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Legal aid in plea bargaining Overview of Georgian legislation and practice

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Introduction

The institutional plea bargaining is quite widespread in Georgia. This is an effective tool through which the state institutions rapidly and effectively fight crime and conduct pretrial investigation and court hearing while economising State resources.

The purpose of the present research is to define the scope of the legal aid during the plea bargaining, especially considering the fact that according to Georgian legislation, the defendant is required to have a counsel during plea bargaining and the State pays for the defense while economising other resources.

During the research, we have studied the legislation related to the legal aid in plea bargaining, compared it with international standards and legislation of other European countries, we have also analysed statistical data in order to identify the positive as well as negative aspects of the existing system.

As it was important to study the views of the legal professionals, a questionnaire for in-depth interviews was prepared and interviews were conducted with prosecutors and judges (respectively 5 and 2 interviews) as well as five lawyers from legal aid and 5 lawyers from GBA. Respectively, the research attempted to answer the following questions:

- What is the legislative framework related to the legal aid in plea bargaining;
- What are positive and negative aspects of the legislation of Georgia;
- How is the legislation implemented in investigative and judicial practice;
- Is it possible to amend Georgian legislation in the light of legislation of other countries and if yes, in what respect;
- What are the views of the participants of the criminal procedure (judges, prosecutors, lawyers) related to the existing system as well as the proposed changes;

As the result of the analysis of the above mentioned issues, we have prepared relevant opinions and recommendations as well as proposals to amend civil procedure code of Georgia, which will be presented for public discussion.

Chapter 1

Overview of Georgian legislation

According to par. 3 of art. 42 of the Constitution of Georgia, the right to defence is guaranteed. According to art. 6 of the European Convention of Human Rights everyone has the right to "*c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*"

Therefore, according to art. 6 of the ECHR, in the course of criminal proceedings (including the agreement on guilty plea) the State has the duty to ensure the legal assistance of the person, if he/she does not have enough means to pay for his/her defense and the interests of justice so require. On its side, the interest of justice implies: a. gravity of crime, b. seriousness of the possible sentence c. complexity of the case d. personal situation of the accused/convict.

Chapter 21 of the criminal procedure code of Georgia allows the plea negotiation and guilty plea on all categories of cases, in the course of which the defendant pleads guilty and agrees on the sentence, alleviation or partial withdrawal of the charges. At the same time, art. 218 of criminal procedure code allows, in exceptional cases, a full exemption of the defendant from criminal liability or from sentence upon motion of the chief prosecutor on all crimes except for those stipulated under art. 144^1-144^3 of the criminal code.

According to art. 210 of the criminal procedure code, a plea bargaining deal can be proposed by the defendant as well as by the prosecutor, while in the course of main hearing of the case the court is empowered to explore the possibility of plea bargaining deal between the parties. Procedurally, plea bargaining can be proposed by a motion of the defendant or by the prosecutor. Plea bargaining deal shall be formalized in plea bargaining record. We must also take into account the fact that plea bargaining deal may be achieved at any stage of the investigation or trial including cassation hearing.

Georgian legislation stipulates the obligation of the prosecutor to inform the defendant about the consequences of plea bargaining deal and explain to him/he that in case if the plea is accepted the court shall pronounce the guilty verdict without examination of the evidence[1]. The criminal procedure code also stipulates the obligation of the court to clarify prior to the approval of the deal a number of issues and make sure that the defendant fully acknowledges the legal consequences of the guilty plea, the nature of the crime charged, the sentence stipulated by the law. Also the court should be convinced that the defendant had the opportunity to benefit from qualified legal defence and the defendant and

[1] Art 210-$_0$ par. 1^2 of criminal procedure code.

his lawyer are fully familiar with the case-files[2]. According to art. 213 (par. 2) of the criminal procedure code, the court should approve the plea bargaining deal if the charges are reasoned, the requested sentence is lawful, and fair and defendant convincingly responded to all of the abovementioned issues.

