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Practical Aspects of a Plea Agreement (bargaining)

In the modern world of negotiations, it is increasingly important to talk about the perfection and renewal of a plea agreement as a speedy justice in the criminal process.

The purpose of the presented work is to discuss and analyze the main essential features of a plea agreement based on the current legislation, existing domestic judicial practice, approaches of the European Court and the experience of foreign countries (mostly, the USA), which contribute to the enhancement of proposals for legislative or practical improvement due to the relevant conclusions.

The paper reviews such topical issues as: the guilty plea as the subject and basis of a plea agreement and the ratio of benefits gained in exchange for it; Participation of parties in a plea agreement and the analysis of their comparison with the concept of a party qualified to take part in the process; A motion to approve a plea agreement as the main formal basis for a mistrial; The place and role of the so-called "plea agreement standard" in the system of proof standards; The exceptional rule provided by Article 55 of the Criminal Code of Georgia and the issue regarding the independence of the judge during the selection/appointment of the type of punishment; Consideration of the motion for approval of a plea agreement and features of the appeal results (current issues of legislation and judicial practice).

As a conclusion, at the end of the paper, the author proposes the opinion on the main problematic aspects, and offers the following summary: at the current stage, it could not be appropriate to introduce changes about increasing the competence of the judge to determine the punishment in the first provisions of a plea agreement of the Criminal Procedure Code of Georgia; It is pertinent to develop the interpretation of the legal regulation and judicial practice in the direction of defining only beyond a reasonable doubt standard as a single standard for establishing a guilty verdict.; It is appropriate to refine the legal regulations and establish a new judicial practice of the prosecutor's appeal of the verdict on the approval of a plea agreement, and it is proposed to recommend that such a case should be considered as a revision of the verdict due to newly discovered circumstances and that the prosecutor exercise the mentioned competence on the basis of a motion.

Keywords: *Plea Agreement, guilty plea, fair trial, standard of proof, appeal.*

"Our values are in conflict and that in reconciling them we must compromise."

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1. Introduction

In the modern world of negotiations, it is increasingly important to talk about improving the plea bargaining institution as a form of speedy justice.

According to the statistical data of the Supreme Court of Georgia in 2021, from 16,649 cases received by the Court of First Instance, 14,955 cases were considered, and among them, 9, 147 were resolved through a plea agreement which comprises 64.4% of the cases.[2]

The aim of the paper is to discuss the essential features of the plea agreement based on the current legislation, judicial practice, approaches of the European Court and the experience of foreign countries (mostly, the USA), as a result, relevant conclusions will contribute to develop proposals for legislative or practical improvement.

2. Legislative Regulation of a Plea Agreement

Chapter XXI of the Criminal Procedure Code of Georgia is devoted to a plea agreement which has been reworked several times. As a result of the amendments of July 24, 2014, the model of a plea agreement was updated and established a new standard of proof – "standard of a plea agreement" which was determined by Article 3, Section 11[1] of the Criminal Procedure Code.[3]

2.1. The Subject and Basis of a Plea Agreement

A plea agreement is the basis (the only basis) to reach verdict without trial on the merits (CPC of Georgia, Article 209, Part 1). The formal basis for initiating a plea agreement can be, on the one hand, the written statement of the accused / convicted person made for the purpose of a plea bargain, and on the other hand, the written proposal of the prosecutor on setting up the agreement (CPC, article 210, part 11). A plea agreement may be motivated by several factors: the desire of a defendant to get less severe sentence; the confession of the accused, which is beyond plea bargaining (open, blind plea); the weakness in the case (in terms of evidence of the accusation and/or technical flaws admitted in the case); an intention to implement speedy justice and others.

According to the part one of Article 209 of the CPC of Georgia, the subject of a plea agreement is the formal accusation in the given criminal case and/or the punishment for this accusation. Before starting the process of a plea agreement, a written decision of the accusation must be issued by the prosecutor. Pre-trial detention of an accused cannot be the reason for initiating a plea agreement until the prosecutor does not make the decision on the confirmation of charges pursued by Article 169 of the CPC of Georgia. The accusation determined by the decision and the type and measure of

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1 Meir Dan-Cohen – Professor at University of California (Berkeley) School of Law. Article: *Dan-Cohen M.,* Article: Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, Vol. 97, Harv. L. Rev. 625, January, 1984.

2 Statistical information is available on the website of the Supreme Court of Georgia <2021w-statistic-3.pdf (supremecourt.ge)> [23.05.2023].

3 On making changes to the Criminal Procedure Code of Georgia, "Legislative Herald of Georgia" [23.05.2023].

punishment are the main subjects to set the agreement. Guilty plea is not considered as a matter of the agreement. The current model of a plea agreement considers guilty plea as an essential condition to make a plea agreement. Before the amendments of the July 24, 2014, CPC of Georgia recognized a form of a plea agreement in which a guilty plea could be as the subject to a plea agreement. For example, US legislation still provides the plea agreement on the basis of "nolo contendere" when the defendants do not contest the charges against them but agree to accept punishment (in contrast to the right to remain silent when the accused does not plead guilty).[4] In Georgian law, this form of a plea agreement was known as the agreement on sentence, in which the defendant "did not contradict the charge".[5] The agreement on the sentence made without guilty plea was the subject to harsh criticism. The main argument for its rejection was related to the right to a fair trial, which cannot be met with exact consistency by some institutions in the countries of common law, including a plea agreement and its individual forms.[6] The accused can identify some conditions to reach a plea agreement. If the prosecutor is open to compromise on charge and sentence bargaining, the accused may initiate to cooperate with the investigation or indemnify against damages (CPC, Article 209, Part 2). Finally, a plea agreement can be identified in the balance and proportionality of this mutual benefit. In the part of accusation or punishment the concession of the prosecutor favors the accused while the concession of the accused in the part of cooperation with the investigation or indemnification damages is in favor of the prosecutor.

