

Application of Plea Bargaining in Georgia

The report has been prepared by the Criminal Law Working Group
of the Coalition for an Independent and Transparent Judiciary

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Introduction

Plea bargaining, as a significant element of legal reform in the sphere of criminal justice, was enacted in Georgia in 2004. The reform was aimed at fighting rampant corruption and combating organized crime. The plea bargaining has played an important role in criminal proceedings in the country. As of now, the vast majority of criminal cases are settled by plea agreements.

This report is dedicated to the application of plea bargaining in Georgia. It mainly consists of the analysis of how plea bargain is practiced in the country. The analysis was prepared by member organizations of the Criminal Law Working Group set up within the framework of the Coalition for an Independent and Transparent Judiciary. The Coalition for an Independent and Transparent Judiciary was established on 29 April 2011 and it unites 32 non-governmental organizations. The goal of the Coalition is to strengthen the capacity of legal professional associations, legal rights NGOs, professional and business associations in monitoring relevant judicial practices and advocating for an independent judiciary. The Coalition was formed within the framework of the Civic Initiative for an Independent Judiciary project funded by USAID. The project is implemented by the Eurasia Partnership Foundation through a partnership with the East-West Management Institute (EWMI).

The Criminal Law Working Group which is set up within the framework of the Coalition involves the following organizations: 42 of the Constitution, Georgian Young Lawyers' Association, Human Rights Center, Georgian Lawyers for Independent Profession, Transparency International Georgia, Open Society Georgia Foundation, Human Rights Education and Monitoring Center, Business and Economic Center.

The Criminal Law Working Group focuses on studying topical issues in the sphere of criminal justice, analyzing the role of courts in this process and drawing up recommendations designed to strengthen the role of courts. To this end, the Working Group has already conducted several studies and developed a set of recommendations. This Group has dedicated the present analysis to one of topical issues – the application of plea bargaining. In studying this topic, the main attention was drawn to the analysis of the practice of plea bargaining in Georgia, in particular, issues such as characteristics of application of plea bargaining; general statistics; the evaluation of the role of courts in decision making on settling cases by plea bargain, et cetera.

The Working Group extends its gratitude to all persons who participated in the conduct of the study and the preparation of this report.

Methodology

The study was conducted according to the following methodology: first, old and new norms of the national legislation regulating the application of plea bargaining in the criminal justice were analyzed.

Since the main emphasis was placed on the analysis of practice of plea bargaining, the Working Group paid a special attention to the study of court decisions on the cases settled by plea bargains. In 2012, some 7,897 cases were settled by plea bargains in Georgia. To study the decisions, the Working Group requested 50 decisions taken in January and December of 2012 each, and also 33 decisions concerning juvenile delinquents, which, in total, made up 133 court decisions. Of these 133 decisions,

some were taken in Tbilisi whilst others in various regions.¹ In case of juvenile delinquents, all the 33 decisions were taken by Tbilisi court.

The analysis of decisions revealed shortcomings; corresponding recommendations were drawn up concerning both the legislation and the practical application. To conduct a survey, questionnaires were sent to Tbilisi city and appeals courts, the Chief prosecutor's Office, the Georgian Lawyers' Association and the US Embassy's Resident Legal Advisor of Georgia Justice Sector Development Program. The findings of this survey were also incorporated in the study.

The present report consists of three main chapters. The first chapter provides a general overview of the national legislation regulating plea bargaining; the second chapter provides statistical data whilst the third chapter contains results of content analysis highlighting problems in criminal proceedings. The study also provides the summary and the recommendations designed to improve the existing practice.

1. General overview of legal environment

One of the reasons for introducing plea bargaining in Georgia was the fight against the existing grave crime situation. Cooperating with convicts enabled law enforcement bodies to efficiently combat the organized crime. At that stage, only prosecutors had the right to ask for plea bargains.

The effect of plea bargain reform was different for the accusation and the punishment. In case of agreeing on punishment, an accused person did not plead guilty but was imposed the obligation to cooperate with the investigation (paragraph 3, Article 679¹ of the Criminal Procedures Code of Georgia of 24.06.2004 wording). In case of agreeing on guilt, "an accused person pleaded guilty or/and cooperated with investigation" (paragraph 3, Article 679¹ of the Criminal Procedures Code of Georgia of 24.06.2004 wording). Admitting guilt was not a necessary precondition for signing a plea bargain. According to the legislation, which is effective today, a plea bargain can be requested by both a defendant (a convict) and a prosecutor. In agreeing on a punishment, a defendant does not oppose a charge leveled against him/her, but agrees with the prosecution on the size of punishment or total release from that punishment. In agreeing on a guilt, however, an accused person admits to the crime.

According to statistical data published by the Supreme Court of Georgia, the number of decisions on cases which have been settled by plea bargain makes up 7,897.² Moreover, this figure comprises 87.8% of all cases.³

1.1 Brief overview of plea bargaining procedures

Pursuant to Article 209 of the Criminal Procedures Code of Georgia, a plea bargain means delivering a decision on a case without the trial on merits, when agreement has been reached on either a guilt or a punishment.

According to the legislation, an offer for plea bargaining can be made by both a defendant (convict) and a prosecutor. Moreover, during hearing a case, a court is also entitled to make an offer to the sides to achieve plea agreement.

¹ Tbilisi – 56, Kutaisi – 12, Akhaltsikhe – 5, Bolnisi – 5, Rustavi – 5, Senaki – 5, Batumi – 4, Gardabani – 4, Telavi – 2, Tetrtskaro – 1, Akhalkalaki – 1, Gori- 1, Zugdidi – 1.

² <http://www.supremecourt.ge/files/upload-file/pdf/5-sapr12.pdf>

³ <http://www.supremecourt.ge/files/upload-file/pdf/6-saproc12.pdf>

If a plea agreement is achieved, a prosecutor has the right to submit a motion for reducing the punishment, lightening or partial release of accusation. In so doing a prosecutor must take into account the public interest, severity of punishment, as well as a degree of gravity of a committed crime and the role of an accused person in committing it. Prior consents of a supervising prosecutor and an accused person are required for executing a plea bargain with a defense lawyer necessarily being involved in this process. A prosecutor must warn a person that he/she is not discharged from civic or any other liabilities.

A defendant (a convict) is imposed an obligation to compensate material damages to a victim. However, in exceptional cases, the chief prosecutor has the right to submit a motion to a court for discharging a defendant of that responsibility, thereby placing that responsibility onto the state. If the cooperation of a defendant with investigative bodies leads to the identification of a public official or/and a person having committed an especially grave crime, the chief prosecutor of Georgia may submit a motion to a court for a complete release of an accused person from punishment. A full release from punishment is not allowed in lieu of payment of penalty or money alone.

In a case to be settled by plea bargain, a prosecutor submits a motion to a court that it takes a decision without hearing the case on merits. The motion provides a full description of an accusation, i.e. what charges are leveled against a defendant (with corresponding article(s) of the Criminal Code indicated), when and in what circumstances was the crime committed, what were the results of the crime, available evidence, a punishment demanded by a prosecutor, et cetera. A plea agreement shall not be achieved through coercion, threat or such a promise that oversteps the limits of the plea agreement.

A court (a judge) is not obliged to agree to and approve a plea bargain unconditionally and without deliberation. It must take a decision on the basis of the law. A court is authorized, without hearing a case on merits, to take a decision to apply a punishment, return a case to a prosecutor or hear a case on merits in accordance with the law.