Taking into account the issues outlined above and also considering the fact that defendant waives one of his fundamental rights to have his case examined on the merits and participate in the examination of evidence, art. 210 (par.4) of the criminal procedure code prohibits the approval of plea bargaining deal reached without direct participation of the counsel.

As we see, the participation of the counsel during plea bargaining is mandatory. Summoning of the counsel is regulated by art. 45 and 46 of the criminal procedure code. Namely, according to art. 45 of the criminal procedure code, during plea bargaining negotiations, the defendant should be assisted by the counsel, while according to art. 46, the State shall bear the expenses of the defence if the participation of the defence counsel is mandatory according to criminal procedure code and the defendant does not have a lawyer selected by him. Also, according to art. 5 (par. 1) of the law on legal aid, the legal aid is guaranteed in cases directly stipulated by the law and also when the defendant, convict or acquitted person is unable to pay.

Therefore, criminal procedure code of Georgia and the law of Georgia on legal aid stipulate stronger guarantees for the exercise of the right to defence those stipulated by ECHR and impose an obligation on the State to bear the costs of the legal assistance immediately from the start of the plea bargaining negotiation, irrespective of whether the defendant is able or willing to invite the counsel of his own choice. We believe that this situation results in an unreasonable increase of the workload of the legal aid service and the decrease of the quality of the service afforded to the socially vulnerable defendants and convicts.

For comparison, we should note that according to the legislation of several EU countries, the participation of the lawyer in plea bargaining deal is mandatory irrespective of the nature of the case (Belgium, Bulgaria, France, Finland, Estonia), while in some countries plea bargaining deal may be accepted without the participation of the defence counsel (Germany, England). We should also take into account that in some countries the non eligible defendant is obliged to pay the costs of the legal assistance after the conviction (Bulgaria, Estonia, Germany[3]).

It is noteworthy that according to criminal procedure code of Georgia an obligation to appoint a defence counsel arises if the plea bargaining negotiation is ongoing. However, the code does not prescribe in detail what is implied by plea bargaining negotiation, when does such negotiation start between the defendant and the prosecutor and since when is the authority in charge of taking decision is obliged to appoint a counsel from legal aid. This enables the participants of the procedure to misuse State resources on Free Legal Aid without proper ground.

We should separately discuss the procedure of removal of the legal aid counsel from the case, when the grounds for the appointment of the legal aid counsel no longer exist. This procedure is not prescribed

[2] Supra note, Art. 212 (2).
[3] Alex Tinsley, Legal Aid In Plea Bargaining, International Standards, 2017, p. 59.

by the code and it totally depends on the caselaw. Subsequently, what we found is that the lawyers who have been appointed to the case on the ground of plea bargaining have to continue assisting defendant despite the fact that the ground for their presence in the case no longer exists, or apply to the court with the motion to have them discharged from the case. However, this motion does not have proper justification, which reduces the chance of its being granted by the court.

Chapter 2

Analysis of the statistical data

In order to properly analyse the necessity of free legal assistance in plea bargaining and the challenges of legal aid service in this respect, we have requested statistical information from the Supreme Court and the Chief Prosecutors Office of Georgia, as well as from Legal Aid Service.

We asked the Supreme Court to provide information on plea bargaining deals approved by the courts in 2015-2016 by the courts of the first instance as well as the defendants who have plead guilty as the result of the bargaining and were sentenced to the fine, as a core sentence or as additional sentence. From the letter of the Supreme Court it could be established that in 2015-2016, 19972 defendants were convicted upon plea bargaining deal (9968 – in 2016, 10104 in in 2015) among which 2067 convicts were sentenced to a fine (1236 in 2015, 1431 in 2016) which constitutes only 30 percent of all criminal defendants.

We have applied to chief prosecutors office with the similar letter and asked for the information regarding the number of the defendants who entered guilty plea in 2015-2016 upon motion of prosecutors office – sorted by category. However, the prosecutors office redirected us to the court.

