



Plea Bargaining in Georgia

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One of the first acts of the Saakashvili government in February 2004 was to introduce plea bargaining into Georgia's legal system. A plea bargain is, quite simply, "an agreement [between the prosecutor and the defendant] that, if an accused person says they are guilty, they will be charged with a less serious crime or will receive a less severe punishment".¹ The principle is simple, a defendant is rewarded for relinquishing his right to a fair trial and therefore saving all concerned from a long and often expensive legal battle.

However, plea bargaining has proved to be as controversial as it is simple. While some legal experts praise it for making the legal process more efficient, detractors slam it as reducing the basic right to a fair trial to something that can be bought and sold. So while plea bargaining is legal and a widely accepted part of the system in the US, various other countries have rejected the practice. The UK authorities even went as far as to crack down on judges who informally engaged in the practice².

Nevertheless, the number of countries that allow at least some form of plea bargaining has been increasing in recent years. Even classically inquisitorial systems,³ such as those of France and Germany, have instituted limited and modified forms of the practice.

Georgia is almost unique among countries operating according to the inquisitorial model, in that it has instituted a much more liberalised- indeed almost unlimited - form of plea bargaining than is common in other such systems.

This report aims to analyse the effects of plea bargaining in Georgia and determine what implication its use has had on the right to a fair trial.

¹ Collins Dictionary definition.

² Verkaik, R., "Judges Face Ban on Plea Bargaining", *Independent* (05/12/2000).

³ See below for definition of this term.



Background: Plea Bargaining in the Georgian Legal System

The Georgian legal system, like most in continental Europe, is based on the inquisitorial system. This means that the role of the judge is that of an investigator rather than, as is the case in adversarial systems such as the US, an arbiter. The judge hears evidence from both the prosecution and the defence and declares both the verdict (guilt or innocence) and the sentence.

This means that plea bargaining in the literal sense cannot be practiced within the inquisitorial system, as such a system “[does] not have the pleading stage, which allows defendants, through a guilty plea, to save the prosecutors from bringing the evidence required for conviction at trial”.⁴ So unlike adversarial systems such as those of the UK or USA, one does not submit a plea. Instead, an admission of guilt on the part of the defendant is merely another piece of evidence – albeit an overwhelmingly strong one – for the judge to take into account when reaching her verdict.

Therefore to label what Georgians call *saprotseso shetankhmeba* (procedural agreement) as plea bargaining, is technically incorrect. However, since the basic principle – extracting a confession from a defendant in exchange for a lighter sentence – is the same, we will refer to the Georgian practice as “plea bargaining”.

The Process

The process itself is simple and is codified in Article 679 of the Georgian Criminal Procedural Code. In theory, either the prosecutor or the defendant can start negotiations which must be attended by the accused’s defence attorney. A plea bargain can be concluded on the charge or on the sentence. The sole difference between these two variants⁵ is that in the latter case the defendant pleads *nolo contendere*⁶ whereas in the former case he pleads guilty. This is not a significant difference as in both cases the defendant, once convicted, is left with a criminal record.⁷

Once the defendant and the prosecutor have agreed to terms (all agreements must be approved by the supervising prosecutor for the region),⁸ it is drafted and submitted to the

⁴ Gazal-Ayal, Oren and Riza, Limor, *Economic Analysis of Plea-Bargaining and Prosecution* (29/06/2009), p6.

⁵ The Georgian definition of charge and sentence plea bargaining differs significantly to the general understanding of these terms. In the USA, charge bargaining refers to the practice of prosecutors dropping one (usually a serious charge) in exchange for a guilty plea on a lesser charge. Sentence bargaining is an agreement on the sentence a defendant will serve if he pleads guilty.

⁶ Meaning that the defendant does not contest the charges and accepts the sentence but does not plead guilty.

⁷ This was not the case in the original legislation which envisaged the prosecution agreeing to dismiss all charges in exchange for the payment of an agreed fine.

⁸ Georgia is divided into regions (*mkhareebi*) which in turn are divided into districts (*raioni*). All plea bargains in Georgia must be approved by the regional prosecutor (for example Kakheti) as well as the district prosecutor (for example Telavi). Every plea bargain must be approved by the Supervising Prosecutor (*zemdgomi prokurori*) for the region.⁸ This effectively means that all of the thousands of plea bargains concluded in Georgian each year must be approved by eight regional prosecutors.



court for approval. The presiding judge can then decide to either approve or reject the plea bargain.

The judge must confirm that the plea bargain was reached voluntarily without the use of threats, deception or violence and that the defendant was properly assisted by a qualified attorney. The judge must also ascertain that the defendant and his lawyer are familiar with the plea bargain agreement and are aware of the repercussions (such as the relinquishment of the right to appeal) of going through with the bargain.

There must also be a *prima facie* case presented by the prosecution, as by law conviction cannot be based solely upon a confession attained as part of a plea bargain; other evidence must also be presented.

Usage

The use of plea bargaining has increased exponentially since its introduction. The past five years has seen it graduate from being a measure used in a few high profile corruption cases to widespread use in all sorts of criminal cases.