To prove the accusation, a court, when taking a decision, must examine whether an accusation is corroborated or not, whether a demanded punishment is legal or not, whether a case contains undeniable evidence or not. A court is entitled to offer the parties the change in terms of plea bargain, which must be agreed with a supervising prosecutor. An accused person has the right to refuse a plea bargain at any stage until a court has taken a decision on allowing the plea bargain.

A decision taken by a court without hearing a case on merits can be appealed if rules of plea bargaining set forth in the Criminal Procedures Code have been significantly violated (paragraph 3, Article 215 of the Criminal Procedures Code of Georgia).

2. Topical issues related to plea bargaining

2.1 Prosecutor's discretion

The criminal procedures legislation grants special rights to a prosecutor in negotiating a plea agreement. A prosecutor can offer a plea bargain to the defense and agree on a guilt or size of sentence. The legislation does not specify types of crime which are eligible for plea bargaining. And vice versa, it does not specify types of crime which are not eligible for plea bargaining. However, pursuant to paragraph 8, Article 218 of the Criminal Procedures Code, a defendant shall not be fully released of sentence if he/she was accused of any of the crimes specified in articles 144¹, 144², and

144³ of the Criminal Code of Georgia (torture, threat of torture, degrading or inhumane treatment). Moreover, the law does not specify the size of sentence, in particular, what can be minimum and maximum sizes of a sentence in case of a concrete crime, when a plea agreement is entered between the parties. According to Article 55 of the Criminal Code of Georgia:

“A court may apply a punishment lighter than the lowest threshold of penalty established under a relevant article of this Code or a more lenient punishment, if parties have signed the plea bargaining agreement.”

Consequently, a prosecutor is granted a broad discretion in offering a size of punishment, whereas a judge, who does not have the right to interfere in the process of negotiations and change terms of agreement, may only agree or refuse to approve a plea bargain.

A representative of a court, surveyed during the study, said that plea bargaining is not voluntary.

Often, the defense has to agree to clearly enslaving discriminatory conditions because a court does not have the right to apply Article 55 of the Criminal Code and is also restricted in applying conditional sentence.⁴

2.2 Rights of an accused person

According to paragraph 1, Article 212 of the Criminal Procedures Code of Georgia, a plea bargain is executed in writing.⁵ According to paragraph 2, Article 212, a plea bargain may be offered by both a defendant and a prosecutor. This legal provision says nothing about a form of offer, which means that a prosecutor may also verbally offer a plea bargain to an accused person. In such a case, an accused person is not guaranteed that the terms which were previously offered verbally by the prosecution will be the same in a written agreement.

Although it is true that a deceit represents a ground for canceling a decision taken without hearing a case on merits, it is unknown how a defendant can prove a fact of deceit. In such a case, a defense lawyer is to play a special role. A defense lawyer must ensure the defense of an accused person, provide him/her with complete information and act in the interests of an accused person. However, the effective legislation does not create firm guarantees for the defense to efficiently defend interests of an accused person during signing a plea agreement.

A problem of proof arises not only when appealing a decision taken without hearing a case on merits to a higher court, but also when considering a motion for signing a plea agreement in a trial court. According to paragraph 3, Article 212 of the Criminal Procedures Code of Georgia, a judge must become convinced that a defendant fully understands the terms of a plea bargain and realizes legal results thereof. The legislation does not specify the means which a judge must apply in order to establish a true will of an accused person. In practice, a judge may fulfill the obligation envisaged by paragraph 3, Article 212 of the Criminal Procedures Code, by informing an accused person of a sentence which may be applied to him/her and taking an attempt to find out whether an accused person wants to serve this sentence. Even if this proves to be the first occasion when a defendant learns about a real punishment which he/she may face, because a prosecutor lied to the defendant when offering a plea bargain to him/her, or because the defendant did not receive an adequate legal assistance, the defendant, for fears of being imposed a more severe punishment, may declare that

⁴ Chamber of Criminal Cases of Tbilisi Appeals Court (survey), May 2013. Tbilisi.

⁵ The Criminal Procedures Code of Georgia, 9 October 2009.

he/she understands the terms of plea bargain. Such an answer of an accused person is, actually, a sufficient ground for a judge to consider the obligation imposed on a judge under paragraph 3, Article 212 of the Criminal Procedures Code as fulfilled. The only tool a defendant has to counteract a probability that a plea agreement submitted to a court might not express a true will of an accused person because a defendant was deceived by a prosecutor or he/she was unable to enjoy an adequate right to defense, is a verbal explanation. A prosecutor's lie or poor defense activity would have been exposed if a judge had had a certain idea about offered plea bargain and negotiations conducted to achieve it. When the offer and dynamic of negotiations do not conform to the content of a text of plea agreement which is submitted to the court, a reasonable doubt arises that the plea bargain does not reflect the will of an accused person; that the accused person was deceived and the defense failed to prevent the lie. If the conduct and the result of negotiations do not match the final content of the text of a plea agreement, a judge must find out the reason of this mismatch.

Deceiving an accused person by a prosecutor is not a characteristic feature for Georgia alone. This issue was a topic of deliberation in the United States in a decision on the case *Missouri vs Frye* taken in 2011.⁶ Judge Kennedy, who wrote the opinion of the majority of Supreme Court judges, declared that the prosecutor and the trial court must perform certain actions which will help the accused avoid less favorable terms of plea bargain. To this end: first, the fact of a formal offer means that terms of plea bargain and its processing can be documented so that what took place in the negotiation process becomes clearer for a judge later. Second, all offers must be in writing to ensure against later misunderstandings or fabricated charges. Third, formal offers can be made part of the record during undertaking such investigative actions which has taken place before a trial on the merits. The documenting ensures that a defendant is fully advised about the accusation before trial. Before the commencement of a trial on merits, it must be ensured that: first, a plea bargain offer was made; second, the defendant was advised of the offer and its precise terms; and third, the defendant is given a possibility to respond to the plea bargain offer.

According to paragraph 2, Article 211 of the Criminal Procedures Code of Georgia, an accused person must fully understand the content of a plea bargain before signing it. Until it is signed, an accused person must receive a legal advice. Given that the law does not require either making an offer or determining terms of plea bargain in writing, a protocol of negotiation between a prosecutor and an accused person is drawn up. It is unclear how an accused person or his/her defense lawyer can fully understand the content of a plea agreement. Only after a prosecutor obtains a written consent of a defense lawyer and an accused person on cooperating in accordance with paragraph 3, Article 211 of the Criminal Procedures Code of Georgia, a motion is drawn up in which a plea bargain is reflected in a written form. This motion is signed, along with the prosecutor, by the defense lawyer and the accused. The Criminal Procedures Code does not provide a possibility for an accused person and a defense lawyer to seek additional advice concerning the text of motion drawn up by a prosecutor. If the text of the motion conflicts with the verbal agreement achieved between the accused and the prosecutor, the defense lawyer, naturally, is obliged to inform the accused person about this.

Judge Kennedy states that after a written offer of signing a plea agreement has been made and a protocol of negotiations drawn up, a defense must be given a certain period of time to explain terms reflected in this document to the accused. If within the specified period, the accused person does not receive consultation, it will be considered that he/she was not rendered the effective assistance.

⁶ <http://www.law.cornell.edu/supremecourt/text/10-444#writing-10-444> OPINION 3

To avoid misunderstandings and deception of an accused person, the law must envisage an obligation of written communication between a defendant and a prosecution from the very initial stage of a plea bargain offer. If a motion for plea bargain runs counter to a protocol of negotiations, the burden of proof on the absence of deceit of defendant must lie with a prosecutor.