Interesting data for the purpose of the research was provided by LAS, which revealed following:

In 2015, the LAS has received 8406 case on the grounds stipulated by art. 45 of the CPC (10 grounds in total) which represents 88 percent of all cases filed (9532 cases total). Out of these 8406 cases a lawyer was allocated to the defendant on the ground plea bargaining negotiation in 4272 cases (50 percent). Out of these 4272 cases only 194 defendants were insolvent and finally 3632 cases were completed by plea bargaining deal. Fine was imposed in 1238 cases (in 39 cases the amount of fine exceeded 10000 GEL, in 153 cases the amount of fine was up o 10 000 and in 923 cases the amount of fine was from 1000 to 2000 Gel).

In 2016, on the ground of mandatory defence 8148 cases were filed to LAS which represents 88 percent of total number of cases (9233). Out of these 8148 cases a lawyer was assigned to the defendant in 4113 cases on the ground of plea bargaining negotiation. Out of these 4113 case only 216[4] defendants were insolvent and finally only 3343 cases were completed by plea bargaining agreement in which the fine was imposed as a sentence in 1064 cases (exceeding 10 000 GEL in 13 cases, from 5000 to 10 000 GEL in 88 cases and in 846 cases from 1000 to 5000 GEL)

[4] This data may not be statistically accurate, however, is extracted from the LAS information system database.

Thus the statistical data reveals that in 2015-2016 out of plea bargaining deals approved by the court (19972 persons) 8383 persons (42 percent) have benefited from legal aid out of them only 400 (4.8 percent were insolvent). Here we also have know that out of 8385 cases filed on the ground of plea bargaining, 6975 were completed by plea bargaining deal (83 percent) and among them 2302 defendants (33 percent) were imposed a fine as a sentence.

Chapter 3

The analysis of in-depth interviews

In order to understand the views of the participants of the criminal procedure related to the legislation and practice of legal aid in plea bargaining, we have planned and conducted in-depth interviews with 5 prosecutors, 10 lawyers and 2 judges.

A questionnaire for in-depth interviews was prepared based on the analysis of the criminal procedure code of Georgia, international legislation and ECHR case-law and the questions formulated in the questionnaire covered to the extent possible all the issues, that we though would be crucial for understanding the views of the participants of the procedure. In the course of the preparation of the questionnaire we also took into account the role of the respondent in the appointment of the defence counsel or in the execution of such decision.

Based on the questionnaire, the respondents were asked to evaluate the Georgian legislation related to the appointment of the counsel (questions of general nature), the existing caselaw and the conduct of the participants of the procedure (main part) as well as give recommendations to the other participants of the procedure on the effective conduct of the process (the conclusive part).

As the result of the interviews, we found out the following: according to the respondents, the legislation of Georgia related to the appointment of defence counsel in plea bargaining negotiation as well as the exemption of the counsel when the grounds are no longer present is ambiguous and gives floor to manipulation to the decision-making authority. As the lawyers of the legal aid service have explained, the expression used by the law "plea bargaining negotiation is ongoing" is not subject of uniform interpretation or application by prosecutors and judges. There are cases, when prosecutors involve legal aid lawyers in criminal case, when the plea bargaining negotiation is almost over and the defendant is willing to plead guilty based on specific condition. On the other hand, judges also file a request for the appointment of defence counsel to the legal aid bureau even when the defendant does not plead guilty (the guilty plea is a mandatory prerequisite for the plea bargaining deal) and/or despite the guilty plea, the prosecutor is against striking a plea bargaining deal with this specific defendant.

To the question of when, according to Georgian legislation the defendant should be provided by the lawyer and what is implied by "ongoing negotiations", the judges responded that this is the case when defendant pleads guilty and both parties corroborate that negotiation is ongoing, despite the fact that officially none of them have applied to the court with plea bargaining motion. On the similar question, the GBA lawyers have responded that the ground for negotiation is the written statement of the defendant or the record of proposal from the prosecutor. However, most prosecutors responded that the verbal statement by the defendant that he wants plea bargaining constitutes a ground for the

appointment of the mandatory defence in order to have defendant ensured by the lawyer in the process of elaborating the conditions of the plea deal.