2.2. The Participants in the Plea Agreement

A plea agreement as a judgment rendered without a hearing on the merits, first of all, is the right to the accused. Then, a plea agreement might be considered as a form of speedy justice imposed to unload the judicial system, provided to the prosecutor as an authority and ultimately approved by the court.

The concept of parties to a plea agreement is different from the concept of parties in a criminal case. The parties to the plea agreement are the accused[7] and the superior prosecutor of the given

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4 Federal Rules of Criminal Procedure, Title IV: Arraignment and Preparation for Trial, Rule 11, <https://www.law.cornell.edu/rules/frcrmp/rule_11> [23.05.2023].

5 See Sections 3, 4 of Article 209 of the Criminal Procedure Code (before the amendment of July 24, 2014) <Criminal Procedural Code of Georgia | "Legislative Herald of Georgia" (matsne.gov.ge)> [23.05.2023].

6 On the globalization of plea bargaining and the influence of its American model on civil law countries, see, for example: *Langer M.*, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, Harvard International Law Journal, 45(1), 2004. On the problems of the incompatibility of the plea agreement with the provisions of the fair trial and the principles of the competitive process, see also: *Laliashvili T.,* Problems of the Plea Agreement in Relation to the Main Principles of the Criminal Process, In the textbook: The Impact of European and International Law on Georgian Criminal Procedural Law, *Tumanishvili G., Jishkariani B., Shrami E. (eds.),* Pubishing House „Meridiani", Tbilisi, 2019, 363-379, (in Georgian).

7 In the case when a plea agreement is formed in a higher instance, since the subject of the agreement still remains the charge and/or punishment, the person should be considered as an accused. Otherwise, it is incompatible for the prosecutor to agree to charge the person convicted or acquitted by the court's verdict.

criminal case. They, applying a specific agreement, determine the scope and content of each issue within their own responsibilities and authorities, and enter into a bargain on charges or punishments.

A special case, when the General Prosecutor of Georgia or his deputy appears as a party to the agreement, is provided by Article 210, Part 13 of the CPC of Georgia. One of the conditions to make plea agreement is fully or partly release of an accused person from the civil liability.

Part 4 of Article 210 of the CPC imperatively requires the direct participation[8] of a lawyer in the process of negotiating a plea agreement for purpose of ensuring the fairness of the agreement. Apart from this general goal, the lawyer's participation has a very practical meaning: the prosecutor has less to explain the essence of a plea agreement and the rights to the accused because the accused receives the information from the lawyer. When making a plea agreement, the accused is more aware of various legal aspects that usually gets the process of negotiation easier. Taking into account the factual circumstances of the case, the accused, who has already been informed by the lawyer within the legal framework, can set prospective goals, therefore, the terms of the agreement from his side are real.

On some occasions, the legal representative of the accused becomes a participant in making a plea agreement. According to parts 11, 12 of Article 3 of the Code of Juvenile Justice of Georgia[9], the interests of the juvenile defendant are represented by his legal representative and signing the plea agreement with the juvenile defendant, the legal representative has to take part in the process, which does not exclude the participation of the lawyer as well (CPC, Article 210, Part 6).[10]

Although a plea agreement is finally approved by the court, the court is not allowed to be a party or participant of a plea agreement.[11]

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8 There are known several decisions of the Supreme Court of the USA which played an important role in making a plea agreement to provide a guarantee for the accused, the right to a lawyer, by the 6th amendment of the US Constitution. First of all, this is the case of *Gideon v. Wainwright*, (1963) 372 U.S. 335. ასევე, გამოყოფენ საქმეებს *Padilla v. Kentucky* (2010) 559 U.S. 356, *Missouri v. Galin E. Frye* (2012) 566 U.S. 134, *Lafter v. Cooper* (2012) 566 U.S. 156, which are known by the "plea agreement trilogy". See, e.g., *Roberts J.*, Effective Plea Bargaining Councel, The Yale Law Journal, 2013, 2650-2674.

9 Law of Georgia "Juvenile Justice Code", Article 3, 12/06/2015.

10 Georgian legal literature offers the opinion that the institution of a plea agreement harms the best interests of juveniles and it should not be appropriate to be applied. We may talk about perfecting and protecting all possible guarantees of scrupulous protection of the best interests when signing a plea agreement with a juvenile accused, but he/she ought not to be limited by a plea agreement, a "bonus" right to speedy justice, allowed in criminal proceedings which can be considered in the interest of a juvenile (For example, see Articles 11, 55 of the Juvenile Justice Code (adopted 12 June 2015). See: *Tskitishvili T.,* Separate Aspects of Regulating the Issues of Substantive Criminal Law Issues of Juvenile Justice, TSU Journal of Law, 2019, #1, 190-221 (in Georgian); On the shortcomings in signing a plea agreement with a juvenile see Coalition for Independent and Transparent Justice. The report of criminal justice working group, the use of plea agreements in Georgia, 2013, 19-21 (in Georgian) <http://coalition.ge/files/coalition_criminal_law_wg_ research_ geo_9th_forum..pdf> [23.05.2023]. It is interesting to see the current challenges in a plea bargaining for juveniles in the USA, which are related to the decision of the juvenile's negligence, e.g. Research conducted as a part of one of the dissertations, during which the author uses a large-scale interviewing method with practicing lawyers and manifests the real situation in practice: Dissertation: *Fountain E.,* Adolescent Plea Bargains: Developmental and Contextual Influences of Plea Bargain Decision Making, Washington, D.C., Georgetown University, 2017.