Plea Bargaining Rates in Georgian Courts 2005-2009 ⁹			
Year	Criminal Cases	Plea Bargains	% Plea Bargains
2005	7358	932	12.7
2006	13602	3791	27.9
2007	17526	8432	48.1
2008	17639	9207	52.2
2009 (Jan-Aug)	9459	5380	56.9

The current statistic of 56.9% of criminal cases concluded with a plea bargain in Georgia may not seem high when compared to the equivalent US figures, estimates of which range from 90-95%,¹⁰ but they nevertheless signify the consolidation of the plea bargain as a pillar of the Georgian legal system to an extent far beyond that of any other inquisitorial judicial system.

It is also a sign of the total confidence of Georgian judges, prosecutors and government officials in the practice and the fact that, as in the USA, “the ‘normal’ trial is rapidly becoming the ‘alternative’ procedure”¹¹.

Plea Bargaining in Georgia: the Rationale

While it is accepted, even by those who argue for plea bargaining, that it is a product of pragmatism (ideally all cases would be dealt with in a full and fair trial) the academic literature on plea bargaining offers several justifications of the practice, most of which are also put

⁹ Statistics provided by Supreme Court and Human Rights Centre (HDIRC).

¹⁰ Olin, D., “Plea Bargain”, *New York Times* (29/09/02).

¹¹ Thaman S., *Comparative Criminal Procedure: a casebook approach* (2002).



forward by its Georgian proponents. The most common of these are (1) as a tool in the fight against corruption, (2) caseload – the fact that there are more cases than can be dealt with efficiently by judges, (3) the lack of prison places, and (4) a tool in fighting organised crime.

An Anticorruption Measure

Given that Georgia was, until a few years ago, one of the most corrupt states in the world¹², it would be natural to assume that the most obvious argument for the introduction of plea bargaining is its utility in the fight against corruption. Indeed, plea bargaining was originally seen primarily as a tool in the post-Rose Revolutionary anti corruption campaign. The idea is that plea bargaining provides a means for the state to recoup funds lost to corruption. Corrupt officials are allowed to walk free, provided they compensate the state for the funds they embezzled.

Judging by this standard, plea bargaining certainly worked, and quickly. The first months following the passing of the original amendment introducing plea bargaining in February 2004 were marked by a series of high profile plea bargains with former government officials and other influential figures accused of corruption. The most famous case was that of former president Eduard Shevardnadze's son-in-law, Gia Jokhtaberidze, who was arrested on charges of hiding over \$300,000 from the state budget. Jokhtaberidze was released after paying \$15 million to the state budget as part of a plea bargain.¹³

Several former ministers and tax officials were also given similar deals, albeit for less money. In all these cases however, the officials involved were not given criminal records. The prosecutor merely agreed to cease pursuing the case in exchange for financial compensation.¹⁴

The practice of allowing defendants to walk away without a criminal record was abolished in 2005 in the face of both domestic and international criticism.¹⁵ A prominent opposition politician went as far as to call this practice “legalized state racketeering”¹⁶ and a report by the Council of Europe said that the 2004 version of plea bargaining “on the one hand allows some alleged offenders to use the proceeds of their crimes to buy their way out of prison and, on the other, risks being applied arbitrarily, abusively and even for political reasons”.¹⁷

Nevertheless, placing the broader morality of the practice to one side, plea bargaining was successful in the short term as a means of recouping revenue lost to corruption. It also sent a

¹² Transparency International's Corruption Perceptions Index (CPI) placed Georgia in 133rd place in 2004 out of 146 countries ranked. It has since improved to 66th in 2009 out of 180 countries ranked. In 2004 Georgia's CPI score was 2.0 and in 2009 it was 4.1. Best possible CPI score is 10.

¹³ Reichelt, J., “A Hobson's Experiment: Plea Bargaining in the Republic of Georgia” in *Journal of East European Law* vol. 11-2/3 (2004).

¹⁴ This was made possible by the fact that the original 2004 legislation on plea bargaining differed significantly from the current law in that the prosecutor could agree to dismiss all criminal charges as part of the bargain meaning that the defendant emerged without a criminal record.

¹⁵ In 2005, the rules were amended so that defendants were mandatorily given criminal records if they agreed to enter into a plea bargain.

¹⁶ *Civil.ge* (20/02/2007).

¹⁷ PACE Resolution (2005).



clear message that corruption would no longer be tolerated, something that probably had an effect on reducing public perceptions of corruption, if not reducing corruption itself.¹⁸

Some argue that plea bargaining has also helped reduce corruption in a different way: providing a legal alternative to petty bribe payments to police, prosecutors and judges.