To the question related to the legislation, most interviewees responded that art. 45 and 46 compel the decision making authority to appoint the lawyer immediately on the ground of mandatory defence if a plea negotiation is ongoing. This compels the State to pay for the expenses of the legal defense even in cases when the defendant has the ability to afford his lawyer. The respondents also stated that they wish to have more specifically described grounds for the appointment of the Counsel during plea bargaining and also grounds for the removal of the counsel when the initial preconditions are no longer present. Some of the respondents have talked about possible solution of the problem without amending the law, if the decision makers (judges and prosecutors) implement the practice, according to which they should clarify to the defendant the possibility to choose his own counsel and give a reasonable time (2-3 days). They think that this strategy shall alleviate the workload of legal aid lawyers by 10-20 percent and shall prevent spending of the resources on the defendants who are able to afford their own counsel.

As we have stated above, in addition to the Georgian legislation, the respondents were asked to express views as to the prosecutorial and judicial practice. Taking into account the fact that GBA lawyers do not have much to deal with the activity of legal aid lawyers and given the fact that the judges have scarce practice, no significant opinion has been expressed in this direction;

The prosecutors agree to the view that legal aid lawyers are overloaded. According to them, this is caused by incorrect judicial practice of appointment as well as removal of legal aid lawyers from the case. Namely, the absolute majority of prosecutors believe that the courts should not be assigning the legal aid lawyers on the ground of plea negotiation based only upon the wish of the defendant, while the prosecutor during the hearing explicitly states that no negotiation takes place or cannot take place, because the prosecuting party is not willing to reach plea bargaining agreement. They think particularly problematic are the cases in which the defendant does not even plead guilty (while the guilty plea is necessary precondition for the plea bargaining agreement). They think that similar problem is the failure of the court to grant the motion of the removal of the lawyer from the case when the grounds for the appointment are no longer present, as well as the failure of the some of the defence lawyers to raise such motion despite the fact that the plea bargaining negotiations were unsuccessful and the case is being tried on the merits.

As to the legal aid lawyers, they named several problems, which they think cause the overload and prevents effective exercise of their function. Namely, as the legal aid lawyers stated, in some cases, the judges and prosecutors take decision to appoint a legal aid counsel to the defendant when there is no real negotiation on plea bargaining and decision makers simply try to make their work easier (exchange of case materials, problematic defendants, attempt to cover the errors in the case, etc). The removal of the legal aid lawyer from the case is also problematic, because if the defendant expresses the wish to have a lawyer, the judges often do not grant the motion withdrawal the legal aid lawyer, as the result of which the latter are compelled to participate in the case and assist the defendant despite the fact that the grounds their participation in the case are no longer present.

Part of the lawyers view the solution of the problem in giving reasonable time to the defendant to pick up a lawyer of his choice. The prosecutors also admit the possibility to give reasonable time to the defendant to pick up a lawyer instead of immediately assigning him a counsel. However, some of them believe that giving this reasonable time will result in the waste of additional time because the defendant who is familiar with the possibility of appointed counsel rarely selects private counsel.

At the same time, the prosecutors, as well as attorneys believe that it is impossible to evaluate the financial situation of the person solely based on socially vulnerable database, because it is imperfect and the person who is not in the database can be even poorer than those registered in the database.

In addition to the abovementioned issues, the interviewees were asked to express their opinion on the possibility of reaching the plea bargaining agreement on less serious crimes in the absence of the defense counsel. The judges believe that it should not be mandatory to have a lawyer on all cases including less serious crimes. Out of 30 percent of lawyers and 1 prosecutor deems it possible to differentiate the cases based on this principle and permit plea bargaining on less serious crimes in the absence of the lawyer.