2.3 Role of judge

In the opinion of a representative of court, apart from existing shortcomings in the Georgian legislation it does not fully regulate the activity of the institution of plea bargain. According to that representative, a court must be able to approve a plea bargain with certain amendments if the court believes that the punishment requested in it is unfair.⁷

The role of a judge in signing a plea agreement is limited by the Criminal Procedures Code of Georgia. A judge is not involved in the process of negotiations and is not allowed to apply any other sentence save the one proposed by a prosecutor. However, a court may offer different terms of plea agreement to the sides if it believes that the terms do not serve the interests of justice. Nevertheless, a judge is constrained by a broad discretion of a prosecutor and only at the final stage, on the basis of considering a prosecutor's motion for delivering a verdict without the trial on merits, takes one of the following decisions, in accordance with Article 231:

- a) To deliver a verdict without the trial on merits;
- b) To return the case to a prosecutor; or
- c) To hold a trial on merits in accordance with the rule established by the law.

When taking a decision on delivering a verdict without the trial on merits, a court approves a plea bargain, which implies that the court, based on submitted evidence, considers the leveled charges corroborated and, also, regards the terms of agreement specified in the motion as lawful and fair.

As regards two other alternatives available to a court – the return of case to a prosecutor and a decision to hold a trial on merits, their real content and purpose are rather vague. The legislation fails to explain the terms of application of these mechanisms with sufficient clarity and details, including whether such decisions can be taken at any stage of hearing a case by a court (this implies a sitting of initial appearance, a pre-trial hearing and trial on merits).

Questions concerning the above mentioned mechanisms are related to practical purpose and expediency of these mechanisms. First, it must be noted that two decisions, alternative to the approval of plea bargain, may be taken in different conditions, including when:

1. A court considers that evidence submitted is not sufficient to prove the guilt beyond reasonable doubt:

or/and

2. Even though the guilt is proved, a court deems a proposed size of (unlawful or unfair) punishment unacceptable.

⁷ Chamber of Criminal Cases of Tbilisi Appeals Court (survey), May 2013. Tbilisi.

In order to realize the difference in the outcomes when these conditions are present, these two instances must be reviewed separately.

In the first case, when a court does not regard evidence sufficient to prove guilt, the return of a case to a prosecutor looks like giving a repeated chance to a prosecutor to successfully prove the guilt. The legislation, however, does not specify what happens after the return of a case to the prosecution and whether a prosecutor submits additional evidence and a new motion for plea bargaining or the case continues with a trial on merits, in accordance with the provisions. One should also take into account that a plea bargain may be requested and a relevant motion considered at any stage of court hearing. If a motion for plea bargaining is submitted at a pre-trial hearing, then it should be taken into account that the evidence have already been exchanged between the parties and consequently, both the defense and the prosecution are constrained by the evidence which was provided to each other and submitted to a court. On this stage, the court's refusal to approve a plea agreement and the return of the case to a prosecutor is illogical because the prosecution will not be able to add new evidence to it (save in exceptional cases specified in the law). At the same time, a decision on conducting a trial on merits is also illogical, because the court has already considered that the guilt was not established beyond a reasonable doubt. Therefore, if a court does not agree to a plea bargain at this stage because of the lack of evidence, it, by its decision, must stop a proceeding against a person. The situation is, however, different when a court does not agree with the punishment.

The situation is also ambiguous when a court refuses to approve a plea bargain because of lack of evidence on the stage of trial on merits. Bearing in mind the above provided arguments, it is also illogical to return a case to a prosecution on this stage because the prosecution is constrained by evidence which it gave to another party. If, on this stage, a court regards that the evidence indicated in a motion for a plea bargain is insufficient to establish the guilt and to approve a plea agreement, a court must not approve the motion and must deliver a verdict of acquittal.

Procedural norms effective today do not clearly regulate the above discussed issues, especially, they do not specify on which stage a court can take a decision to return a case or to go on with hearing a case on merits. A provision provided in paragraph 5, Article 213 of the Criminal Procedures Code of Georgia says that "if a motion is considered before a conduct of a pre-trial hearing.... and a court decides that evidence is not enough to prove the guilt.... it returns the case to a prosecutor." Regardless of such a norm, a common analysis of corresponding norms of the Criminal Procedures Code does not provide a clear answer to a question whether it is possible to apply the mechanism of return of a case on the stage of pre-trial hearing or thereafter or this mechanism is valid only before the pre-trial hearing. This issue is even more ambiguous regarding a decision on hearing a case on merits. The Criminal Procedures Code does not contain any concrete wording on that.

Hence, it should be said that a real content and practical importance of court decision is quite vague. The Criminal Procedures Code requires additional changes in order to make the process more clear-cut.

According to representatives of judiciary, the role of a court in plea bargaining is insignificant which, in their opinion, is a shortcoming of the legislation.⁸ According to the legislation, a court examines a plea bargain in terms of its fairness, but it cannot amend it. The refusal to approve it, however, may

⁸ Chamber of Criminal Cases of Tbilisi Appeals Court (survey), May 2013. Tbilisi.

cause a deterioration of a defendant's condition if a plea agreement is not signed on new terms with him/her.

2.1.4. Rights of victim

A victim does not virtually have rights in plea bargaining between a prosecutor and a defendant.

In particular, Article 217 of the Criminal Procedures Code explicitly states that a victim has no right to appeal a plea bargain. At the same time, however, the same article states that until a plea agreement has been signed, a prosecutor shall conduct a consultation with a victim and inform him/her about expected plea bargain.

The mentioned provision is very ambiguous as it does not specify either the aim of the consultation of a prosecutor with a victim or a consequence of it. Moreover, the Code does not envisage a possibility of a victim being involved in plea bargaining. Thus, the role of a victim is much narrowed and he/she does not have any real lever. In such conditions, an issue of reasonable application of prosecutor's discretion must be considered as of a defender of a victim and, in general, public interest.

Representatives of judiciary believe that a victim's right is limited to consultation alone and it would be beneficial if a protocol of plea bargain reflects the obligation to compensate damages to the victim. Several representatives of judiciary reckon that the rights of victims must be better defended and positions of victims must be taken into account while conducting plea bargaining. In the opinion of a judge of Tbilisi Appeals Court, the effective legislation is limited to providing consultation to a victim and informing him/her about the plea bargain. To raise the level of trust towards this institution among society, according to the judge of Tbilisi Appeals Court, elements of restorative justice should be introduced and a victim should be more actively involved in the process of plea bargaining.

In the opinion of the Working Group, the consultation with a victim may be one of conditions in a number of criminal cases, which will create higher guarantees for the protection of victim's rights.

Regarding topical issues pertaining to the signing of plea bargain agreements,⁹ the US Embassy's Resident Legal Advisor of Georgia Justice Sector Development Program, Jared Kimball, noted that there are problems in legislation concerning signing plea bargains, though more problematic is the application of this mechanism in practice. In Jared Kimball's opinion, the use of penalty in every case of plea bargain is unacceptable and moreover, the amount of penalty must be of that size which will not prove to be a heavy burden for a family. Out of problems related to plea bargaining, the US embassy outlines three most important ones:

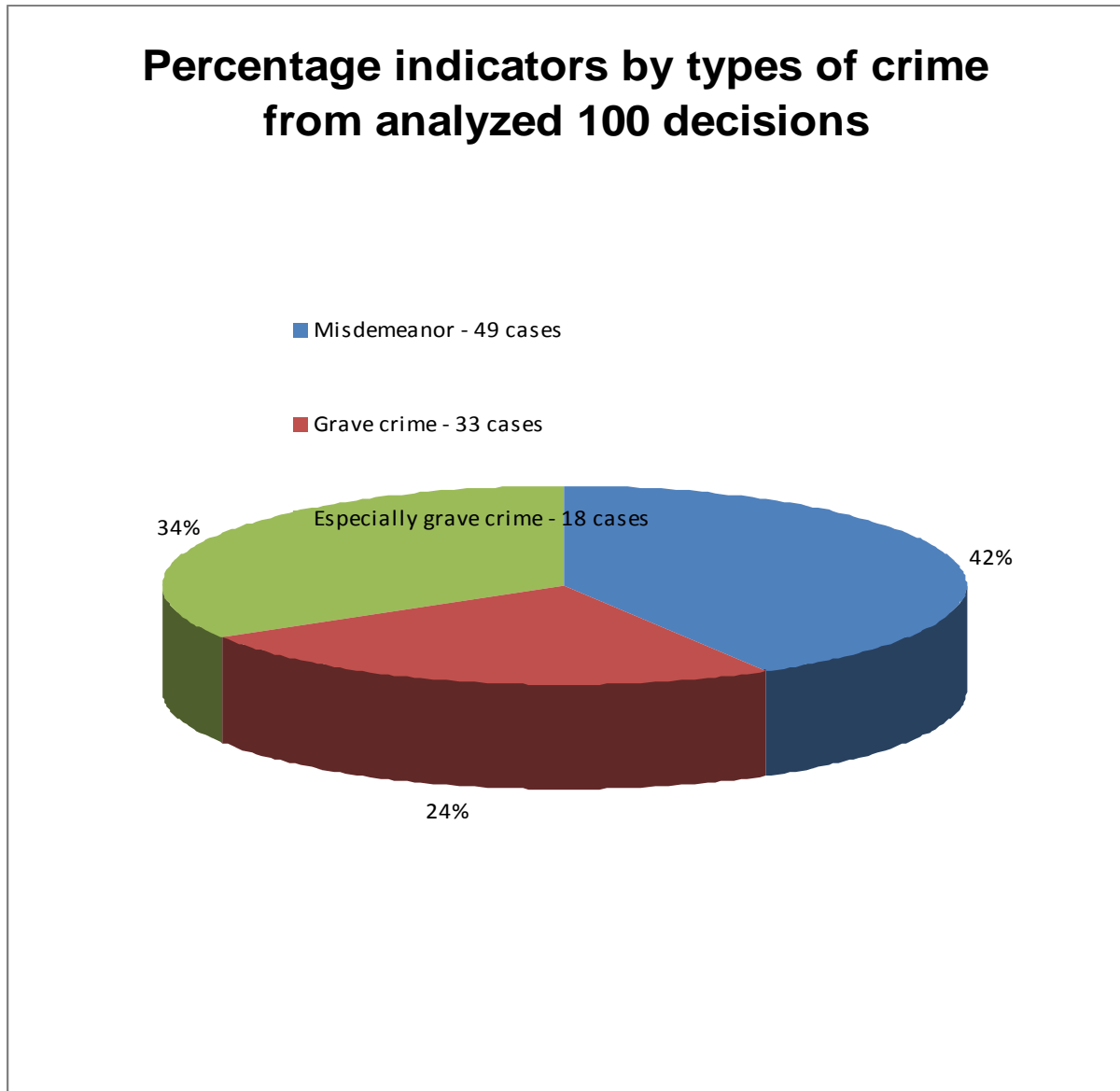
1. The issue of voluntariness of a plea bargaining mechanism;
2. The issue of the size of penalties;
3. The issue of the role of judge.

3. Statistical information on court decisions analyzed within this study

⁹ Interview with the US Embassy's Resident Legal Advisor of Georgia Justice Sector Development Program, Jared Kimball.

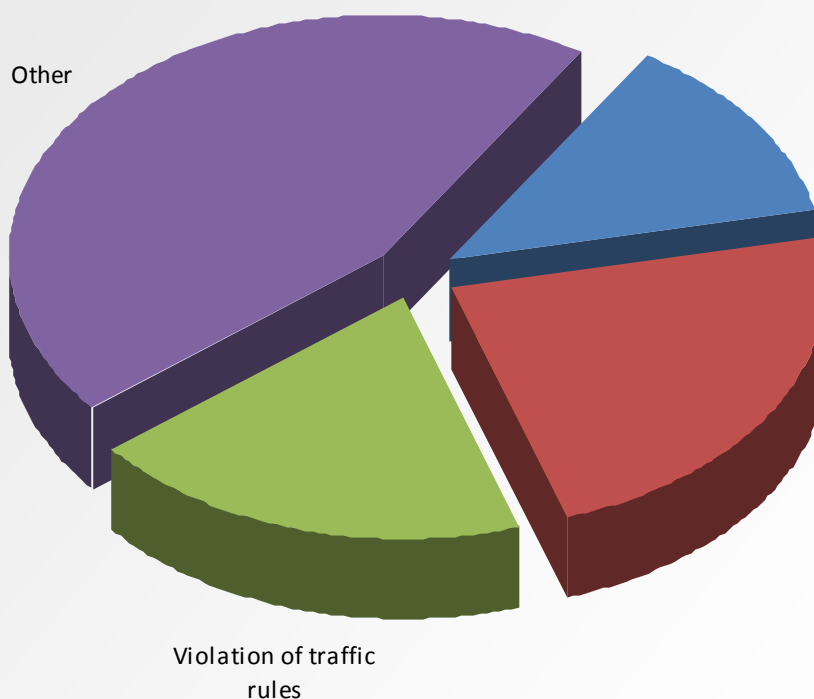
Court decisions studied by the Working Group enabled to come up with certain statistical information which provide a general picture on separate details of the use of plea bargaining; for example, such as: types of crimes towards which plea bargaining is applied, as well as additional punishments, including fines, and the size of fines in plea bargaining.

Let us reiterate that the Working Group studied 100 court decisions in 2012, of which 50 were delivered in January and another 50 in December. Also, the Group analyzed plea agreements signed with 33 Juvenile delinquents. In total, 133 decisions were studied.



Indicators of types of crimes by decisions which were studied are as follows:

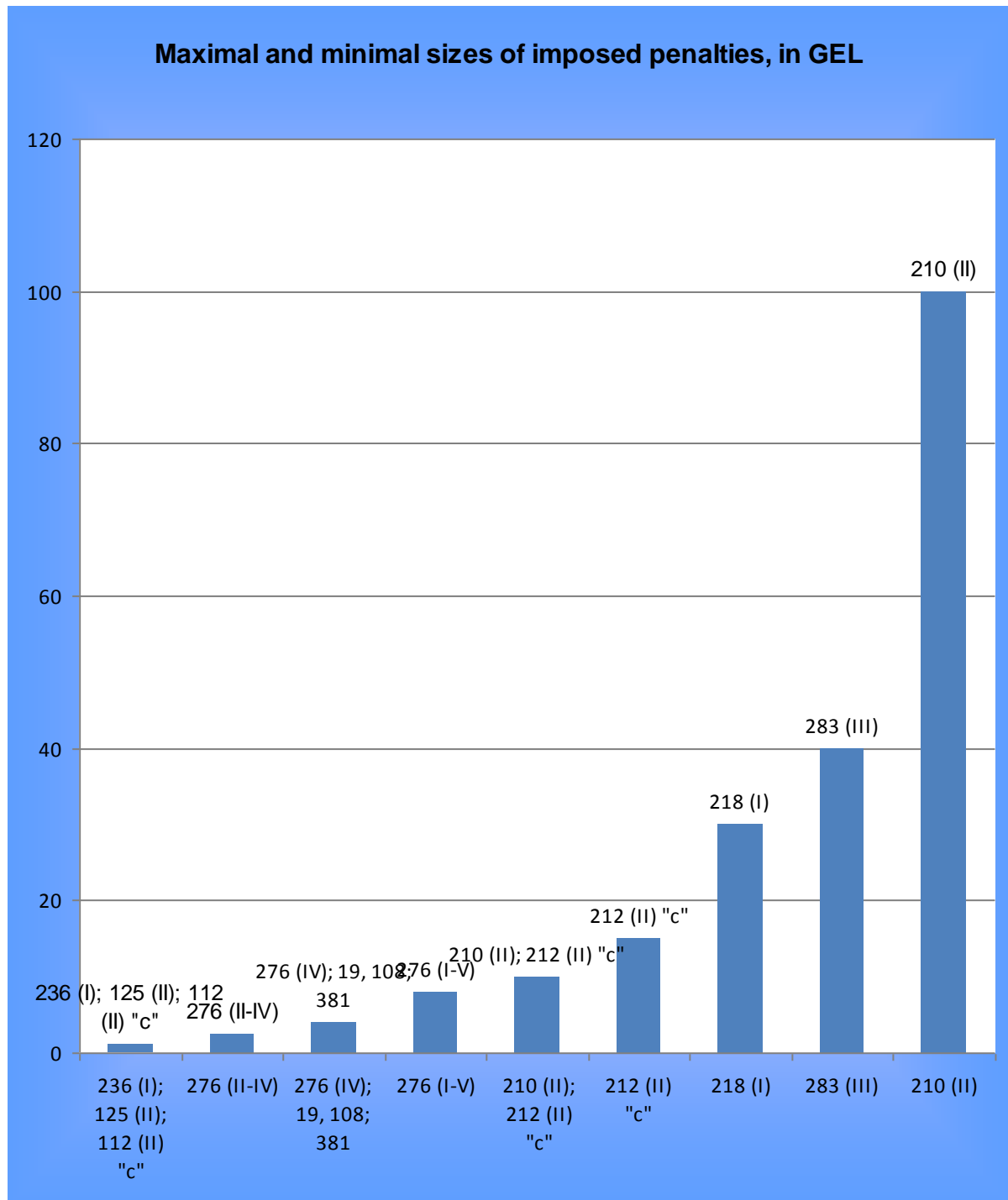
Application of plea agreements by types of crime



4. Penalty as an additional punishment

Out of 100 decisions (on accused adults), which were analyzed during the study, plea agreements without additional punishment – penalties, were signed only in 38% of cases. These plea agreements do not envisage any additional term save those procedures which are envisaged by the law and are required from persons whose deprivation of liberty were replaced with conditional sentences. The mentioned 38 decisions were taken by city (district) courts existing in various territorial units of Georgia. The decisions were provided by the prosecutor's office of Georgia and as noted above, in the chapter on methodology, we requested 50 decisions on adult accused people taken each in the first and last months of 2012.

The remaining 62 plea bargains envisage an additional punishment in the form of penalty. Out of analyzed decisions, the minimal size of penalty is 500,000 GEL whilst the maximum size is 100,000 GEL.



5. Findings of analysis of court decisions

5.1. The role of court in signing a plea agreement

Plea bargaining is applied in delivering justice on criminal cases. Parties to a plea agreement are a prosecutor and a defendant. The interest of a prosecutor in this agreement is a swift and efficient delivery of justice whilst that of a defendant is avoidance of possible severe punishment which may be applied to him/her as a result of trial on merits. When signing a plea agreement, the principles of

voluntariness, equality of parties, preferential protection of legal interests of defendant must be observed. However, this is not the case in practice.

In the opinion of a judge of Tbilisi City Court, the plea bargaining is not voluntary because a defendant often has to agree to extremely unfavorable terms.

In the opinion of a representative of Tbilisi Appeals Court, a plea bargain is a voluntary institution in its essence and directly linked to a will and choice of a party, namely, a defendant.¹⁰ However, the representative of the Tbilisi Appeals Court welcomed the broadening of the discretion of a judge and said that the enhancement of the role of a judge is important in the segment of imposing a punishment when approving a plea bargain.

A member of Georgian Lawyers' Association believes that the role of a judge in plea bargaining is insignificant, virtually limited to performing a function of a public notary in signing a plea agreement. The member of Georgian Lawyers' Association thinks that a judge must have the right to change the size of punishment.¹¹

Before approving a plea agreement, a court must become convinced that a plea agreement is signed with the consent of an accused person and that the latter fully realizes the essence and possible consequences of the agreement. Admittance to the crime by a defendant is not a sufficient ground to convict him/her. Consequently, a court must consider two crucial issues: whether evidence submitted is undeniable, proving the guilt of an accused person, and whether a punishment envisaged in a plea agreement is lawful and fair. Additionally, a court must examine a formal compliance of plea agreement with the requirements of legislation and only after that, it must take a decision on the approval of a plea bargain. It was precisely by these criteria that the role of a court was evaluated in the court decisions that were analyzed within the study.

The analysis of texts of court decisions taken on criminal cases without trials on merits also reveal a passive role and a formal nature of a court in plea bargaining. Similarity of texts of these decisions underscores a passive role of a court in applying plea bargaining. Characteristic qualities of dependents— their family status, criminal record, age, education status - are merely formally indicated in the decisions and not taken into account when approving a plea bargain. The practice has shown that in the majority of cases, plea bargaining is applied for the sake of speedy delivery of justice and the above listed personal qualities of a defendant, which shall be taken into account in determining a punishment because they may represent a ground for reducing a punishment, are ignored.

The study of court decisions approving plea agreements give rise to a doubt that either defendants were not rendered qualified legal counsel or were deceived when they, in lieu of “tipping,” were promised more lenient punishments through plea agreements; the thing is that, in reality, plea agreements approved by courts envisaged sentences which were just a few months or years shorter than the sentences which courts would have applied to defendants as a result of trials on the merits. Therefore, we may conclude that basically plea agreements are executed for the aim of speeding up the delivery of justice and in reality, the interest of a defendant (convict) – the decrease in the size of punishment – is disregarded.

In applying punishment for actions committed by various persons under one and the same article, or paragraph thereof, of the Criminal procedures Code, those criteria which must be taken into account,

¹⁰ A representative of Tbilisi city court (survey), May 2013. Tbilisi.

¹¹ A member of Georgian Lawyers' Association (survey), May 2013. Tbilisi.

such as graveness of crime committed by a defendant, his/her personality, activity, age, health condition, marital and material status, et cetera, are virtually ignored. This opinion is based on a comparative analysis of court decisions. In certain cases, characteristic qualities of two persons were identical, plea agreements with both of them were submitted to a court by the same prosecutor, thereafter, considered by the same judge, but despite such likeness of the two cases, the punishments applied to them are not identical. The same holds true in regards to penalties imposed. The above listed characteristics of a person are not taken into consideration in determining the size of penalties which are imposed upon the demand of a prosecutor.

As noted above, a court's approval of a plea agreement is of clearly formal nature. Texts of plea bargains are identical; judges do not change or correct motions of prosecution; they do not study/explore formal and material preconditions in a due and thorough manner.

In their decisions courts only formally indicate that defendants are well aware of the essence of plea agreement and that they were not pressurized. Courts do not actually deliberate on whether the process of plea bargaining was conducted in conformity with the law; whether there were legal actions taken towards a defendant; whether various forms/methods of coercion or intimidation were applied. Nor did they establish whether a defendant understood and was aware of his/her rights and obligations.