11 This nature of a plea agreement is, to a large extent, the merit of adversariarity, and the peculiar, different distribution of roles and competences among the participants will be clearly revealed in the adversarial and

The authority of the judge to approve a plea agreement with a guilty verdict derives from the essence of a plea agreement, which always results in being the defendant found guilty and convicted. Administering justice and finding a person guilty in every form is the inviolable competence of ordinary courts.[12]

2.3. Motion to Approve a Plea Agreement

While making a plea agreement, the motion to approve the plea agreement is an interim step. The first part of Article 211 of the CPC defines the content of the written motion for approval of the plea agreement. a) According to the point "C", the first part of Article 211 of the CPC, the motion must include sufficient evidences to reach verdict without considering the merits of the case provided by Article 3, Section 11^1 of the CPC. In practice, the mentioned norm is called the "standard of plea agreement", which by the amendments of July 24, 2014 was added to the three-step system of proof in adversarial procedure: probable cause – high degree of probability – beyond a reasonable doubt. It took a place between a probable cause and a high degree of probability.[13] The standard defined by Article 3, Section 11^1 of the CPC is used not only when the prosecutor submits a motion to approve the plea agreement, but it simultaneously creates the benchmark of guilty verdict reached without trial in merits (CPC Article 213, Part 4), so its place in the hierarchical structure of standards can only be proportionate to the standard of beyond a reasonable doubt. Otherwise, the issue might lead to the recognition of two ways to establish guilty verdict, different from each other by degree of proof which is completely unacceptable following the uniform standard of guilty verdict.[14] In fact, the standard of a

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inquisitorial criminal process. However, in the modern period, there is a tendency to integrate criminal justice processes of a different nature through their comparative legal research, borrowing/adapting individual institutions from each other. See: *Turner J.L.,* Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons, Plea Bargaining Regulation: The Next Criminal Procedure Frontier Symposium, William and Mary Law Review*,* Vol. 57, Issue 4, 2016, 1549-1596.

12 For examples from different countries about the role of the judge in a plea bargaining, see, the symposium materials: *Brook C.A., Fiannaca B., Harvey D., Marcus P., McEwan J., Renee Pomerance*, A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States, Wm. & Mary L. Rev., Vol. 57, 2016, 1147-1224. For the relatively early and modern English experience of the nature of court involvement in a plea bargaining (the problem of informal plea agreements), see, e.g., *Thomas Ph.A.,* Plea Bargaining in England, 69 J. Crim. L. & Criminology, 1978, 170-178; *Alge D.,* Negotiated Plea Agreements in Cases of Serious and Complex Fraud in England and Wales: A New Conceptualisation of Plea Bargaining?", Vo. 19, No.1, 2013, 1-18.

13 Regarding the inconsistency of the standard of probable cause mentioned in the motion regarding the plea agreement before making the changes, see, for example: Transparency International – Georgia, Report: Plea Bargaining in Georgia, 2010, 36 (in Georgian) <Plea Bargaining in Georgia – Negotiated Justice – GEO (2).pdf (transparency.ge)> [23.05.2023].

14 After implementing the mentioned changes, the judicial practice knows different approaches to the application of the standard of proof in the judgment on the approval of a plea agreement. For example, by the verdict of Mtskheta District Court of June 27, 2016, the plea agreement was approved in criminal case #1/156-16. In the descriptive-motivational part of the judgment, when explaining the plea agreement and the essence of the charge, it is mentioned in relation to the evidence that: "The evidence and other facts in the case beyond reasonable doubt confirm the commission of the accused crime by A.Z-Vi and G.T-Shvili." In another case, for example, in the judgment of the Bolnisi District Court of April 15, 2020 (case #N

plea agreement is of the same quality as beyond a reasonable doubt that is manifested by a comparative analysis: both standards serve to establish guilty verdict; both are aimed at the objective person; both are based on a body of evidence; both have to convince the court of being the accused guilty. The difference lies in the essential preconditions provided by the standard of a plea agreement: the accused admits the crime; he/she does not make the evidences presented by the prosecution disputable; the accused refuses the right that his/her case can be tried on the merits. Based on these prerequisites solving the issue of proving the guilt of the charged person provides the "author effect" of procedural economy, which the plea agreement can offer and not the trial on the meritsof the case because of a long process of examining the evidence.[15]

In accordance with the above reasoning, it is not appropriate to consider the standard of a plea agreement between a probable cause and a high degree of probability because on the ground of a comparative analysis, it has different content and can be discussed as the standard of beyond a reasonable doubt. Some suppose that the main reason of considering the standard of a plea agreement between a probable cause and a high degree of probability is that a plea agreement is often discussed on the investigational stage when the case is not moved to the court yet, where the case will step-by-step move toward the higher standards of proof. But applying the standard of proof is determined by the content, not the stage of consideration of the case.

