

Plea Bargaining vs Leniency to Confession of Guilt and Punishment: What is the Way Out for China?

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ABSTRACT

China has established the Chinese “plea bargaining”, the leniency to confession of guilt and punishment in 2018 in domestic law. When comparing to western plea bargaining which is causing controversy recently, Chinese leniency to confession shows its own superiority but it also deserves vigilance when it comes to potential risks under this system especially what western plea bargaining are facing now.

Keywords: *plea bargaining, leniency to confession, criminal justice*

1. INTRODUCTION

Plea bargaining, or plead guilty, means that during prosecution, after the initiation of the criminal proceedings, the defendant and the prosecutor may conclude an agreement, as a result of the admission of guilt by the defendant.¹ As a criminal procedure mechanism which was born in the United States, plea bargaining has spread around the world and greatly solved the burden and delay of criminal lawsuits in many countries. However, such a criminal mechanism with civil contract factor is also challenging some traditional and sacred principles of criminal justice.

China has established a similar system called ‘leniency to confession of guilt and punishment’. The most brilliant highlight of this mechanism is the pursuit to the balance of efficiency and effect of criminal justice. But lessons of western plea bargaining are still deserved attention in the development of Chinese leniency to confession.

2. CHARACTERISTICS OF CHINESE PLEA BARGAINING

In Anglo-American legal family, plea bargaining can conclude a criminal case without a trial. When it is successful, plea bargaining results in a plea agreement between the prosecutor and defendant. In this agreement, the defendant agrees to plead guilty without a trial, and, in return, the prosecutor agrees to dismiss certain charges

or make favourable sentence recommendations to the court.

At first glance, guilty plea is the first step towards rehabilitation, which ‘cause little conflict with adversary ideals and raised few ethical problems for defence lawyers. Because remorse was dependent upon factual guilt, innocent people could not be put at risk; and because guilty plea were a product of repentance rather than calculation, reduced sentences would go only to those who deserve them.’² But criminal justice in western countries still cannot supply a satisfying answer about plead guilty. Such a charming and evil system has attracted scholars and officials in different legal systems to explore the legend behind it. China is no exception.

In October 2018, leniency to confession of guilt and punishment, as “Chinese plea bargaining”, was formally regulated in The Criminal Procedure Law of China after two-year pilot scheme: A criminal suspect or defendant who voluntarily confesses accused crime, admits the facts and voluntarily accepts punishment may be treated with leniency according to law. (犯罪嫌疑人、被告人自愿如实供述自己的罪行，承认指控的犯罪事实，自愿接受处罚的，可以依法从宽处理。³)

In order to overcome the inherent shortcomings of western plea bargaining, China’s leniency to confession of guilt and punishment has its own logic and specialties. The role of prosecutor and right to trial is the most noteworthy distinctions between these two systems.

2.1. The limited discretion of prosecutor

Firstly, the discretion of prosecutor is limited by law especially in the content of ‘bargaining’. It means that only sentencing can be a deal but not charged crime, and only judges but not prosecutor have the power to convict, which is a distinct difference with western plead guilty. For example, a criminal of rape cannot be charged as indecent assault by prosecutor if rape was actually conducted. But it may happen in western states as no one cares about the truth and as the role of victim is fading.

2.2. Right to trial from trial centralism reform

Secondly, right to trial is remained because of the ‘trial centralism reform’ in China. After entering confession, fast-track trial, simplified trial instead of full-dress trial will be applied respectively in different cases, but the right to trial of suspect will not be completely abandoned. What is more, these modes of trial are applied in strict conditions. Take fast-track trial as example, it is applied only in county courts and cases where sentencing is up to three years in prison. It also requires clear facts, real and adequate evidence and agreement of the defendant.

2.3. judge in China has the power of reservation

Just as mentioned above, judges play an essential role in courts in order to protect the ‘baseline of justice’. Judges have the responsibility to judicially review the voluntariness, authenticity and legality of confession. If these elements are not satisfied, the judges will not adopt the charges and sentencing suggested by the prosecutor; and if they find that the recommended sentencing is inappropriate, they will overturn it in accordance with the law. The China Criminal Procedure Law Art. 190 presents that If the defendant confesses crime, the presiding judge shall...examine the voluntariness of the recognition, and the authenticity and legality of the contents of the confession. (第一百九十条 被告人认罪认罚的, 审判长应该...审查认罪认罚的自愿性和认罪认罚具结书内容的真实性、合法性。⁴) In the other word, judges have the power to invalidate a plea bargaining if they believes it was illegally conducted under the circumstances of threat, intimidation, or without the assistance of a defence counsel. This is different to “adversarial trial” in the west where judges cannot take a dim view of plead guilty because of their negative role in trial.

3. ANGLE OR DEVIL? FROM A COMPARATIVE VIEW

3.1. From Agency Cost to Duty Counsel Lawyer

The first question of plea bargaining is agency cost existing in criminal justice relationship due to

inconsonant information between two parties. There are two agency relationships: prosecutor is the agent for public and victim’s interest, and criminal counsel lawyer is the agent for defendant’s interest. Agency cost is reflected obviously in the Duty Counsel System in China where the advocacy rate of criminal cases is low and the defence situation is not optimistic. The positioning of Duty Counsel is still hazy and the help to criminal suspects is still formalized in China.