The law obliges a court to listen to and deliberate on a position and opinions of another party on a motion submitted by the first party. In this regard, serious shortcomings have been observed. In particular, none of decisions on the approval of plea agreement contain deliberations on positions of the defense; its arguments concerning a concrete case; and the relevance of evidence submitted by the defense to influence circumstances of the case. Violations which may be regarded as being tantamount to the infringement of rights of defense in the criminal proceeding were the cases in which circumstances submitted by the defense for the aim of lightening the liability of a defendant were left without proper assessment from courts; arguments of the defense were disregard; and adequate substantiations were absent in court decisions. On certain occasions, plea agreements were signed/approved for the aim of swift delivery of justice, thereby grossly damaging the interests of defendants in terms of incompliance of the size and severity of punishments with crimes committed by them, their marital status and other circumstances.

The analysis of plea bargaining makes it clear that courts lack uniform, general guidelines which they would apply in considering plea agreements; such guidelines would ensure achieving plea agreements on identical terms with defendants in cases which involve identical crimes with identical aggravating or mitigating circumstances. In this regard, it would be useful to draw up a uniform practice that would exclude the application of such different punishment measures in plea bargaining applied towards similar cases with similar characteristic qualities of accused persons. Because it is absolutely unclear and unsubstantiated why courts apply punishments of various/different size and severity by courts towards persons accused of same crimes. Court decisions do not show which factual circumstances convinced a judge that the size of punishment specified in a motion is commensurate to a crime a defendant is accused of, or personality of a defendant, his/her social, marital and economic status; this absolutely naturally causes a feeling of injustice. Unfortunately, a key guideline for judges in taking decisions appears to be a motion officially requested by a prosecutor.

5.2 Peculiarities of plea bargaining in Georgia

A gradual change in the legislation on plea bargaining have affected the practice too. The analysis of decisions on plea bargains allowed us to detect and study peculiarities of the practice. As a result of studying the practice several noteworthy issues have been identified, including:

- A problem of a standard of proof;
- Impediment in the development of court practice;
- Disregard of other mechanisms of criminal justice.

In the majority of decisions that have been studied, courts do not say anything about the reliability of presented evidence. A plea bargain is a ground of court decision on a case without a trial on merits. Consequently, during a court consideration of plea bargain, evidence cannot be studied in accordance with the rule established by the law. Nonetheless, the legislation obliges judges to examine the substantiation of a motion. Moreover, Article 213 of the Criminal Procedures Code obliges a judge to examine the reliability of presented evidence. In the majority of decisions studied by the Working group, courts merely list those evidence which, in court's assessment, prove, along with the confession of a defendant, that the crime was committed. In exceptional cases, however, court indicates: "a court believes that evidence in the case was collected and attached to plea bargaining in full observance of the criminal procedures legislation and that they corroborate the accusation against a defendant (name and surname)."¹² Naturally, in assessing submitted evidence, a court is restricted by its powers defined by the procedures legislation. In general, according to the rules established for examining evidence, court powers are restricted by motions submitted by the parties, which it considers in terms of admissibility of evidence. In contrast to that, Chapter XXI of the Criminal Procedures Code does not contain any provision regarding a mechanism of establishing reliability of evidence. If a party does not question submitted evidence (and it is most likely that the majority of cases will be such when on the stage of considering a plea bargain at court), it is unclear how then a court is supposed to become convinced that a submitted motion is substantiated whilst evidence undeniable. The analysis of the court decisions does not provide an answer to this question. Hence, it remains vague how a court fulfills its obligation in practice, which is required under Article 213 of the Criminal Procedures Code.

Moreover, according to the legislation, in order to deliver a verdict of guilty, a standard of proof beyond a reasonable doubt must be met, which means the entirety of such evidence that would convince an impartial person of guiltiness of a person. As regards settling a case by plea bargain during which a verdict of guilty is also delivered, the law requires that if a court considers submitted evidence as undeniable to prove the guilt of a defendant whilst demanded punishment as lawful and fair, it delivers a verdict without the trial on the merits. In this case, a legislator does not require a standard of beyond a reasonable doubt, which means that the highest standard in the criminal justice is not relevant in this case. Pursuant to subparagraph "c," paragraph 1, Article 211 of the Criminal Procedures Code, a motion for a plea bargain submitted to a court by a prosecutor must indicate that "evidence are sufficient for a reasonable belief that this person committed the mentioned crime." A reasonable belief to level a charge, conduct an investigation or/and apply a detention is an established standard. Clearly, an entirety of evidence which give rise only to a reasonable belief about the guilt of a person is not a sufficient ground to deliver a verdict of guilty. The decisions that were analyzed indicate about a different practice applied by courts. Separate decisions note that "the entirety of evidence prove beyond a reasonable doubt that a defendant committed a crime."¹³ However, part of

¹² A decision of Gardabani district court on the case #1-27/12, dated 24 January 2012.

¹³ Decision of Bolnisi district court on the case #1/246-11, dated 17 January 2012.

court decisions do not contain any indication of a standard of beyond a reasonable doubt and is limited to a phrase that collected evidence prove the accusation towards a defendant.¹⁴

Naturally, signing a plea agreement means refusing the use of a number of fundamental rights, including the questioning of a witness during a trial, effective implementation of adversarial principle and other important possibilities of criminal justice. That's why settling a case by plea bargain, apart from its result, starkly differs procedurally from a standard court hearing. Consequently, during plea bargaining without the use of abovementioned procedural guarantees of defense (cross-examination, et cetera), a standard of beyond a reasonable doubt cannot be objectively met.

A mass application of plea bargains allows us to say that a great number of criminal cases were conducted without these very fundamental procedural rights being realized because of plea agreements applied in those cases. Comprehensive procedural elements appeared to be only exceptions whereas the mechanism of delivering verdicts without trials on merits turned out to be the main process. One of decisions studied by the Working Group reads: “the commitment of incriminated action is undeniably proved, in addition to confession of a defendant at a court hearing, by the entirety of evidence presented in the case, in particular: a protocol of inspection of a site of incident, a protocol on impounding an object, a testimony of a victim {name and surname}... and the entirety of other evidence existing in the case.”¹⁵ Yet another decision says, that “an illegal action committed by the defendant {name and surname} is proved by a confession of the defendant {name and surname}, a certificate on a traffic accident,... conclusion #709/a of translogic-technical expertise.”¹⁶ Presented evidence differ from one another by their significance and degree. Some directly prove defendant's guilt whilst others are of indirect nature and prove other circumstances related to a crime. The conclusion of expertise is of descriptive nature though a court is obliged to evaluate it from a legal standpoint.

According to paragraph 1, Article 13 of the Criminal Procedures Code, evidence does not have a pre-established power. Consequently, without examining, evidence cannot be regarded as something proving factual circumstances of a case. In the presented decisions, court did not indicate which concrete circumstance proved a fact. In general, problems in examining evidence which are submitted by the prosecution were discussed in the beginning of this chapter. This issue is important because it is a good illustration of a common feature characteristic of cases settled by plea bargains.

When discussing plea bargaining, it should be said that the final decision on a case lies with a court. It is precisely a judge that will be a guarantor that a plea bargain is not achieved on unfair terms which are detrimental to an accused person. The analysis of court decisions, conducted by the Working Group, has shown that courts apply non-uniform approach in assessing the reliability and legality of evidence and the fairness of main or additional punishment. In certain instances, when a penalty is applied as an additional punishment, court does not deliberate at all on a financial state of an accused person and limits itself to merely noting that the demanded punishment is fair.¹⁷ In cases of such type, questions legitimately arise as to whether or not a court performed the role of a guarantor of the rights and legal interests of accused persons.

A problem of development of court practice must also be noted. The application of plea bargaining in the majority of criminal cases has impeded the development of the case law. There are no court

¹⁴ Decision of Kutaisi city court on the case #1/18, dated 17 January 2012.