b) According to point "F", Part one, Article 211 of CPC of Georgia, , the type and size of the punishment requested by the prosecutor should be mentioned in the motion. Despite the fact that a plea agreement is a procedural institution of criminal law, it has an influence on imposing a punishment. As the parties participating in a negotiating process of a plea agreement, the accused agrees to the prosecutor on the punishment (Part 1 of Article 209 of the CPC). Current legal regulations, as well as judicial practice, recognize a uniform approach for the determination of the type of the punishment in the same form or following the changes in accordance with the procedure by Parts 6-8 of Article 213 of the CPC of Georgia. The court imposes a punishment as a constituent part

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1/110-20), the court notes: "Based on the case materials and the guilty plea of the defendant, the court concludes that the accusation is substantiated (provided by the Criminal Procedure Code of Georgia the evidences obtained in accordance with the law, sufficient to render a verdict without consideration of the merits of the case provided for in Section 11^1 of Article 3, which would convince an objective person that the accused committed a crime, taking into account that the accused pleads guilty, does not dispute the evidences presented by the prosecution and waives the right that his/her case can be tried on the merits.."

15 Reasoning is relevant in the legal comparison of standards. In practice, they are not detected with such strict accuracy and we can talk about the convergence of standards. For example, during the substantive hearing of the case, there might be a case where the accused pleads guilty and/or does not challenge the evidence of the accusation (uncontested proceeding). Just as the plea agreement, which is approved at the late stage of the case, at the end of the substantive hearing or during the proceedings in a higher instance (late guilty pleas), loses its main feature of procedural economy. For example, by the judgment of the Supreme Court of Georgia on November 7, 2018, the plea agreement was approved (case #453AP-18), where the court notes that in addition to the testimony of the witnesses, the charges presented against the convicted person are unequivocally confirmed by the combination of the evidence, which was assigned pre-judicial value following Clause "D" of Article 73. On the positive sides of signing a plea agreement at the early stage (EGP – early guilty pleas), See also: 2018 Report of the Chief Prosecutor of Georgia, 14 (in Georgian) <Multimedia/Files/Multimedia/Files/report/Chief Prosecutor's report 6.02.2018.pdf (pc.gov.ge)> [23.05.2023].

of administrating justice.[16] It is not reasonable to reduce the power of the court to determine the type of the punishment. Today, the court approves the plea agreement and the type and size of the punishment determined by the prosecutor.[17] On the other hand, if a punishment is removed from the subject of the plea agreement, but the guilty plearemains as the main pre-condition for the plea agreement, can the interest of the accused be breached? Can the balance between making compromise and getting benefit, provided in the plea agreement be violated if the accused pleads guilty (compromise), but in return, will not have a guarantee of imposing specific punishment (benefit)? It is possible to find an intermediate option. For example, within the framework of a plea agreement, the prosecutor can make a promise to the accused of providing a motion (recommendation) to the court on imposing a specific type of punishment.[18] If the motion to approve the plea agreement is already a motion including requiring, position, recommendation and support, applying a type of punishment is more a request than an imperative stipulation, as if the problem does not arise anymore. However, the non-binding nature of this motion is revealed by the decision made within the independence of the court (Article 212, Part 5 of the CPC of Georgia): on the full satisfaction of the motion (approval of the plea agreement) or rejection (refusal to approve the plea agreement). Regarding the mentioned, it is not considered to take a different approach of the court (partial approval of the plea agreement or approval with changed conditions initiated by the court) to the individual issues of the motion. The court either approves the motion in the same form as it was presented (taking into account the 6th – 8th parts of Article 213 of the CPC) or refuses to approve it. The main explanation of the mentioned trait is related to the basis of the motion – the agreement of the parties.[19] One of the rational solutions

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16 *Vardzelashvili I.,* Some Issues of Sentencing (Analysis of Judicial Practice), SEU, Tbilisi, 2020, 13, (in Georgian).

17 The opinion that in this case the function of the court is weakened and the position of the prosecutor is strong, see: *Turava M.,* Criminal Law, Overview of the General part, 9th ed., Meridiani, Tbilisi, 2013, 362. For reasoning in the same developed direction, see: International Transparency Georgia, Research: Plea Bargaining in Georgia, 2010, 15, 21 (in Georgian).

18 For example, while making a plea agreement the form of recommendation to the court does not limit it when imposing a sentence, and it is known by Rule 11 (c)(1)(B) of the US Federal Rules of Criminal Procedure <Rule 11. Pleas | 2021 Federal Rules of Criminal Procedure> [23.05.2023]. For factors related to sentencing in plea agreements, see: *Wolfson R. (ed.),* American Bar Association Rule of Law Initiative (ABA/ROLI), A Guide for Lawyers in a Plea Agreement and Negotiation Skills, Author Group, Meridian, Tbilisi, 2013, 128-133 (in Georgian).