As Davit Managadze, a lawyer for HRIDC explains: “whereas before you paid the investigating police officer, prosecutor or judge to get a lenient sentence, now this is all official and the money goes into the budget instead of into officials’ pockets”.¹⁹

The basis of this argument is that since unofficial plea bargaining happened anyway, it is better to have it as an open and legal process subject to scrutiny rather than behind closed doors as corruption. This is an argument that has also been made in other countries for a long time. A 1978 US Supreme Court verdict upholding plea bargaining said that prohibiting the practice would “only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged”.²⁰

Government officials, however, downplay the role of plea bargaining in reducing bribery within the Georgian legal system. Georgia’s deputy chief prosecutor stressed efficiency gains, rather than reduced corruption, as the major advantage of plea bargaining²¹. His point is backed up by opposition Republican party lawyer Irakli Khorbaladze, who argues that the government’s widely accepted success in eradicating low-level corruption was far more to do with police reform²² and the other anti corruption measures adopted at the time than plea bargaining: “how can you think that the state lacks the strength to stop officers from taking bribes [without resorting to plea bargaining] when everyone is afraid, not just of accepting money, but even accepting a small present?”²³

Indeed, it is difficult to assess the role of plea bargaining in the reduction of bribe taking independently of the other reforms the government implemented at the same time. Nevertheless, it probably played a minor role, alongside the other measures, in combating low-level corruption in the short term. Any effect, however, would not be reversed by the abolition of plea bargaining, as there are plenty of other disincentives (not least hefty punishments) to low level bribe taking. This point is only really relevant to the pre-2005 period anyway.

Caseload

Since 2005, when the emphasis shifted away from prosecuting corrupt former officials, plea bargaining has been justified mostly as a means of achieving “fast and effective justice”²⁴ or as

¹⁸ The reduced perceptions of corruption in Georgia can be demonstrated by looking at Transparency International’s Corruption Perceptions Index – see note 12.

¹⁹ Author interview.

²⁰ *Bordenkircher vs Hayes* (1978).

²¹ Author interview.

²² The 2004 police reform is perhaps the best known of the post Rose Revolution anti corruption measures. The entire traffic police force was sacked and then reconstituted, with officers earning increased wages so they would not resort to extracting petty bribes, which was the norm before 2004.

²³ Author interview.

²⁴ Author interview with First Deputy Prosecutor Davit Sakvarelidze.



Zaza Meishvili, deputy chief justice of the Supreme Court, put it: “achieving justice with increased speed without compromising standards”.²⁵

This is perhaps the most oft repeated argument in support of plea bargaining around the world. In fact, it is seen by many to be the *raison d'être* of the practice. As one article put it: “the fundamental goal of plea bargaining is to clear space in the legal system for cases ‘worth’ a trial”.²⁶ The US Supreme Court also upheld plea bargaining on similar justification, arguing that “if every criminal charge were subject to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities”.²⁷

Does this argument apply to Georgia though?

A look at the statistics suggests that it does. The number of criminal cases has ballooned from 7,358 in 2005 to 17,639 in 2008.²⁸ Moreover, there are a total of just 281 judges in Georgia. That means that there are 15,393 people in Georgia for every judge, compared to equivalent figures of 6,425 in Estonia and 1,981 in Slovenia.²⁹

If all the cases currently being rushed through the courts in days were pushed through the full legal process (with potentially a trial at both an appeal court and at the Supreme Court) the Georgian courts would grind to a standstill. Before plea bargaining was introduced in 2004, even considering the fact that the volume of criminal cases was less than half of what it is now, the length of time from arrest to verdict could be up to 3 years.³⁰

Although in the long term, it could be argued that Georgia should invest in training more judges, it is certainly true that some form of plea bargaining or an acceptable alternative is required in Georgia for the system to work effectively in the short term.

Overflowing Prisons

Prison statistics also offer a strong short to mid-term justification for plea bargaining. According to 2007 figures, there were 18,310 prisoners in a penitentiary system with a capacity of just 15,040.³¹ This has led to dire conditions inside some of Georgia’s jails. The 2008 US State Department’s country report for Georgia talks of “inhumane and life-threatening conditions, including poor facilities, overcrowding, and inadequate health care”.³²

Again, of course, it could be said that this is an argument to build more prisons. But Georgia already needs more prisons even with plea bargaining in place. As Davit Managadze, HRIDC

²⁵ Author interview.

²⁶ Sims, C. *Historical and Racial Implications of Plea Bargaining* (2008).

²⁷ Santabello vs. New York 1971.

²⁸ Prosecutors in Georgia say the astronomic rise in criminal cases since 2004 is a result of the government’s anti corruption drive. Cases that previously ended in the suspect being released without charge after the payment of a bribe now end in prosecution.

²⁹ Statistics provided by Georgia’s Supreme Court.

³⁰ Author interview with Zaza Meishvili.

³¹ Kings College London World Prison Brief for Georgia.

³² US State Department Human Rights Country Report 2008.



lawyer told TI Georgia “we may have 20,000 prisoners now but if it were not for plea bargaining we would have 40,000”.³³

Fighting Organised Crime

The Georgian government has met with a measure of success in its crack down on the *kanonieri kurdi* (thieves-in-law)³⁴ who ruled the criminal underworld since the Stalin era. The mafia’s influence in Georgia is almost universally recognised to have fallen since 2004. Whether plea bargaining has played a part in this is less clear.

The usefulness of plea bargaining in the fight against organised crime is generally recognised. Even countries that do not allow plea bargains in ordinary cases make exceptions when it comes to fighting organised crime and mafia organisations.