Majority of lawyers and prosecutors are categorically against plea bargaining in the absence of the lawyer, while 2 lawyers hinted to a possible problem of discrimination and proposed to differentiate per type of sanction as opposed to the seriousness of the crime.

On the question of how possible it is to impose the costs of the defence on the defendant and later enforce it (upon the defendant who is not registered in socially vulnerable database), majority of the participants noted that this procedure is complex and may create additional problems (100 percent of judges, 60 percent of prosecutors, 70 percent of lawyers). However, they also pointed out that in case if the database of the socially vulnerable persons was perfect, then the majority of them would favour the appointment of the State appointed legal aid counsel only to the socially vulnerable defendants.

The interviewees were asked to give recommendations to other participants of the criminal procedure for the improvement of the practical work, subsequently, the judges recommend to the prosecutors to obtain information about defendants financial situation and give him reasonable time to pick up the counsel of his choice before appointing legal aid counsel. The judges recommend legal aid lawyers to check whether the plea negotiation is really ongoing and remove themselves from the case when the grounds are no longer present. The prosecutors and the majority of GBA lawyers have similar recommendations for legal aid lawyers, while on the other side, the legal aid and GBA lawyers recommend the prosecutors to give reasonable time to the defendant to pick up the counsel of his choice or at least to clarify to the defendant that he has the right to counsel of his choice instead of directly proposing legal aid counsel, particularly to those persons, who have a capability to afford the private counsel.

To the question of what recommendations would lawyers and prosecutors give to the judge, most of them responded they were recommending against such a broad interpretation of the provision of the law related to the plea bargaining negotiation and they recommended the judge to appoint legal aid counsel only in if the defendant plead guilty, did not contest the evidence and the prosecutor also

expressed willingness to negotiate. If the ground for the appointment of the lawyer was no longer present, then they recommended the judge to enable the LAS lawyers to withdraw from the case.

As a conclusion, we should say that most of the respondents recognize the problems existing in legislation and the practice and they think it is possible to remedy those problems by legislative amendments in criminal procedure code.

Chapter 4

Conclusions and recommendations

As we have noted in the introduction, the purpose of the present research is to define the need of legal aid in plea bargaining, propose the ways of improvement and present the recommendations to the wide audience. We believe that the conclusions of the research and the recommendations shall assist the stakeholders to improve their activity in this area.

Conclusions

- According to ECHR the State has an obligation to provide legal assistance to the person if he/she doesn't have adequate means to afford his defense and this is required by interest of justice.
- According to the criminal procedure code of Georgia, it is mandatory for the defendant to be assisted by the lawyer if the plea bargaining negotiations are ongoing.
- According to the same code, the body in charge of the criminal proceedings (the prosecutor, investigator, judge) has a duty to summon the legal aid lawyer irrespective of the financial situation of the defendant or his wish if the ground for mandatory defence is present and the defendant is not assisted by the lawyer of his choice.
- Georgian criminal procedure code does not envisage the possibility of the removal of the counsel from the case, if in the course of the proceedings it was found out that the negotiation between the parties stopped or/and plea bargaining is no longer foreseeable and subsequently there are no grounds for further assistance of the defendant on this ground. Subsequently the caselaw on this respect is not uniform and the removal of the counsel from the case totally depends on the discretion of the judge.
- In investigative and court practice, the formula used by the code "plea bargaining negotiation is ongoing" is not interpreted uniformly and this enables the decision maker in charge to abuse this possibility of the appointment of the counsel.
- According to the legislation of Georgia, plea bargaining deal can be reached in all categories of cases in investigation as well as in court hearing, including cassation and this may enable the protraction of negotiation process for long period of time.
- According to legislation of several EU countries, the participation of the lawyer in plea bargaining deal is mandatory irrespective of the nature of the case (Belgium, Bulgaria, France, Finland, Estonia), while in some countries on simple cases plea bargaining deal may be accepted without the participation of the defence counsel (Germany, England). While in some countries the non vulnerable defendant may be obliged to pay the costs of the legal assistance after the conviction (Bulgaria, Estonia, Germany).

