose any other restraint measure and I could not leave without it either so I had to impose bail." Another judge notes that "the alternatives provided by the law for measures restraint are insufficient and suggest that the use of agreement not to leave as a measure of restraint should not be limited by the severity of the crime."

The lawyers' inquiry revealed that in practice there are cases when the accused agrees to enter into a plea bargain because s/he wishes to avoid a severe restraint measure. One lawyer explains that "if an accused is in custody and imprisoned on unreasonably high bail, he or she agrees to a conditional sentence and fine under the plea bargain and prefers to leave the facility under the agreement of future payment. If s/he fails to pay the fine, the conviction will remain, but this will not lead to the annulment of the plea bargain and his/her return to custody." Another lawyer explained that sometimes an accused does not want to or cannot afford paying bail and therefore prefers to sign a plea bargain quickly." Another lawyer cites the case of an accused in his/her defense: "The person is in pre-trial detention. S/he had not pleaded guilty until now. Now it is very difficult from him/her to be in prison. S/he has been in custody for two months and the trial has been postponed twice due to a judge's replacement. S/he now has to plea and conclude a plea bargain and thus avoid pre-trial detention and delayed trial."

[81] See Chapter 1, Diagram N9

4.1.3. Insufficient judicial control over the voluntary choice of the accused

The research of the international standards has shown that the best international standards set a very high requirements for a judge to assess a defendant's voluntary agreement to a plea bargain. Although the European Court's practice of assessing the legality of a plea bargain is quite scarce it is notable that the UN Human Rights Committee, for example, took into account not only the consent and awareness of the issue, but other factors as well when assessing the contest of a person to enter a plea bargain.

When examining the question of voluntariness, the court must inquire both the information directly disclosed by the accused and indirect indications of the voluntariness of concluding a plea bargain. Also, the judge must take into account the general practice of using a plea bargain in the country and the influence of other factors on the will of the accused.

The information available on the use of a plea bargain does not allow an in-depth assessment of how widely the court defines the voluntariness of the accused's choice and by which criteria it is assessed, in each particular case, the accused agrees to enter into a plea bargain by his/her own true will, of because there are no other choices; is there a reason the accused cannot tell the court and the reason cannot be observed by a superficial examination of the will of the accused.

Interviewed judges explain how they investigate a defendant's voluntariness. One of the judges noted that in his/her practice there was a case in which the accused initially answered all questions positively to the judge, but after asking a number of questions, the accused stated without further explanation that s/he agreed to enter into a plea bargain as there was no other way. After this statement, the judge did not approve the plea bargain. Other more specific examples, referring to the broad definition of examination of the voluntariness of the accused were not mentioned by the judges.

It is noteworthy that the survey of judges by the Human Rights Education and Monitoring Center also confirms the difficulties associated with proper examination the accused's will in practice. Research indicates: "Judges note that it is difficult to study and verify a defendant's will in practice, especially if the parties say that there has been no pressure on the accused and this is not visually evident."[82]

[82] The Role of the Judges in the Criminal Justice System - The Results of a Qualitative Study, Human Rights Education and Monitoring Center (EMC), 2019, 17.

The Criminal Procedure Code of Georgia specifies how a judge may assess a defendant's voluntary consent to enter into a plea bargain: By asking questions and assessing the plausibility of the accused's answers. Accordingly, the circle of issues around which the judge asks the accused questions should be broadened in practice to make sure that his or her will is free.

4.1.4. Legislation does not restrict plea bargaining by the categories and types of crime

The fact that plea bargaining is not restricted by the categories and types of offenses in itself gives rise to unlimited, large numbers of plea bargains, broadens the prosecution's discretion and does not provide it with a legislative framework on what types of offenses plea bargain can be concluded. On the other hand, the imposition of legislative restrictions would only create mechanical barriers to the conclusion of plea bargains and reduce the ability of the public interest and the individual circumstances of the accused to be effectively considered. This is why none of the interviewees considers it appropriate to limit the plea bargaining by the categories or types of crime. However, such a broad discretion of the Prosecutor's Office to conclude a plea bargain for crimes of any type and category requires stronger legislative safeguards to prevent the misuse of broad discretionary powers and effectively protect the rights of the accused in the plea bargain.