The theory is simple. You offer to release or substantially decrease the sentence of the defendant in exchange for incriminating information on the defendant’s co-conspirators, or for that matter, any information that helps to solve a more important case.

So, after five years of plea bargaining practice in Georgia, has this happened?

Unfortunately, the answer is not clear. It doesn’t look good though. The statistics³⁵ show that only one person convicted of “membership of the criminal underworld” in 2007 entered into a plea bargain. If plea bargaining were being used to crack down on organised crime, we would expect this figure to be higher. On the other hand, there have been cases where plea bargains have been given in exchange for a testimony, although these are definitely the exception rather than the rule.

Avtandil Kherkiladze got only eight years for the murder of the head of Tbilisi’s gas distribution company after he entered into a plea bargain, agreeing to testify against two other co-defendants and admitting guilt. The other two defendants received life sentences.³⁶

The fact is that, so far, plea bargaining has not played a significant enough role in the fight against organised crime to justify its existence on this basis. Although plea bargaining is potentially a useful weapon against organised crime, its potential is undermined by a lack of an effective witness protection scheme in Georgia.

Why Crime Pays for the State: Plea Bargaining as a Source of Revenue

While the government recognises the role of plea bargaining in the ways outlined above, many allege that there is another, rather less noble motive for the practice. Zakaria Kutsnashvili of the NGO Law for People goes as far as to say that plea bargaining in Georgia is “a money-making institution, not a crime-fighting institution”.³⁷

³³ Author interview.

³⁴ Georgian mafia bosses.

³⁵ Provided by Human Rights Centre (HDIRC).

³⁶ HDIRC trial monitoring project in Georgia – report (2006).

³⁷ Author interview.



“The vast majority of plea bargains are concluded in exchange for a fine,” explains Natia Katsitadze, a lawyer for the Georgian Young Lawyers’ Association (GYLA).³⁸ Indeed, the lawyers TI Georgia spoke to all talked of the “cash for freedom” approach as the single most troubling aspect of plea bargaining practice in Georgia. Dito Khachidze, a lawyer for the Article 42 NGO, told TI Georgia that “how much will you pay?” is often the first question asked at plea bargaining negotiations.³⁹

The government denies that revenue-raising is an aim of plea bargaining. When asked by TI Georgia, First Deputy Chief Prosecutor Davit Sakvarelidze denied the importance of the funds gained from plea bargains: “plea bargaining is not a means of filling the budget...the treasury receives more money from administrative fines for offenses such as drunk driving...the money involved [in plea bargaining] is not enough to be of significance to the state”.⁴⁰

The fact is, however, that the revenue gained from plea bargains is indeed significant. The treasury gained GEL 32,760,994 from plea bargains in the first eight months of 2009.⁴¹ Assuming the same average revenue for the entire year, this makes the projected revenue from plea bargaining for 2009 a cool GEL 50 million⁴².

To put that into perspective, that is over 1% of the draft national budget for 2010⁴³ and is more than the draft 2010 budgets of nine ministries and of parliament.

Freedom for the Rich, Prison for the Poor

There is also a strong moral case against the “cash for freedom” approach that appears dominant in the Georgian version of plea bargaining. While it was corrupt officials and oligarchs who benefitted in 2004/5, the period since 2005 has seen a sort of “democratisation” of the practice, with the principle being applied to anything from hooliganism to murder.

Lawyers report cases where prosecutors have demanded ridiculous sums of up to GEL 100,000 in petty theft cases. But even when the penalty offered is far less, there are many who simply cannot afford to pay. A situation which has led to what critics have called “justice for the rich”.⁴⁴

“Plea bargaining has totally devalued the Criminal Code,” says Republican party lawyer Irakli Khorbaladze. “It no longer constitutes a deterrent to crime, as you can pay your way out of anything you do”.⁴⁵ Article 42 lawyer Dito Khachidze agrees: “if you are rich, you are above the law in Georgia”.⁴⁶

³⁸ Author interview.

³⁹ Author interview.

⁴⁰ Author interview.

⁴¹ Statistic from Prosecutor’s Office - statistics from before 2009 were not provided to TI Georgia. The Prosecutor’s Office claims that it does not possess statistics from previous years.

⁴² Currently TI Georgia only has the first eight months’ data.

⁴³ Revenue for draft national budget for 2010 is GEL 5,188,177.

⁴⁴ Republican party leader Davit Usupashvili (Civil.ge 20/02/07).

⁴⁵ Author interview.

⁴⁶ Author interview.



Some cases at least appear to support this view. Perhaps the most prominent recent example is that of a Turkish captain detained for illegally entering Georgian waters in Abkhazia. He was arrested and faced a sentence of 24 years in prison. The captain was however released without having to serve any of this sentence as part of a plea bargain which envisaged the confiscation of the ship and the payment of GEL 30,000.⁴⁷ In contrast, former Chamber of Control Chairman Sul Khan Molashvili, who refused enter into a plea bargain, was sentenced to nine years⁴⁸ in prison for embezzlement. There are also many cases of people being sentenced to seven years for the possession of small amounts of illegal drugs.