19 It is essential to take into account the fact that during the negotiation of a plea agreement, the prosecutor knows exactly the volume and content of the "real" charge and considers the public interest from the point of view of the original, complete charge. He/she can proportionally determine the "fee" of the compromise in the part of the accusation in relation to the punishment, which is required in the plea agreement. However, the importance of judicial control over the terms of the agreement reached between the parties (especially the sentence) cannot be denied. For the example of Canada, on the prosecutor's ethical obligations during plea bargaining (including the proportionality of the charge and sentence), see: *Paciocco P.*, Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining, *McGill Law Journal*, 2018 CanLIIDocs 324, 45.
The experience of Australia is interesting, where a plea agreement is not formally allowed, however, in case of a plea agreement with the prosecutor, a concessional system of sentencing by the court is in effect. The determining factor here is how early the accused makes a confession (fast-track guilty plea), according to which the percentage of the punishment is reduced: *Bartels L., Wren E*., "Guilty Your Honor": Recent

to the disputed issue can lie in the revision of Article 55 of the Criminal Code of Georgia. The reasoning developed in the constitutional lawsuit #1556 (p. 15)[20] of December 21, 2020, which refers to the constitutionality of Article 55 of the Criminal Code of Georgia, is partially shared. According to Article 55 of the Criminal Code of Georgia: "The court can impose a sentence below the lower limit of the sentence or a slighter type of the sentence according to the Code, if a plea agreement has been concluded between the parties."[21] Such a record limits the court to impose a sentence, and at the same time, approving the type of the sentence requested by the prosecutor in the motion to accept the plea agreement is consistent with executing judgment by the court without considering the merits of the case as an action based on the agreement. The argument, made in the constitutional claim (see p.15 of the claim) about dependence of the court on a good will of the prosecutor to enter into plea agreement with the accused, cannot be shared. It is essential to interpret correctly the basis of the exceptional rule provided by Article 55 of the Criminal Code. This is not a "good will" of the prosecutor, it is understood as a "compromise" (concession -to get one in return) determined by existing conditions of making plea agreement, considering the public interest CPC, Article 16, Part 3 of Article 210). If Article 55 of the Criminal Code is changed in such a way that the authority of the judge will be entitled with the free universal competence outside the plea agreement to impose a sentence less than the lowest limit of punishment or slighter type of punishment, this will provide approaching uniform standars for guilty verdict while trial on the merits or without it. Simultaneously, the court will be allowed to deal with the problems of ensuring the independence of determining the sentence in a criminal case. As for the type of the final punishment when approving the plea agreement, the judicial practice is not expected to change much even if the court has the right to use the benefits provided by Article 55 of the riminal Code without limitation. Considering a motion to approve a plea agreement, the judge is guided by the position of the prosecutor on the type of the punishment specified in the agreement; If the judge considers that the type of the punishment requested by the prosecutor is too harsh and should be changed, according to the 6-8 parts of Article 213 of the CPC of Georgia, he/she can ask the prosecutor to change the condition of the plea agreement in the part of the punishment and get it slighter; if the prosecutor does not change the condition, the court using its (already general) authority, following Article 55 of the Criminal Code, will change the type of the punishment or refuse to approve the plea agreement. Judicial practice has not got frequent cases when the judge asks the prosecutor to change the condition of the plea agreement[22], thus, with this combination, the prosecutor is more careful about defining a type of the punishment. If the judge still has to refer to his authority and assign a type of a slighter sentence compared to the one requested by the prosecutor, the judge, in turn will be obliged to justify the decision in the part of changing the sentence. The defendant and his

Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on it's Operation, Adelaide Law Review, 2014, 361-384.

20 Constitutional Lawsuit #1556, 21 December 2020. According to the protocol records of the Constitutional Court of Georgia dated April 23, 2021, the mentioned constitutional claim was merged with the constitutional claim #1458 and accepted for making a review. See: Protocol of the Constitutional Court of Georgia on April 23, 2021.

21 Criminal Code of Georgia, Article 55, Legislative Herald of Georgia, 22/07/1999.

22 Regarding the lack of initiation by the court to change the terms of the agreement, see also: *Giorgadze G. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 642, 645 (in Georgian).

lawyer sign the plea agreement, support the terms of the plea, including the sentence, and there is no reason to file a motion and ask the court to change the terms requested by the prosecutor every time. Based on these conditions, there is an expectation that the amendment of Article 55 of the Criminal Code will not lead to a drastic change in the judicial practice of sentencing upon an approval of a plea agreement. As for the interests of the parties, if the court approves the plea agreement with a modified sentence, the accused receives more benefits. However, there might arise a question about the prosecutor's right to appeal the verdict of the plea agreement in the part of the punishment, which is not recognized by the CPC of Georgia (Article 215 of CPC).