3.1.1. Agency Cost in Plea Bargaining

Prosecutors, in most cases, are more willing to give plea offer for their own good. In Germany, ‘controls designed to reinforce the norm of objectivity have been pushed aside in favour of efficiency-related metrics that emphasize the efficient processing of cases...In this efficiency-driven climate, a prosecutor may be more inclined to seek a confession agreement rather than to order law enforcement to conduct a more extensive investigation.’⁵ In the UK, ‘in espousing cost-effective values, administrative realities have come to replace remorse as the basis for sentence inducements designed to encourage guilty pleas.’¹ From the perspective of defendant, the lawyer who under financial pressure will also have a strong willingness to make plea bargaining, although this cannot completely represent the true willingness of the criminal suspect or defendant. The indigent suspects do not have the right to choose a lawyer, and government who appoints lawyers tend to choose those who are willing to cooperate, but not the most enthusiastic. All of these will cause cost in agency relationship, which will cause serious damage to public interest and effective law enforcement.

3.1.2. Agency Cost of Duty Counsel Lawyer in China

China has changed the job of Duty Counsel lawyer from ‘defense’ to ‘legal assistance/suggestions’ and deleted the words ‘acting as an agent to make accuse and appeal’⁶, from which we can find that the responsibilities of them have been cut down to the minimum. Actually, this leads to a dilemma where Duty Counsel lawyer is difficult in finding facts and evidence in cases. According to an investigation, under normal circumstances of China, Duty Counsel lawyer can only meet the accused when prosecutor inform to sign the confession of guilt and punishment because of Duty Counsel’s ambiguous meeting right and reading right.⁷ Therefore, it is difficult for Duty Counsel to establish trust relationship with the accused to verify the fact and evidence in such a short time. The only thing they can help is to introduce general rights and obligations to their temporary client, the accused, instead of offering some substantial assistance.

The key point of leniency to confession of guilt and punishment lies in the pre-trial stage where the

prosecutor and defendant conduct an agreement. At this stage, the two parties confirm the facts and evidence of the case and negotiate the sentencing and application of trial mode. Therefore, in this stage Duty Counsel lawyer plays an essential role in protecting the legitimate rights and interests of criminal suspects. Once the Duty Counsel lawyers transform to be partner of prosecutor, the authenticity and voluntariness of the confession will not be ensured, thus the possibility of unjust cases even conviction of innocence will increase. Hence, the vagueness of the position and rights of Duty Counsel lawyers will, to a certain extent, transform their role from defense towards prosecution, making them become part of the joint force of public power.

3.2. The Role of Judges

The decline of judges and trial waivers are the direct result of the waiver of trial in plea bargaining, which does not accord with the main idea of trial centralism reform in China. In order to ensure the voluntariness and authenticity of confession in leniency mechanism, the central position of judge must be guaranteed.

3.2.1. The Trial Waivers in Western Plea Bargaining

During practice of the UK (both Scotland, England and Wales), it is virtually impossible to appeal if someone pled guilty. Thus, if the accused accepts the deal and pleads guilty, that is an end to the matter. Therefore, it can be said that plea bargaining makes the suspect lose the right to appeal subjectively and objectively.

Actually, a defendant who enters a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.

‘There also seemed to be large gaps in knowledge: we couldn’t find many comprehensive sources of information on global plea-bargaining practices, and international and regional human rights mechanisms are virtually silent on the issue.’⁸ In the USA, the guilty plea defendant is often not aware of those procedural rights and does not fully understand his rights and how they apply to his case.

With the spread of plead guilty and trial waivers follows, unintended effects like net-widening or increasing unsafe convictions deserve our attention. It is much easier than before to get a conviction because the burden of proof, presumption of innocence and many other traditions of due process are limited under the plea bargaining. Since the protection of human rights is an important objective of criminal proceedings, the trial waivers would result in the loss of a support of the protection to the accused's human rights.

3.2.2. Insure the Independence Position of Judges in China

As a constitutional right of trial by judges, it is an essential method to acknowledge the objectivity and substance of cases, and it is also a crucial purpose of China justice reform. Chinese scholar and justice Hu Yunteng has recorded and supported an idea that in the cases of confession, the judge can intervene in the prosecution stage in advance and cooperate with the prosecutor to investigate the facts of the case and confirm the evidence of the crime.⁹ It is, without doubt, will carry a foreshadowing of destruction in justice reform.

Traditional inquisitorial-mode trial relies on a strong and mature lawyer system where judges are urgent to find out the truth of cases. However, just as mentioned above, China is a country where criminal defendant rate is actually low and the Duty Counsel Lawyer system is in developing. So, judges ought not to interview in the prosecution stage whose negative and independent position is the last guarantee of voluntariness and authenticity in confession.

What is more, judges’ independent is also a contribution to controlling the discretion of prosecutor. Julia Fionda, the professor in King’s College London, has research the situation of prosecution in England and Wales, Scotland, Germany and the Netherlands and found out that in three of four the countries, the role of prosecutor is expanding especially in the influence on charge and sentencing.¹⁰

Even though Chinese prosecutor is limited by statute law, but they are the focus role runs through the whole process of criminal proceeding. From the lessons of criminal justice problems in western countries, it can be concluded that expansive discretion of prosecutor without proper administrative power is the ultimate risk under leniency to confession.

4. CONCLUSION

On the basis of absorbing the original intention and institutional design of plea bargaining, leniency to confession of guilt and punishment in China has its own characteristics and wisdom. Still, it is important for China to continue studying western plea bargaining from the valuable hundred-year experience and lessons. The biggest challenge to the development of confession is how to balance efficiency and fairness in criminal justice. Through the analysis of plea bargaining, it can conclude that expansion of prosecutor's discretion and ambiguity of judge's central position are the main potential risks.

In summary, we must remain vigilant against sacrificing transparency and justice on the altar of efficiency from improving Duty Counsel Lawyer and guaranteeing the independence of judges to ensure the sound progress of confession system.

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