Whether this state of affairs is, as opposition activists allege, a result of a conscious policy or just sporadic violations that have served to dent public confidence, it is clear that the centrality of penalties to the plea bargaining system and the excessively liberal legislation that allows prosecutors to strike plea bargains in murder cases have done nothing to boost trust. A more limited approach to plea bargains, centred on evidence gathering rather than fine paying, would certainly help dispel the popular image of plea bargaining as a source of government revenue.

However, there are indications that the emphasis on fines may shift. First Deputy Chief Prosecutor Sakvarelidze told TI Georgia that plans are being made (with church cooperation) to increase the number of community service sentences, which would potentially provide a viable, and most importantly non-cash based alternative to fines.

Transparency

There are also widespread concerns about the transparency of the system. Foremost of these is the lack of information available publically on the money being paid to the treasury by individuals as part of plea bargains. TI Georgia publically called on the government to release a comprehensive list of concluded plea bargains in 2006,⁴⁹ but this was still not public information at the time of writing.

When TI Georgia most recently requested this information from the Prosecutor's Office, we received a reply stating that the information could not be released as this would violate "the right of offenders to not have information held about them publically disseminated without their consent".⁵⁰

There is a case to say that such information should be withheld for reasons of witness protection when the plea bargain involves the defendant revealing sensitive information about organised crime networks. However, as has been established previously, such cases are the exception, not the norm, so there is no reason why information on plea bargains concluded

⁴⁷ Frantic Turkish diplomacy, including a visit by the Turkish foreign minister, almost certainly played a part in this case.

⁴⁸ Later reduced to eight on appeal.

⁴⁹ "The Prosecutors office (sic) needs to make a full account of the results of "plea bargaining". How much was received from whom, when and in exchange for exactly what. If the practice is to continue there should be a regular and legally mandated reporting mechanism to the public" 17 Steps to a More Transparent Georgia (http://www.transparency.ge/index.php?lang_id=ENG&sec_id=215&info_id=262).

⁵⁰ Email response to author.



between individuals and the prosecutor should not be in the public domain. After all, the plea bargain has to be approved by a judge in a public court procedure.

The other major issue in terms of the transparency of the financial aspect of the system is that of where the money actually goes. This was highly unclear in the first years after the system's introduction, with the money going into highly controversial non-budgetary funds for the armed forces and police.⁵¹ The situation has improved since then and the money was, until recently, paid into Prosecutor Office or Interior Ministry accounts before being forwarded onto the Treasury.⁵² In 2009, the system changed again and the “penalty fees” are now paid directly into a Treasury account to “counter accusations that the money is going to the Prosecutor”.⁵³

The problem remains, however, in that there is no line item in the Georgian budget for plea bargaining revenues which means it is not totally clear where the money goes. Opposition MP Gia Tsagareishvili says that he thinks that this money goes into the “non-budgetary revenue” section of the budget but that “this information is a secret even for me as a member of parliament”.⁵⁴

A Threat to Judicial Relevance and the Right to a Fair Trial

Plea bargaining is thought by many across the world to undermine the right to a fair trial and weaken the power of the judiciary. In a country like Georgia, where the independence of the courts is doubted by many⁵⁵ and trust in judges and prosecutors is low, this is certainly not what the doctor ordered.

An All-Powerful Prosecutor?

One of the most concerning side effects of plea bargaining from the perspective of critics of the system is the resultant strengthening in prosecutorial strength vis-à-vis both judges and lawyers. As one US prosecutor said in a 1978 article, the plea bargain is “the greatest weapon a prosecutor has. The prosecutor is in the driver's seat”.⁵⁶

The argument is that while under a normal procedure, the defence has to convince either a judge or a jury that the defendant is innocent (i.e. it is the judge or jury that is the arbiter of the fate of the defendant), in plea bargaining, the role of arbiter is played by the prosecutor. In a plea bargain, it is the prosecutor who is the main decision maker and the defence has to convince her to agree to terms favourable to the defendant.

⁵¹ The Army Development Fund and the Law Enforcement Agency Development Fund (see Anjaparidze, Z, “Georgian Government Questioned About Secret Funds”, *Jamestown Foundation Eurasia Daily Monitor* 3-71 2006).

⁵² TI Georgia (2006), *State Expenditure Monitoring Project: Main Findings and Recommendations*

⁵³ Author interview with First Deputy Prosecutor Davit Sakvarelidze.

⁵⁴ Author interview.

⁵⁵ For example Freedom House's Nations in Transit report for 2009 said that judicial independence is “frequently violated” giving Georgia a score of just 4.75. This score, however bad does however make Georgia the best of a very bad bunch among the non-EU former Soviet states.

⁵⁶ “Is Plea Bargaining a Cop Out?” *Time Magazine* (1978).



Plea bargaining's Georgian critics share this concern. Opposition MP Gia Tsagareishvili says that plea bargaining has “reduced the function of judges to that of a notary,” adding that “both the courts and lawyers have become mere appendages of the Prosecutor’s Office”.⁵⁷

In 2008, the then public ombudsman, Sozar Subari, went as far as to call the Prosecutor’s Office “the true rulers of this country”.⁵⁸ The statistics show that plea bargains, once agreed upon between defendant and prosecutor, are almost always upheld.