2.4. Consideration of a Motion to Approve a Plea Agreement

The main purpose of the court is revealed at the stage of making plea agreement, when the court begins to consider the motion for approval of the plea agreement (plea discussion). This process can be divided into two directions. On the one hand, the court excludes procedural errors and creates the belief that the agreement is based on the true will of the accused (Article 212 of the CPC of Georgia), on the other hand, the court verifies the affirmative part of the agreement and the legitimacy of the sentence (Part 3 of Article 213 of the CPC of Georgia). Part 2 of Article 212 of the CPC of Georgia offers circumstances that contribute the court to find out if the accused is aware of the essence and consequences of the plea agreement and has made the decision considering free will. Based on the above, the plea agreement is justified as a form of case review when the main democratic principles of justice are rejected: the substantive review of the case, the examination of evidences and the right to refuse self-incrimination.[23] The norm is constructed in such a way that the element of voluntariness appears only in the recognition part (Article 212, Part 2, Clause "b" of the CPC). Although the analysis of the norms allows to provide counterarguments, there is no direct provision that the court is obliged to make out if the accused has voluntarily waived his right to a substantive hearing and examination of the evidence. Especially, the standard stipulated by Article 3, Section 11^1 of the CPC distinguishes three equally important circumstances: the accused admits the crime, does not dispute the evidence presented by the prosecution and refuses the right to consider the merits of his case by the court. Despite the fact that in accordance to Article 212, Part 2, Clause "I" of the CPC, before approving plea agreement the court is obliged to make certain that the accused is aware of his rights, including the right to have his case heard on the merits ("I.C" c/point), does not fully emphasize the main duty of the court to make sure that the accused voluntarily refuses to apply his rights. [24]

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[23] In the USA, within a plea agreement, the defendant's surrender of those essential rights, which are considered an important acquisition of the US Constitution (VI Amendment), is considered the primary and essential drawback of the plea agreement. Therefore, the court focuses on establishing to get the accused make the decision under conditions of free choice of action to receive an appropriate legal assistance. See, e.g.: *Redlich A.D., Summers A.*, Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry, Psychology Public Policy and Law, 18(4), 2011; Coercive Plea Bargaining, Policy Forum, Cato Institute, 2018, October <https://www.cato.org/events/coercive-plea-bargaining> [23.05.2023]; Among the decisions of the European Court, it is interesting, for example: Scopolla v. Italy (No.2) [2009] ECHR, 135 <SCOPPOLA v. ITALY (No. 2) (coe.int)>.

[24] However, the skeptical attitude of a part of the (legal) community towards a plea agreement as a formal process may be due to certain circumstances. The same US jurisprudence and legal practice, along with the

According to Article 213, Part 31 of the CPC of Georgia, the court should not approve a plea agreement if it cannot receive convincing answers[25] from the accused to the questions provided by Article 212, Part 2 of the CPC. The answers must be specific, declared separately and independently.[26]

According to Article 45, Clause "F" of the CPC, it is mandatory for the accused to have a lawyer, if he is negotiated on making plea agreement. The mentioned rule has been reinforced many times in the chapter of the plea agreement (CPC, Part 4 of Article 210; Parts 2, 3, 6 of Article 211, etc.). Provided Article 212, Part 2, Clause D of the CPC the court is obliged to make sure that the accused had the opportunity to receive qualified legal assistance. This record cannot be understood as a mere opportunity which the accused was free to use or refuse. It is implied that the accused could receive qualified legal assistance throughout the process of the plea agreement. Qualified legal assistance means assuring the court (by reviewing the case materials, explanations of the accused, hearing the answers and observing the actions by a lawyer) that the lawyer acted considering the best interests of the accused.[27]

2.5. Acceptance or Rejection of a Plea Agreement and to Appeal

As a result of reviewing the motion to approve a plea agreement, the court reaches a guilty verdict on the approval of the plea agreement or refuses to approve the plea agreement (Article 213 of the CPC).

a) Defining guilty verdict on the approval of a plea agreement and the procedure for appealing it are related to some controversial issues which lead to inconsistent judicial practice. The section 4 of Article 213 of the CPC determines the subject and scope of the evidence to reach guilty verdict without considering the merits of the case. According to this norm, the court is authorized to approve a plea agreement and find the person guilty if: a) the court has the evidences provided by Article 3, Section 11^1 of the CPC; b) the accused answered convincingly to the questions provided by Article 212, Part 2 of the CPC; c) the finally requested punishment is legal and fair. And, the process of inspecting substantiation of allegation and legality of the punishment provided by the section 3 of Article 213 of the CPC, serves the same purpose as the examination of evidences by the parties, making an introductory and closing statements of hearing.

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inevitable need for plea bargaining, recognize the existence of the "ugly practice of coercion" of a plea bargaining, which has become routine in the US judicial system: *Neily C.*, Overcriminalization and Plea Bargaining Make Criminal Justice Like Shooting Fish in a Barrel, Cato Unbound, A Journal of Debate, July, 2020.

25 Regarding the verification of a defendant's voluntary consent to a plea agreement after getting aware of the legal consequences, see, for example: Judgments issued by the European Court of Human Rights against Georgia (2005-2019), Collection, Georgian Bar Association, 65-67 <Final – ECtHR.pdf (gba .ge)> [23.05.2023].

26 *Giorgadze G. (ed.),* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 642, (in Georgian).

27 Regarding the issue it is interesting: *Chomakhashvili K.,* Legal Aid in Plea Bargaining. Overview of Georgian Legislation and Practice, UNDP, 2018; *Tinsley A.*, Criminal Legal Aid and Plea-Bargaining (Overview of International Standards and Recommendations for Georgian Legal Aid), UNDP, 2017, 11-17.