According to statistics, plea bargaining for serious crimes is more common than for less serious offenses.[83] The recommendation of the Council of Europe to the Member States on the introduction of a plea bargain was made for the speedy and efficient administration of justice for less serious, less prejudicial offenses.[84] As for plea bargain for serious crimes, the public interest in punishing the offender in full severity is higher in the event of such an offense. Accordingly, in the case of serious offenses, the prosecution should substantiate more when entering into a plea bargain what public interest was considered when reducing or mitigating the sentence or partially removing the charge.

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[83] See Chapter 1.

[84] Recommendation No. R(87)18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice: http://bit.ly/2N6PghX

And, the court's ruling should clearly show what public interest was the plea bargain approved under.

Such justification on the part of the Prosecutor's Office, as well as reference to the existence of a public interest, and the reasoning of the judgments do not appear in the judgments. In addition, the judges interviewed also confirm that the Prosecutor's Office almost never submits to the court specific information about the public interest in concluding a plea bargain. According to the judges, when referring to the public interest, the prosecution only states that a person pleads guilty, in some cases the prosecution may indicate general information that the accused is also cooperating with the investigation, which is overly general information and may be equally applicable to any accused.

It should be taken into consideration that the Criminal Procedure Code clearly states that a motion to render a judgment without hearing the case on merits shall include in case of collaboration of the accused with the investigation, the form and content of the collaboration[85]; According to the same article, the prosecutor's motion and the protocol of the plea bargain shall be publicly available, except for the part that contains information provided by the accused to the investigation[86]. This implies that the Prosecutor's Office should provide the court with detailed information about the co-operation of the accused with investigation.

Because the prosecutor's office only refers to the public interest in general, this issue is not properly reflected in court rulings. In addition, both lawyers and part of the judges point to a different approach of the Prosecutor's Office towards the conclusion of plea bargains. In addition, the statistical data shows that the share of plea bargain on serious crimes is very high within the data of plea bargains concluded. Considering the abovementioned, it is clear that unlimited possibility to conclude plea bargain includes the risk of biased approaches on the one hand and affects percentage of the plea bargains concluded on the other as well as influencing the choice of an accused to enter into a plea bargain in case of being charged in serious crime.

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[85] Section "d" of paragraph 1 of Article 211 of the Criminal Procedure Code of Georgia.

[86] Paragraph 6 of Article 211 of the Criminal Procedure Code of Georgia.

In contrast to less serious offenses, a more rigorous approach to plea bargaining in the case of serious and particularly serious offenses is justified by the fact that the disproportionately high expected benefit of pleading guilty has an effect of improper influence. Such a disproportionately high benefit can result in a plea bargain when the expected minimum and maximum sentence is so high that the defendant finds it difficult to agree on hearing of the case on merits (especially in the context of a very low rate of acquittals) and the expected disproportionately lenient sentence pushes him/her to agree to a plea bargain. The limited role of the judge in the determination of a fair sentence, which is envisaged in Georgian law is added to the abovementioned.

4.1.5. Biased approaches to plea bargaining

When asked what they consider to be a major problem with the application of a plea bargain, some judges and lawyers cite the prosecutor's biased approach when making a decision on plea bargain.

As a result of the legislative amendments, the scope of public interest was more clearly defined, but it did not appear to have had a significant impact on the practice. All of the judges interviewed and the court decisions reviewed confirm that the public interest in the plea bargain is not explained/substantiated by the prosecution in practice. In response to the mentioned the prosecutors interviewed indicate that there is no biased approach. They explain that the trial participants may have an impression of observing different approach, though this may be due to the prosecution considering individual circumstances and individual approaches. In response, one of the judges mentioned in the interview that even given the individual circumstances of the case, the problem of a biased approach was apparent to him/her.

As part of the research, the Prosecutor General's Office was asked to provide information on how the Prosecutor's Office ensures a uniform approach to plea bargains. According to the prosecution's response[87], "In 2016, a recommendation was elaborated on conditions to be applied when determining the restraint measure and plea bargain. The recommendation is intended to assist the prosecutor in decision-making and to

[87] Letter No 13/42398 of June 12, 2019 of the Prosecutor's Office of Georgia.

implement a uniform criminal justice policy by the various structural units of the Prosecutor's office. In order to comply with the amendments to the Criminal Code, a revised recommendation (draft) was developed in 2018 for internal use and it is not a public document."

According to the prosecution's response, we can conclude that there is a guideline in the prosecution system that will assist prosecutors in applying uniform approaches to plea bargains. However, it is a fact that both the judges and the lawyers interviewed point out the problem of homogeneity and there is a problem of biased approach from the observers' point of view[88]. In such circumstances, it is even more important to have a publicly available rule that assesses the relevance of existing practices. This will promote a more uniform approach, prevent corruption and increase public confidence in the criminal prosecution policy pursued by the prosecution.