In theory, the presiding judge is meant to ensure that the plea bargain was not attained as a result of undue pressure on the defendant and that the deal was made voluntarily. The judge must also ensure that the defendant’s core rights (such as that of assistance by a defence attorney) were not violated. In practice, only eight plea bargains were denied by Georgian judges in 2008 out of a total that year of 8,770, a rate of less than 0.1%.⁵⁹

Judges are also meant to ascertain that there is a *prima facie* case. In other words, the judge must be satisfied that the evidence provided by the prosecutor would be considered sufficient to warrant a full trial. The difference being that, in a plea bargain, the evidence is not questioned by the defendant.

The lawyers interviewed by TI Georgia all doubted that judges reviewed the *prima facie* case “in anything but the most procedural manner”.⁶⁰ One example of judges allegedly failing to look into the case properly is that of Natsvlishvili and Togonidze vs. Georgia, where the defendant said that the prosecutor only agreed to enter into a plea bargain *after* he transferred shares in a car manufacturing plant to the government and paid GEL 50,000 “of his own free will”. The court then upheld a plea bargain, based on an official fine of GEL 35,000, which did not include the “presents” paid beforehand, without even looking into the suspicious payments.⁶¹

Another, perhaps more bizarre, example is that of Aleksey Bakhutovi, who was pressured into confessing to the murder of Lasha Chopikashvili and named two co-conspirators to the crime as part of a plea bargain. Bakhutovi was sentenced to eight years in prison. The court, however, obviously didn’t look into the evidence too carefully, because the alleged murder victim was later found to be alive. Despite this, Bakhutovi was not released even after this minor problem emerged. He was instead reconvicted for attempted murder and released after a year.^{62,63}

These may be aberrations in an otherwise working system, but there are also more basic theoretical problems. Firstly, judges have lost the power of discretion in sentencing that they possessed prior to the introduction of plea bargaining.

⁵⁷ Author interview.

⁵⁸ Freedom House, *Nations in Transit 2009*.

⁵⁹ Information given by Prosecutor’s Office.

⁶⁰ Author interview with Natia Katsitadze.

⁶¹ Katsitadze, N. The practice of “plea bargaining” in Georgia: violating the principles of a fair trial? in *European Human Rights Advocacy Centre Bulletin 10* (Winter 2008).

⁶² *24 Saati* (13/10/08) The Georgian rules of plea bargaining.

⁶³ Human Rights Centre website “Exceptional convict Aleksey Bakhutovi freed” (27/06/08) <http://www.humanrights.ge/index.php?a=news&id=4925&lang=ge>.



The Criminal Procedural Code of Georgia (CPCG) regulates minimum and maximum sentences for crimes but until 2005, judges were able to use their discretion to give a sentence lower than the minimum under extenuating circumstances.

The current legislation stipulates that judges can no longer do this for crimes carrying more than a five year maximum sentence and the only way for defendants to receive a sentence lower than the statutory minimum is through a plea bargain (which, of course, is the prerogative of the prosecutor).

The introduction of the Criminal Law Guidelines in 2007, which gives sentencing recommendations within the limits proscribed by the CPCG, has further reduced the level of judicial discretion in practice⁶⁴. While the existence of guidelines is not harmful in itself (it can help to ensure consistent sentencing) the fact that “judges do not deviate from the guidelines”⁶⁵ in practice has further strengthened the prosecutor’s hand at the expense of the defence and the judiciary.

This increased regulation of judges stands in sharp contrast to the minimal regulation of prosecutor decision making. There are few regulations limiting prosecutors’ judgment in plea bargains. According to the lawyers interviewed by TI Georgia, there have been cases when judges demanded fines of over GEL 100,000 in petty crime cases, while token fines were sometimes paid in far more serious cases.⁶⁶ This makes it clear that it is important to match increased regulation of judges’ activities with similar guidelines for prosecutors to ensure balance.

The problems are not limited to those concerning the relative influence of judges and prosecutors. Victims have absolutely no rights apart from being informed *post factum* of the plea bargain. It is perfectly possible for prosecutors to agree to a plea bargain with a murderer without even consulting relatives of the victim.

Prosecutors deny that this is the case in practice, however, and say that victims are asked to give a statement outlining their position as a matter of course.⁶⁷ This is something that should be in the legislation itself rather than be a matter for individual prosecutors to decide.

Lastly, lawyers also complain that their role has been undermined by plea bargaining. “A good defence lawyer is now somebody who will enter the right offices and talk to the right people in order to get you a good plea bargain,”⁶⁸ notes lawyer Natia Katsitadze.

An Omniscient Prosecutor?

If you’re charged for a crime in Georgia, you can be pretty sure that you’ll be found guilty. Conviction rates are sky high. Of the 17,639 criminal cases filed at Georgian courts during 2008, only seven ended in an acquittal and 111 more were terminated before a verdict was

⁶⁴ These Guidelines encourage the use of stricter sanctions.