In both cases, the court creates a firm attitude towards its decision which is known as internal belief and considered to be a decision beyond a reasonable doubt in the competitive process.[28]

What is the attitude of the European Court of Human Rights to the institution of a plea agreement which includes declaring a person guilty without making substantive review! In general, the European Court of Human Rights does not consider the plea agreement as a process completely incompatible with the idea of a fair trial. This has been emphasized many times in the decisions of the European Court, including several cases against Georgia: Kadagishvili v. Georgia;[29] Natsvlishvili and Togonidze against Georgia.[30]

Article 215 of the CPC of Georgia defines the procedure for appealing the judgment on the approval of a plea agreement. Guilty verdict provided in the plea agreement is reached as a result of the strategic interaction[31] of the parties and it is a kind of agreed version of the verdict. "Agreed verdict" differs from a standard judgment as the interests of the opposing parties are usually unequally satisfied. For that reason, a rule to appeal the verdict of a plea agreement (subject, basis, term) requires a different arrangement from the general procedure. For example, according to the first part of Article 292 of the CPC, the verdict of the Court of First Instance can be appealed if the appellant considers it illegal and/or unjust. In contrast to the mentioned rule, Article 215 of the CPC defines different reasons for the subjects of appealing (convicted person, prosecutor) which are relevant to their interests.[32] Following the part 3 of Article 215 of the CPC, the convicted person has the right to file a complaint to a higher instance about quashing the decision on approval of a plea agreement, if 1) a plea agreement was signed under duress and threat or by deception; [33] 2) the right to defense was limited 3) there were insufficient evidences 4) The court ignored the essential requirements of the

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28 Regarding the issue, see. for example: *Fisher T.,* The Boundaries of Plea Bargaining: Negotiating the Standard of Proof, Vol. 97, Issue 4, J. Crim. L. & Criminology 943, 2006-2007; *Tsur Y.,* Bounding Reasonable Doubt: Implications for Plea Bargaining, The Hebrew University of Jerusalem, September, 2016.

29 Kadagishvili v. Georgia) [2020] <kadagishvili-saqartvelos-winaagmdeg.pdf (supremecourt.ge)> [23.05.2023].

30 For a detailed analysis of the mentioned case of the institute of a plea agreement, see: *Okhanashvili A., Surmava B.,* Georgian Model of a Plea Agreement in Light of the Secision of the European Court of Human Rights: the case of Natsvlishvili and Togonidze against Georgia #9043/05, German-Georgian Journal of Criminal Law, 2021, #1 (in Georgian).

31 On a plea bargaining as a strategic interaction between the prosecutor and the accused, see: *Mezzetti C., Baker S.,* Prosecutorial Resources, Plea Bargaining and the Decision to Go to Trial, Journal of Law Economics and Organization, 2001, Vol.17. No.1.

32 By refusing the right to a substantive review during the plea agreement, the accused loses the right to standard appeal (appeal, cassation) of the verdict established as a result of the substantive review, which does not contradict the fair trial guaranteed by Article 6 of the European Convention and Article 2 of the 7th Protocol With the right to appeal a criminal case guaranteed by Article. See, for example: Natsvlishvili and Togonidze v. Georgia, [2014], (in Georgian), (C) <NATSVLISHVILI AND TOGONIDZE v. GEORGIA (coe.int)> [23.05.2023].

33 Regarding the issue, it is interesting, for example, the judgment of the Chamber for criminal cases of the Tbilisi Court of Appeals of June 25, 2013, case # 1/ბ155-13.

law.[34] And, the prosecutor is entitled to request the annulment of the verdict only if the convicted person has violated the terms of the plea agreement (Part 4 of Article 215 of the CPC). Article 215 of the CPC does not offer a reservation about one-off nature of the appeal. In practice, the norm regarding the appeal of the judgment to the higher instance is interpreted differently, especially when a plea agreement is brought to a cassation trial.[35] According to part 3 of Article 307 of the CPC, the judgment of the Court of Cassation is final and cannot be appealed. As a rule, the propositions of a plea agreement are used to discuss it (CPC, Part 2 of Article 219; Part 3 of Article 230; Part 1 of Article 197, Clause "E"). Based on Article 297 of the CPC, to consider an appeal it is essential to apply to the norms of First Instance proceedings and the record of Article 230, Part 3, on the issue of approving a plea agreement during the consideration of an appeal. Article 306 of the CPC does not cover the record that allows to consider a plea agreement and use the propositions during the review of the cassation appeal. Due to the fact that the cassation proceedings do not directly contradict the propositions of a plea agreement (the plea agreement does not contain an element of substantive review, the court of cassation has the competence to make a decision in the form of a verdict, according to Article 250, Part 2 of the CPC, the prosecutor can reject the charge or a part of the charge or replace it with a slighter charge) it is permited to consider the issue of a plea agreement during cassation proceedings, and judicial practice provides the examples of this. The issue of how the propositions of Article 215 of the CPC should be applied when considering the issue of a plea agreement in the cassation proceedings leads to different interpretations, since the cassation proceeding is already the highest, final instance and the decision cannot be appealed. The rule of appealing provided in Article 215 of the CPC already furnishes the right to appeal the decision, including the decision obtained as a result of considering a plea agreement (judgment on refusal; judgment on approval), and it is appropriate even it is of one-off nature. Discussing a plea agreement during the cassation proceeding it is possible to talk only about the final decision, which cannot be appealed. In a possible case,[36] when the plea agreement is approved during the cassation proceedings,

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34 On this issue, see the US experience in appealing plea bargains in federal cases: *Ellis A., Bussert T.,* Stemming the Tide of Postconviction Waivers, Published in Criminal Justice, Vol. 25, Number 1, 2010, American Bar Association.