4.1.6. Ineffectiveness of the right to defense

The passive role of a lawyer does not allow the accused to understand the pros and cons of the plea bargain, the possible outcomes, the future prospects of the case, and to consider all of these factors in deciding whether to accept the plea bargain.

In examining court decisions, there was one case where a judge did not approve a plea bargain because the defendant's lawyer did not consider it appropriate to approve the plea bargain, while the accused himself/herself consented to its approval. The above example highlights the important role of a lawyer in the approval of a plea bargain.

Judges' inquiries show that they often notice the lack of communication between a lawyer and his or her client at trial. The judges cite cases when the accused first meets with the lawyer in the courtroom, and it appears from their communications that they had not been contacted until that point. Judges also cite examples where there are factual or legal shortcomings in the terms of a plea bargain that ultimately aggravate the situation of the accused and the lawyer agrees to such plea bargain. All judges agree that in some cases the lawyer is not qualified or is not effectively defending the interests of the accused.

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[88] See Chapter I for more details.

According to the lawyers themselves, they are mainly given the opportunity to effectively defend the accused in the process of negotiating and approving the terms of the plea bargain. They explain that they are engaged in the process from the start of the negotiation and have proper access to the case materials. However, an important problem cited by some lawyers is that, often when a lawyer is involved in a case, the prosecutor has established the terms of the plea bargain and the process of negotiating the terms of the plea bargain is only formal. “The accused is told: if you are OK with these terms and conditions, I will appoint you a lawyer. If you do not agree to these terms, I will not offer you other plea bargain with different terms.”

The use of such approach in negotiating the terms of a plea bargain indicates to a unilateral determination of the terms by one party, it is not the result of an equal agreement between the defendant/defense and the lawyer. In addition, the judge’s ability to balance the prosecution’s preferable condition in negotiating a plea bargain is significantly limited.

Recommendations

Regarding the legislation regulating plea bargain:

1. The judge shall be entitled the right to impose a sentence less than the minimum threshold of the sentence prescribed by the relevant article of the Criminal Code or any other, lenient sentence without concluding a plea bargain.
2. The legislation shall determine with greater clarity and specificity the power of the court to decide on the return of the case to the prosecutor or on hearing the case on merits, which will give a greater visibility into its actual content and practical purpose. For this purpose, the law should set out the procedures and timeframes to decide returning the case to a prosecutor or hearing the case on merits.
3. Procedures/grounds for reviewing, deciding and substantiating an application for a plea bargain by the accused/convict and/or his/her lawyer shall be regulated by law.
4. The legislation shall determine the mandatory rules for drawing up a protocol on the offer of a plea bargain and a list of the circumstances envisaged therein.
5. The types of restraint measures provided by the Criminal Procedure Code shall be extended and the court and the prosecution shall be enabled to better tailor the restraint measure to the individual and individual circumstances of the case.
6. Legislation and/or by-laws shall determine creation of a unified database on statistical data of plea bargain application as well as on processing of the data; Agencies responsible on data processing and accessibility to the information shall also be determined.

Regarding the application of plea bargain:

7. In-depth examination of the voluntary agreement by the accused to the plea bargain and different factors shall be ensured. Including, assess whether the accused had any choice but to agree to a plea bargain by examining the public interest in concluding a plea bargain.

8. The courts substantiated decisions on approval of a plea bargain shall be ensured and detailed reference to both the existing evidence and its content shall be made, as well as the public interest criteria for plea bargaining and consultation of the prosecutor with the victim (where possible) shall be provided.

9. Public interest in concluding a plea bargain with an accused shall be substantiated and evaluated, which is particularly important when concluding a plea bargain for crimes of serious and particularly serious categories.

10. At the plea bargaining sessions, the prosecutor shall, in all cases, present information about the financial capacity of the accused and his/her personal characteristics, and the court shall examine whether the sentences imposed by the parties are fair and lawful.

11. When making a decision, the judges and prosecutors shall be guided by the standard on sufficient evidence to render a judgement without hearing the case on merits, which is equivalent to the standard of beyond a reasonable doubt, taking into account that the accused pleads guilty, does not dispute the evidence presented by the prosecution and waivers the right to have a hearing of the case on merits.