⁶⁵ Alkon, C. “Plea Bargaining as a Legal Transplant: a Good Idea for Troubled Criminal Justice Systems” http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=cynthia_alkon.

⁶⁶ According to lawyers spoken to by TI Georgia.

⁶⁷ Author interview with First Deputy Chief Prosecutor Davit Sakvarelidze.

⁶⁸ Author interview.



reached. That makes for a 99% conviction rate, which opponents of plea bargaining say is a direct result of the loss of judicial independence caused by the practice.

Prosecutors say that the high conviction rate is the result of “hard work” and “careful prosecution” and is evidence of the system working well.⁶⁹ Deputy chief justice of the Supreme Court, Zaza Meishvili, argues that the conviction rate is nothing out of the ordinary when compared to the USA, where 90-95% of criminal cases end in a plea bargain and therefore a guilty verdict⁷⁰.

The difference however, is that a very high proportion of non plea bargaining cases in Georgia also end in conviction. Most countries have conviction rates far lower than Georgia’s. For example, amongst OECD countries, only Japan’s 99.7% conviction rate exceeds Georgia’s. Concerns over the right to a fair trial in Japan have led to the reintroduction of jury trials, which in most countries have led to lower conviction rates.⁷¹

Georgian lawyers blame conviction rates on plea bargaining. Several of the lawyers talked to by TI Georgia said that acquittals were “much easier to get” before plea bargaining was introduced.

But is it fair to blame low acquittal rates on the introduction of plea bargaining? A look at the statistics suggests not.

Acquittal Rates in Georgian Courts 2000-2009 ⁷²					
Year	Criminal Cases	Acquittals	% Acquittals	Terminated	% Terminated
2003	7017	43	0.6	204	2.9
2004	7601	28	0.4	213	2.8
2005	7358	52	0.7	350	4.8
2006	13602	23	0.2	169	1.2
2007	17526	9	0.1	252	1.4
2008	17639	21	0.1	213	1.2
2009 (Jan-Aug)	9459	7	0.1	111	1.2

While the proportion of acquittals has dropped since plea bargaining started in 2004, the numbers were so low before that it hasn’t made much difference. We have come from a 97% conviction rate in 2003 to a 99% conviction rate in 2009. In fact, in 2005, the year plea bargaining graduated from being an anti-corruption measure to being widespread practice in ordinary criminal cases, the number of acquittals and terminated cases almost doubled and the conviction rate came down to 94%; the lowest on record.

⁶⁹ The Prosecutor’s Office told TI Georgia that it terminated investigation on 1,415 cases it was pursuing in 2008.

⁷⁰ Author interview.

⁷¹ *BBC News* “Japan Re-launches Trial by Jury” (03/08/09).

⁷² Statistics obtained from Georgia’s Supreme Court.



The explanation for high conviction rates has less to do with plea bargaining and more to do with Georgia's Soviet legal legacy, a system in which confession was king. As one academic put it: "the most powerful person in the Soviet model of criminal justice was, and largely remains, the prosecutor. He or she was responsible for directing the entire criminal proceeding, and thought little of using coerced confessions, falsified evidence or pre-trial detention as a method of inducing a confession"⁷³.

Deputy Chief Justice of the Supreme Court Zaza Meishvili reaffirmed the high incidence of confessions to TI Georgia, saying the "vast majority" of plea bargains involved a defendant's confession.⁷⁴

No Choice but to Bargain

But while we cannot blame plea bargaining for overtly high conviction rates, the overwhelming statistical likelihood of conviction has another very negative effect. The essence of plea bargaining dictates that it should be just that, a bargaining process with the defendant trying to extract the lightest possible sentence from the prosecutor. This is possible only when the defendant has sufficient leverage to make such a deal worth the prosecutor's while. In other words, the prosecutor knows that if he doesn't agree to the defendant's terms, he will have to go through a lengthy legal process, perhaps through three levels of courts. When you have conviction rates approaching 100%, this leverage is much weakened, allowing prosecutors to dictate the terms and leaving defendants with "take it or leave it" offers.

In systems with high conviction rates, plea bargaining doesn't work. When even innocent defendants feel pressure to "admit guilt" because the statistical likelihood of an acquittal is so low, the power is left in the hands of the prosecutors. Thus, unless Georgia's conviction rate comes down to something more realistic, plea bargaining as an institution cannot work effectively.

Conclusions and Recommendations

Plea bargaining is neither the wonderful success that the government says it is, nor is it the unmitigated disaster that its opponents allege. The fact is that plea bargaining, while important, does not change the main problem, which is that Georgia's courts are not yet independent enough and that the working culture is not yet developed enough to produce a fair system.

Georgia has a dilemma. On the one hand, it suffers from prisons bursting at the seams and a shortage of judges, but it also has a legal system that has not developed sufficiently for plea bargaining to work properly.

Georgia is a country where the Soviet style presumption of guilt has not been fully replaced by a universal presumption of innocence. Astronomically high conviction rates and the predominance of the confession as evidence attest to this. The introduction of a fair system of

⁷³ Reichelt, J., "A Hobson's Experiment: Plea Bargaining in the Republic of Georgia" in *Journal of East European Law* vol. 11-2/3 (2004).