35 For example, by the judgment of the Supreme Court of Georgia on November 29, 2018, the plea agreement was approved, and the motion of the Kutaisi Court of Appeal of October 1, 2018 on the refusal to approve the plea agreement was canceled. In the resolution part of the verdict, the court was guided by Articles 301-307 and 209-215 of the CPC, stating that: "The verdict is final and cannot be appealed, except for the cases provided for by law." In other cases, the Supreme Court of Georgia by the decision of December 10, 2018 (case #416AP-18), the cassation appeal of the prosecutor was rejected and the decision of the Tbilisi Court of Appeal of June 21, 2018 remained unchanged. According to the resolution part of the ruling, the cassation chamber was guided by Articles 301, 307, 209-215 of the CPC which refused to satisfy the cassation appeal and indicated that the verdict is final and not subject to appeal. See: Collection of decisions of the Supreme Court of Georgia, Criminal proceedings, 2018, 43-58, 58-64 <http://old.supremecourt.ge/files/upload-file/pdf/2018w-sisxli-krebuli-10-12.pdf> [23.05.2023].

36 The mentioned case can be considered theoretically rather than in a common way in practice. As a rule, the statistics of approval of a plea agreement in cassation proceedings are not high, it is exceptional and has the form of a "guaranteed verdict", where the risk of violating the condition of the agreement is lower than the

the verdict is final and cannot be appealed, and the convicted person avoids fulfilling the conditions, the prosecutor can file not a complaint, but a motion to the appellate court as a newly discovered circumstance. Article 215 of the CPC creates such a basis. In contrast to the rule of appealing the verdict by the convicted person, when he has the right to appeal to the superior court within 15 days after the verdict is reached (Part 3 of Article 215 of the CPC), the prosecutor has the right to appeal to the court within 1 month after detecting the violation (and not after the verdict is issued), which confirms that breaching the plea agreement by the accused has the nature of the newly discovered circumstances.

b) Parts 5, 6^1 and 7 of Article 213 of the CPC provide for cases when the court refuses to approve a plea agreement within the framework of a motion and the case is continued from the relevant stage (where the motion was considered). As a result of the amendment of July 24, 2014, the party was allowed to appeal the refusal of the court to approve a plea agreement. According to part 2 of Article 215 of the CPC, the complaint must be submitted within 15 days and it will be considered by the higher instance court. In contrast to parts 5 and 6^1 of Article 213, the case provided by part 7 of the same article, when the court refuses to approve on the grounds that the accused has used his right and refused the plea agreement (withdraw the plea) without a substantive review, before passing the verdict, it is logical that it should no longer give rise to the right to appeal the decision. The legislation does not provide reasons and conditions when the accused may refuse a plea agreement. On the contrary, the accused has the right to refuse the plea agreement at any time before sentencing without the consent of the lawyer and he/she does not have a legal obligation to submit the refusal in the written form.[37] Consequently, the refusal to approve the plea agreement will result in passing a motion (unconditional, automatic) which cannot be subject to the appeal provided by Article 215, Part 2 of the CPC. In other cases, when the party submits an appeal against the refusal to approve the plea agreement, the court of higher instance can leave the appealing motion or approve the agreement which is reflected in the judgment. In the latter case, another unusual feature of a plea agreement might be revealed, when the judgment is made for the first time by the high instance without making a decision by the court of the first instance.

3. Conclusion

1) It is not appropriate to make an amendment in the Criminal Procedure Code of Georgia considering the competence of the court, against the will of the prosecutor, change the terms of a plea

minimum. Regarding the issue, see Activity Report of the Prosecutor's Office of Georgia 2021, 21, (in Georgian), <Microsoft Word – ad7e-f55d-3189-23ba.docx (pog.gov.ge)> [23.05.2023].

[37] Such formulation is more similar to the right of the accused to remain silent than to the right to refuse a plea agreement. It turns out that the accused rejects the confession made within the framework of the plea agreement, which does not require any justification or consent from anyone (including the lawyer). This is confirmed by the record of Article 214 of the CPC, according to which, if the accused refuses the plea agreement, it is not allowed to use his testimony against him. And, the rejection of the plea agreement is more reflected in the procedure of appeal by the convicted person against the verdict on the approval of the plea agreement provided by Article 215, Part 3 of the CPC when the appeal is submitted for making the verdict annulled.

agreement and reduce the type of the requested punishment. Except for that way of making changes to Article 55 of the Criminal Code of Georgia when the court is given the right to use the benefits provided by the mentioned Article without limitation (universal and not only in plea agreements);

2. Determining a guilty verdict to approve a plea agreement, the court is guided by the uniform standard of conviction that is beyond a reasonable doubt. The standard provided by Article 3 Section 11^1 of the Criminal Procedure Code is the guide of the prosecutor to draw up a motion for an approval of a plea agreement. Considering the circumstances of the same norm, it creates the basis for the court to be guided by the standard beyond a reasonable doubt when passing a judgment on approving a plea agreement;

3. According to the amendments which might be made in Article 215 of CPC the party has the right to appeal the refusal to approve a plea agreement only once, except for the issue to be considered in the cassation proceedings. Also, the prosecutor will have the right to apply a motion to the Court of Appeals and request vacating the verdict reached at any stage (including the cassation proceedings) of approving a plea agreement, if the convicted person breaches the terms of the plea agreement.

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