- Statistical information reveals that in 2015-2016, out of 19972 plea bargained cases approved by the court 8355 persons (42 percent) have benefited from free legal assistance and among them only 400 (4.8 percent were socially vulnerable). Out of 8385 cases received by LAS on the ground of plea bargaining negotiation, 6975 cases were completed by plea agreement and out of them 2302 persons were sentenced to a fine (33 percent), while each lawyer of LAS conducts 80 cases on average every year, which raises doubt about quality and effectiveness of their work.
- Majority of the interviewed lawyers view the solution of the problem in giving reasonable time to the defendant to pick up the counsel of his choice. The prosecutors also believe that it is possible, instead of immediately appointing a legal aid counsel, to give reasonable time to the detained person for selecting a lawyer, however, some of them believe that this can only result in the waste of time.
- The prosecutors as well as lawyers deem impossible to evaluate the financial situation of the person according to socially vulnerable people's database, because they believe that the database is not perfect and the person registered therein may be economically in poorer situation than those registered.
- The judges do not believe that it should be mandatory to have a lawyer in plea bargaining negotiations on all categories of cases including less serious crimes, however only 30 percent of lawyers and 1 prosecutor deemed possible to differentiate cases for this purpose and formalize plea bargaining without presence of the lawyer on less serious crimes. Majority of the lawyers and prosecutors categorically object to formalize plea bargaining without the presence of the lawyer, while two lawyers hinted to possible discrimination and argued it will be better to differentiate on the bases of sanction as opposed to seriousness of the crime.
- Related to the issue of the reimbursement of the costs and its mandatory enforcement against those persons who are not in socially vulnerable database, the majority of the respondents noted that this procedure may be complex and create additional problems (100 percent of judges, 60 percent of prosecutors, 70 percent of lawyers).
- In case if the database for socially vulnerable persons were perfect, the majority of the respondents believe that it would be fair to invite legal aid counsel to the defendant who is insolvent, while if non insolvent defendant fails to select the counsel, this shall be interpreted as a waiver of the right.

Recommendations

- Amendments should be introduced in criminal procedure code, defining more precisely the moment from which the lawyer should be assigned to the case, namely the moment of starting plea bargaining negotiation between the parties, which shall prevent unjustified waste of State resources on this ground in the future.

- Georgian criminal procedure code should envisage the possibility and procedure for the removal of the counsel in case when the ground for mandatory defence is no longer present.

- Wide audience should be presented with alternative recommendations on legal aid in plea bargaining. As the result of the discussions, a legislative package of amendments should be proposed in criminal procedure code, as well as in the law on legal aid, namely:

- The presence of the lawyer shall be mandatory in all plea bargained cases, but if the defendant is not registered in socially vulnerable database, he may be imposed the minimal costs of the defense by the decision of the court (e.g. 1 day 10 GEL)

- If the defendant/convict is registered in socially vulnerable database, mandatory participation of the lawyer, while the non eligible defendants shall be given reasonable time (in analogy of the art. 168 of the Georgian criminal procedure code) to pick up the counsel of his choice, after the lapse of which the failure to pick up the counsel shall be interpreted as a waiver of the right to the defense.

- The possibility of making the lawyer non mandatory in cases when the charges do not envisage the deprivation of liberty.

Before implementing legislative changes

- LAS lawyers should be recommended to apply to the decision-making body – (prosecutor, judge) for their removal from the case, each time when the ground for mandator defense is no longer present.
- The prosecutors should be recommended to clarify with the negotiating defendant whether he wants his counsel every time before summoning legal aid counsel.
- The judges should be recommended that in cases when the defendant does not plead guilty or the prosecutor is against plea bargaining deal, to abstain from summoning legal aid lawyer, while in case when negotiation clearly didn't have any result, to allow the lawyer to withdraw from the case for the purpose of saving State resources.