⁷⁴ Author interview.



plea bargaining into such a system is very difficult. However, plea bargaining has arguably not made matters much worse than before: if we do not have fair trials now, we certainly didn't have them before the introduction of plea bargaining either.

Therefore, in the circumstances, the government's introduction of plea bargaining was justified, at least in the very short term, to avoid a complete overload of the penitentiary system and the courts. But five years after its introduction, it is time for the government to make some difficult choices. It must transform the system and ensure public trust in the courts rises to a level where entering into a plea bargain is a choice rather than a necessity.

President Saakashvili promised in 2005 that Georgia would have a police force and a Prosecutor's Office "like the ones we have seen in French and American movies".⁷⁵ This will have to be a lot more than words before plea bargaining can work in a healthy way in Georgia. Here a few measures that are necessary if the government wants to improve plea bargaining system in Georgia:

(1) Take measures to end the culture of the presumption of guilt.

The public does not currently have confidence in the courts. This means that defendants feel they have no choice but to enter a plea bargain, even if they believe themselves to be innocent, because the alternative is an almost certain conviction linked to a lengthy jail term. This is predominantly a cultural problem, but there are measures that can be taken to improve this state of affairs. None of them, however, are easy.

Jury trials, currently being proposed only in a very limited proportion of cases, could help. Even in authoritarian post-Soviet systems such as Russia, jury trials have demonstrably reduced conviction rates to a more realistic level and helped ensure that people get a fair trial.⁷⁶ Of course, this system has its perils,⁷⁷ but if instituted intelligently, juries could help break the negative perception of the public *vis-à-vis* the courts.

Alternatively, other measures could be taken to cement judicial independence. Current plans to begin the lifetime appointment of judges could help achieve this, but it will take a long time for this to produce dividends and end clientelism in the judiciary.

Perhaps the best thing the government could do is to admit that 99% conviction rates are not a symptom of a fair system and make it clear that it expects high standards of judicial impartiality.

⁷⁵ Official press release (14/04/2009 - www.president.gov.ge).

⁷⁶ In fact so much that they are abolishing the system. See *New York Times* "Justice in Russia is No longer Swift or Secure" (23/02/2003).

⁷⁷ For a more in depth review on the possible implications of jury trials in Georgia, see TI Georgia's report on the issue (http://www.transparency.ge/files/215_273_886537_Trial%20by%20Jury.pdf).



Meanwhile, government and pro-government media should abstain from undermining the presumption of innocence by castigating individuals as guilty before they even reach court⁷⁸, what is not rare in Georgia.

(2) Increase the transparency of the system

Plea bargaining is an informal animal and it attracts suspicion even in developed legal systems. There is no reason why this must be the case, especially in a country like Georgia where trust is low. The authorities could improve the situation by releasing lists of individuals entering plea bargains with the prosecutor and posting them on the internet for everyone to see. Exceptions may be made when the defendant has given key information against other criminals for the sake of witness protection. Full information should be given about every plea bargain that involves financial outlay on the part of the defendant.

A line item in the budget for plea bargaining revenue should be introduced, which alongside the above itemisation of penalties paid, could be used to determine that all plea bargaining revenue is truly going into the budget.

(3) Eliminate/reduce the financial element

Fines have a proper place in every criminal justice system. They can provide effective deterrent to minor misdemeanours and economic offenses. However, the ubiquity of the fine in Georgian plea bargains is harming the reputation of the institution. The current practice of “cash for freedom” whereby decades of jail time can be avoided with the payment of a penalty is abhorrent. Fines should be used proportionately alongside alternatives such as community service and reduced jail time. While discretion is part and parcel of plea bargaining everywhere, prosecutor use of plea bargains should also be regulated to ensure higher consistency.

(4) Sentencing: put judges back into the driving seat

Georgia’s Criminal Procedural Code (CPCG) defines the range of sentences judges can impose while the Criminal Law Guidelines (CLG) “guide” judges within these limits. As has been stated above, in practice, judges rarely diverge from the CLG and amendments to the CPCG have banned judges from using discretion to reduce the sentence to under the CPCG defined minimum unless there is a plea bargain.

This has taken discretion out of the hands of judges and into those of the prosecutors. To return it to judges, sentence “discounting” should be reinstated. This would allow judges to exercise judgement and take extenuating circumstances into account or reward a defendant for confessing and showing remorse. Since prosecutors are able to do this under plea bargaining, judges should be afforded similar rights.

⁷⁸ For example, during the 7 November 2007 crackdown on opposition protests, key figures were portrayed by government officials and the media as Russian spies with government wire taps of phone conversations broadcast on TV.



(5) Invest in more judges and prisons

Investment in more judges and prisons would reduce the necessity for such large-scale use of plea bargaining. While it is unlikely that the state will be able to muster the resources to end plea bargaining completely, the situation can be improved in the long term if this vital investment is made.

(6) Allow victims a say in the process

Plea bargains should preferably not be struck with those who have committed serious crimes. But if they are, victims should have to give their consent.

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