¹⁵ Decision of Gardabani district court on the case #1-27/12, dated 24 January 2012.

¹⁶ Decision of Tbilisi city court on the case #1/4890-08, dated 14 December 2012.

¹⁷ Decision on the case # 1/853-12 of Kutaisi city court, dated 7 December 2012.

decisions of proper importance taken on problematic cases. This problem was also apparent in the process of this study. District (city) courts take different decisions on identical cases. Examples of uniform practice are rare and a common standard is not observed which, naturally, will be not conducive to the development of criminal justice. Similarity of plea agreements has created an acute threat to the existence of generalized practice.

A peculiarity of the application of plea bargain is that this institution has replaced other mechanisms. The analysis of plea bargains by types of crime, findings of which is provided in the beginning of this report, has made it clear that the prosecution requests the use of plea bargain towards any type of crime – be it misdemeanor, grave or especially grave crime as well as crime against life and health of people and financial crime. In the majority of cases, it is unclear what are the grounds of a prosecutor's motion for signing a plea agreement with, for example, a person accused of committing especially grave crime of sexual nature. In such cases, it is difficult to attribute it to a public interest of speeding up the delivery of justice.

Apart from court decisions on grave and violent crimes, the Working Group also analyzed such decisions that were delivered on less grave crimes committed against private property. On some occasions, the damage caused by such crime is insignificant whilst an accused person does not have a criminal record and has not committed the crime in aggravating circumstances. In particular, according to one of court decisions which concerned a theft, an object of crime was a metal armchair. According to investigation, an accused person sold it for 3 GEL whereas the damage incurred by a victim comprised 50 GEL.¹⁸ In this case, a prosecutor made a motion for a plea bargain, which was approved by the court.

According to Article 7 of Criminal Code of Georgia, "An act, which though formally contains features of crime, but due to its insignificance has not caused such harm or has not created the danger of such harm that would make criminal responsibility of its perpetrator essential, shall not be considered as a crime." This provision, which is a guideline, indicates about the necessity of applying a less severe attitude towards especially insignificant crimes. Moreover, according to the Criminal Procedures Code, a prosecutor has the power of discretionary prosecution allowing him/her to reject the criminal prosecution or/and apply measures alternative to prosecution.

Amendments to the Criminal Procedures Code, which were adopted over the past few years, have provided an alternative mechanism of diversion. A mechanism of diversion enables a prosecutor, through examining graveness of crime, personal characters of an accused person, damage caused by a crime or other public and private interests, to take an optimal decision and in some cases, to reject the criminal prosecution against a person.

Alternative measures to criminal prosecution were established as a counterbalance of the attitude of zero tolerance and serves the aim of liberalizing the policy of criminal justice. Initially the diversion applied to juvenile delinquents alone. As of today, the mechanism of diversion is also effective with regard to adults in a somewhat different form. This institution implies the signing of agreement between an accused person and a prosecutor. Under a signed agreement, an accused person commits him/herself to fulfill assumed liabilities and in exchange, avoid a verdict of guilty. The fulfillment of liabilities is ensured by a possibility of renewing a criminal prosecution against an accused person by a prosecutor.

¹⁸ Decision of Gardabani district court on the case # 1-27/12, dated 24 January 2012.

In contrast to diversion, the plea bargaining implies the delivery of a verdict of guilty. A defendant, who engages in negotiations on a plea agreement, automatically becomes a convict, if this agreement is signed, and a verdict of guilty is delivered against him/her.

As regards the diversion, by applying it the state changes the attitude towards concrete criminal cases. Instead of being an implementer of criminal prosecution, a prosecutor becomes a party to the deal. A person to whom diversion is applied shall properly fulfill assumed liabilities in accordance with the agreed terms. In exchange, a verdict of guilty is not delivered against a person and he/she thus avoids criminal conviction.

There were cases among court decisions studied by the Working Group, which dealt with insignificant criminal wrongdoings. Nevertheless, even in such cases courts approved motions of prosecutors for plea bargaining. In contrast to the diversion, a plea agreement, regardless of its terms, produces concrete negative legal consequences for a defendant such as a verdict of guilty, criminal conviction, social stigma, et cetera. An agreement on diversion is of civil law nature and does not cause a criminal conviction. This is exactly one of fundamental differences between these two mechanisms. Consequently, the Working Group deems a number of cases, which concerned minor wrongdoings and regardless of personal characteristics or past life of accused persons they were settled by plea agreements instead of applying alternative measures, as strange precedents.

The study conducted by the Working Group revealed obvious wrongdoings in the practice of plea bargaining and those features which are characteristic for this mechanism in the Georgian justice. The aim of the Working Group was not the analysis of concrete criminal cases and terms of plea bargains. The aim pursued was the analysis of the practice and interesting precedents which showed an interesting modification of a plea bargaining in Georgia.

6. Application of plea bargaining towards juvenile delinquents

The Working Group also requested court decisions approving plea agreements with juvenile delinquents from January through December of 2012. The total of 33 court decisions was received. Out of received decisions only nine contained an additional punishment in the form of imposed penalty. The minimal size of penalty imposed was 490 GEL whilst the maximum size reached 15,000 GEL.¹⁹

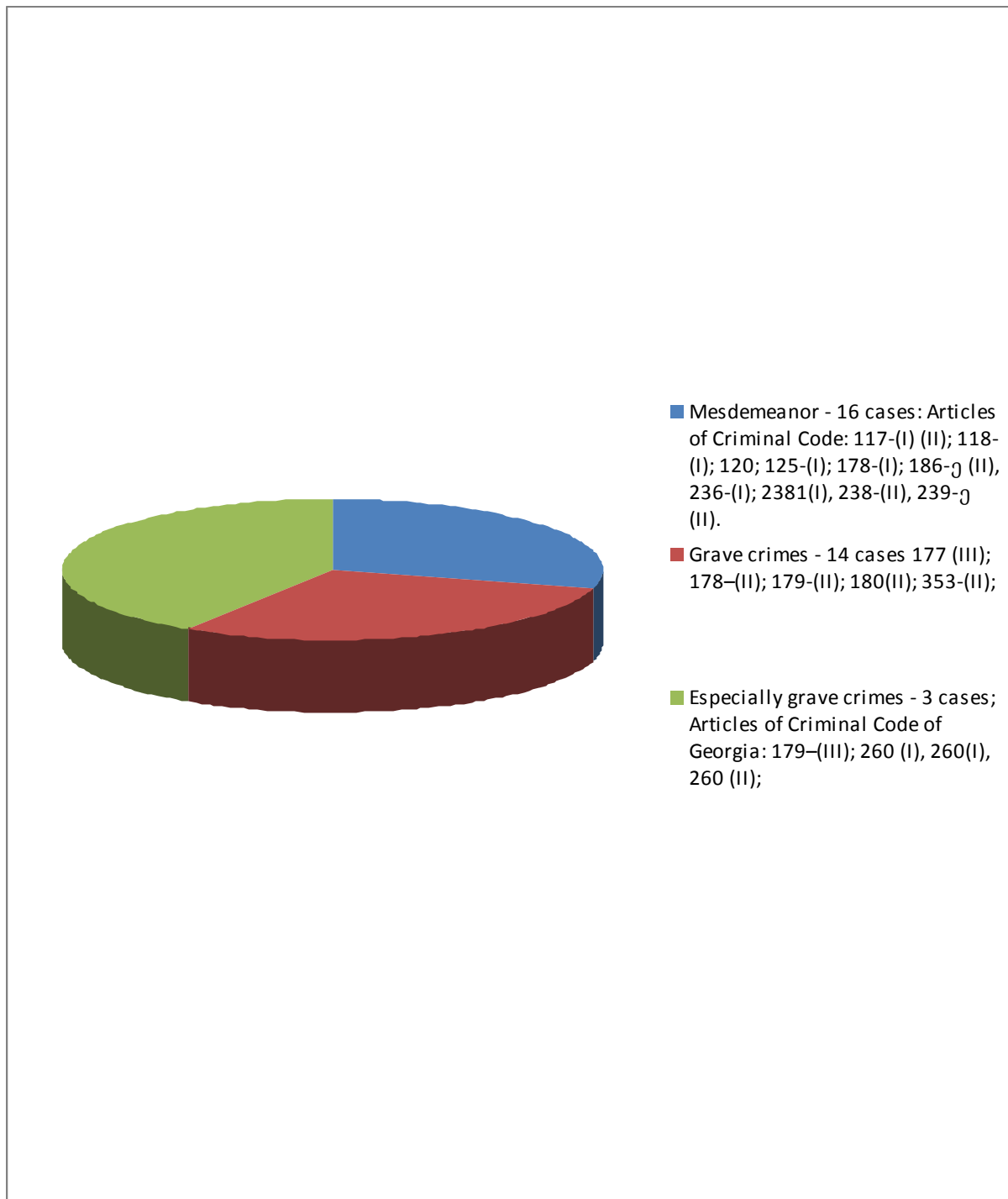
¹⁹ 1.1. Size of imposed penalties:

