



## The practice of 'plea bargaining' in Georgia – violating the principles of a fair trial?

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In February 2004 the practice of 'plea bargaining' was introduced into the Criminal Procedure Code of Georgia (CPCG). This article will consider whether the process of plea bargaining as it is applied in practice raises issues as to the fairness of the proceedings.

One reason given by the Government of Georgia for introducing plea bargaining is the 'effective fight against corruption'. However, following its introduction, plea bargaining, particularly the monetary element of concluding a plea bargain, has been highly criticised by Georgian lawyers and local and international human rights organisations.<sup>1</sup> Despite there being nothing said about the financial element of a plea bargain in the CPCG, in each case, regardless of whether an economic crime was involved or not, making a monetary payment is a main factor in the prosecution agreeing on the settlement of a case on the basis of a plea bargain. Defendants frequently pay particular sums to have their charges reduced or completely dropped. This might be considered to be a practice developed independently from the written provisions of the relevant law.

As it is generally understood in criminal law, plea bargaining is an agreement between the prosecution and a defendant to settle the criminal case pending against the defendant. Similarly, under Art. 679(1) of the CPCG, a court can pass sentence against a defendant without hearing the case on the merits by approving the plea bargain concluded between the prosecutor and a defendant either on a finding of guilt or on sentencing. In both cases a defendant is found guilty by the verdict of the court.

As a consequence of the concept of a plea

bargain, it is arguable that a defendant who agrees to a plea bargain in effect waives part of his/her right to a fair trial. For the purpose of having the charges or sentence reduced or even no sentence imposed at all<sup>2</sup> a defendant agrees to enter into a plea bargain, pleading guilty or pleading no contest, and thus waiving the right to have their criminal case examined on its merits. However, even in this situation, the court, while approving the plea, plays a vital role in supervising the conditions of a plea bargain. A judge examining the case has to make sure that a defendant expresses the will to enter into a plea bargain without any coercion and should also ensure that the prosecution has a *prima facie* case against the defendant.

Similarly, under Arts. 679(3) and 679(4) of the CPCG the court is obliged to enquire into all the issues. However, these obligations are applied in different ways in practice. A good example of this is the case of *Natsulishvili & Togonidze v Georgia* (No. 9043/05 9/3/05).

In this case the first applicant argued that the prosecutor agreed to enter into a plea bargain only after he, his wife and eight other shareholders of Kutaisi Auto Plant had transferred their shares, amounting to 22.5% of shares in the Plant, to the ownership of the Government, and after the applicants had paid 50,000 GEL (22,000 EUR) to bank accounts stipulated by the Office of the General Prosecutor. Furthermore, although under the CPCG the sanction a defendant has to serve must be approved by the court, the first applicant had previously paid a fine, amounting to 35,000 GEL (15,000 EUR), which was later approved by the court as a sanction under the plea bargain, clearly in breach of domestic legislation. However, in the court's final verdict approving the plea bargain, a fine of only 35,000 GEL was

referred to. In its Observations to the ECtHR of 2 May and 13 July 2007, the Government asserted that the transfer of Auto Plant shares as well as the payment of 50,000 GEL was made by the applicants under their own free will (while the first applicant was detained on remand). Although all these circumstances were known to the court approving the plea bargain, it confined itself merely to a formal enquiry - the court did not attempt to find out what were the reasons for the additional payments or the transfer of shares.

In reality, this is a common practice in criminal cases, irrespective of whether the defendants are released with a fine or in addition to serving a prison sentence. In the light of this practice it has been argued that "since its introduction, plea bargaining has become a means for the illegal extraction of property (money) from the defendants, as well as a means for the perpetrators of torture to avoid conviction."<sup>3</sup>

In the light of the above, it has been rightly stated by the Parliamentary Assembly of the Council of Europe Monitoring Committee that the system of plea bargaining cannot be sufficiently controlled in a country like Georgia where an absence of legal and administrative checks and balances in the police force, prosecutor services and courts create a risk of abuse.<sup>4</sup> The courts should guarantee to supervise the process of plea bargaining, however in practice, the courts only play a formal role in approving the conditions offered by the prosecution to the defendant, and do not always ensure that there is a *prima facie* case against the defendant, while, for a defendant in most cases plea bargaining is the only possibility to escape a trial by courts which still have the reputation for following the will of the prosecution.<sup>5</sup>

1 OMCT. 2006. Human Rights in Georgia: Alternative Report to the UN Human Rights Committee 90th session, 24 April 2006. [Online]. Available at: [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ngo\\_georgia90.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ngo_georgia90.pdf). International Helsinki Foundation. 2005. Human Rights in the OSCE Region: Europe, Central Asia and North America. [Online]. Available at: [http://www.ihf-hr.org/documents/doc\\_summary.php?sec\\_id=58&d\\_id=4057](http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4057); Transparency International Georgia. State Expenditure Monitoring Report. [Online]. Available at: [http://www.transparency.ge/files/215\\_266\\_273143\\_STATE%20EXPENDITURE%20MONITORING%20PROJECT.pdf](http://www.transparency.ge/files/215_266_273143_STATE%20EXPENDITURE%20MONITORING%20PROJECT.pdf).

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2 Article 679(9) of the CPCG provides that in extraordinary circumstances, where the defendant expresses a will to cooperate with the prosecution in helping to solve a particularly grave crime or identifying the perpetrators of a grave crime, the Prosecutor General is entitled to solicit the judges that no sentence be imposed on the defendant, but that they will still have the status of a convicted person.

3 OMCT 2006 (supra 1) pp. 53-54.

4 PACE Resolution 1415(2005) Honouring of obligations and commitments by Georgia; Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe. 2004. Honouring of obligations and commitments by Georgia. Doc. 10383, 21/12/04.

5 See also: Human Rights Watch, 2005. Accountability and Impunity since the 'Rose Revolution'. [Online]. Available at: [http://hrw.org/backgrounders/eca/georgia04057.htm#\\_ftnref44](http://hrw.org/backgrounders/eca/georgia04057.htm#_ftnref44).