- **490 GEL** was applied to a crime envisaged under the Article 238(1) of the Criminal Code of Georgia;
- **500 GEL** was applied less grave crimes (the Articles 19, 177-(I-II)) of the Criminal Code of Georgia);
- **1,500 GEL** was imposed on a less grave crime, in particular, Article 238(II) of the Criminal Code of Georgia;
- **2,000 GEL** worth penalty was used only in two cases of mentioned cases, Articles 178(II-III) ; 177-(II-II) of the Criminal Code of Georgia;
- **3,000 GEL** worth penalty was used in five cases of mentioned cases for crimes envisaged by Articles 118(I), 186-(II), 186(II), 238(I), and 178(I) of the Criminal Code of Georgia;
- **4,000 GEL** worth penalty was used only twice and in both cases for crimes envisaged in Article 177(II-III) of the Criminal Code of Georgia;
- **5,000 GEL** worth penalty was used five times for crimes envisaged in Articles 177(II), 19, 177(III), 177(III), 177(III), 236(I), 260(I) of the Criminal Code of Georgia;
- **7,000 GEL** worth penalty was imposed for crimes envisaged in Articles 239(II) and 260(II) of the Criminal Code of Georgia;
- **15,000 GEL** worth penalty was used only once for the crime envisaged in Article 260(I) of the Criminal Code of Georgia.

6.1 Types of crimes in plea agreements approved by courts

The study of plea agreements signed with juvenile delinquents clearly shows that on the stage of court hearing courts do not discuss and evaluate terms of plea agreements, do not adequately assess the legality and fairness of punishments. None of court decisions contains even an indication about whether a court examined circumstances specified in Article 89 of the Criminal Code of Georgia, namely, conditions of life and upbringing of a juvenile, the level of mental development, state of health, other personal features, influence of an older person on a juvenile, even though all this is an important requirement of the law when applying punishment to a juvenile.

Court approvals of plea bargains from 33 cases on juvenile delinquents



Proceeding from the above mentioned, the bulk of crime belongs to the category of misdemeanors. It is necessary to implement a correct state policy towards juvenile delinquents and in this endeavor the position of a prosecutor is important, especially when alternative measures of criminal prosecution in the form of diversion and community service programs are available.

The program of diversion and mediation is a new mechanism for releasing juvenile delinquents from criminal prosecution. It is a mechanism of clearing juveniles from criminal conviction, an alternative mechanism to the criminal prosecution which is applied by a prosecutor. The diversion program for juvenile delinquents implies that a prosecutor does not institute a criminal proceeding or stops it against a minor.

The key role in implementing this program is played by a prosecutor. It is up to him/her to apply the diversion program to a minor. A prosecutor must have a belief that the punishment of minor is unfair and on this basis a prosecutor and a juvenile delinquent should sign an agreement containing corresponding terms and obligations.

Even though the Criminal Procedures Code contains such a possibility, the court decisions studied by us revealed that personal qualities of juvenile delinquents and other relevant factors were not adequately studied for the aim of determining the expediency of plea bargains. Among the studied cases, 30 minors did not have previous convictions but the diversion was not applied towards any of them even though the law says that “if a minor has committed a misdemeanor for the first time, the priority must be given to the diversion from criminal system,” and also that “the placement of a minor in the system of justice may bring him/her more harms than benefit.”

7. Conclusions and recommendations

A general overview of legislation on plea bargaining, court practice which was analyzed and interviews conducted have revealed that some legal norms regulating plea bargaining in the Criminal Procedures Code need to be improved. However, the results of the study of practice and interviews show that there are also serious problems in the application of plea bargaining. The analysis of plea bargains provides a ground to assume that, in reality, a leading role of a prosecutor and secondary role of a judge significantly distort the nature and aim of plea bargaining institution.

To eliminate above noted problems, several recommendations have been drawn up:

- To avoid misunderstandings and deception of defendants, paragraph 2, Article 209 must be amended to specify that the offer of a plea bargain shall be made in writing by a prosecutor or a defendant. Article 210 of the Criminal Procedures Code must be added paragraph 6 requiring that a protocol of negotiation on a plea agreement conducted between a prosecutor and a defendant with a necessary involvement of a defense lawyer must be drawn up. Paragraph 2, Article 211 of the Criminal Procedures Code must be added a provision enabling that a defendant agrees to signing a plea agreement only after consulting a defense lawyer, which, among other issues, may concern a written offer and the explanation of factual and legal circumstances indicated in the protocol of negotiations. For conducting such a consultation, a defendant must be given a reasonable time from the moment of offering a plea bargain or drawing up a protocol of negotiation. If a motion for signing a plea bargain contradicts the protocol of negotiation, the burden of proving that a defendant has not been deceived lies with a prosecutor.

- A plea agreement must be signed after a consultation with and taking into account opinions of a victim, although a victim must not have the right to veto a final decision of a prosecutor. An opinion of a victim must be one of factors, but not the only factor, that should influence a final decision of a prosecutor. A position of a victim must be reflected in a motion. Moreover, a prosecutor may be required to substantiate whether a balance between a public interest of signing a plea agreement and private interest of a victim is observed, in the event when a victim is against of a plea agreement with an accused person. This substantiation of a prosecutor must be an object of control of a court. A court may be given a possibility to hear a position of victim during considering a motion.
- When approving a motion, a court must explain to a defendant a minimal and maximal size of sentence envisaged by the article of Criminal Procedures Code, which is applied to a defendant without the trial on merits. A judge must also inform a defendant about the size of punishment specified in a plea agreement and find out thereafter whether a defendant is willing to sing a plea bargain.
- The application of alternative measures to criminal prosecution and provisions in paragraph 2, Article 7 of the Criminal Code of Georgia, requiring to take into account circumstances of a case, must be encouraged.
- Legislators must review the list of crimes envisaged by the Criminal Code of Georgia and determine (expand) a circle of those especially grave premeditated crimes which shall not be eligible for plea bargaining.
- Legislators must determine maximum and minimum sizes of main and additional punishments, taking into account the amount of damage caused by a criminal action.
- Law must explicitly define powers of a court in it returning a case to prosecutor or taking a decision on considering the case on merits – grounds and aims of decisions, and particularly at which stage of case hearing is this possible.