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Reconsideration of the Role of Prosecutors in the Chinese Plea Bargaining System: A Comparative Perspective

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Abstract

A plea bargaining system was introduced into Chinese Criminal Procedure Law in 2018 and became a basic principle of Chinese Criminal Procedure. This plea bargaining system embodies characteristics of both adversary and inquisitorial models. Chinese prosecutors are granted with a leading role in this plea bargaining system, as in the U.S., and can decide which cases are suitable for plea bargaining, which type of process can be applied, and give recommendations as to the sentencing, which judges shall in principle follow. To transplant such an arrangement from the U.S. model into an inquisitorial system, however, causes various problems. Fairness and justice cannot be entirely guaranteed under the wide-ranging practice of plea bargaining; the function of trials is derogated and undermined; and the decision-making process on core issues is moved forwards to the pre-trial period. Moreover, the procedural rights of defendants are more at risk when prosecutors dominate plea bargaining without any supervision from outside. With a brief introduction of an inquisitorial model based on the German plea bargaining system, the role of Chinese prosecutors in plea bargaining is urged to be reconsidered and their authority should be restricted in order to ensure that judges are guaranteed the judicial power to make final decisions.

Keywords

Plea Bargaining, Prosecutors, Judges, Chinese Criminal Procedure Law, German Model

1. Introduction

In 2014, China initiated a judicial reform, which concerned introducing a plea

bargaining system into Chinese Criminal Procedure, in order to improve judicial efficiency. According to a report on a two-year experiment on plea bargaining in eighteen cities, which was authorized by the Standing Committee of the Chinese National Parliament in 2016, until the end of September of 2018, the percentage of cases solved by means of plea bargaining was 53.68% over the course of the two years (Hu, 2018: p. 271). The trial process of these cases lasted no more than ten days. Only 3.35% of all cases solved through plea bargaining were appealed (Hu, 2018: p. 274). In the first half of 2020, 82.2% of cases were solved through plea bargaining (Shi, 2020b). These statistics demonstrate that the Chinese plea bargaining system is becoming a common practice and is improving the efficiency of criminal proceedings. As a result of such a positive outcome, the plea bargaining system was officially introduced into Chinese Criminal Procedure Law (hereafter referred as CCPL) in 2018 and Art. 15 of the CCPL establishes the plea bargaining system as a basic principle of Chinese criminal procedure. As a consequence, all types of cases can be addressed through plea bargaining.

According to the arrangement of the CCPL, the Chinese plea bargaining system follows neither the German nor the U.S. models of plea bargaining, instead, it embodies characteristics of both models. On the one hand, in a similar way to the German model, the burden of proof on prosecutors remains the same in plea bargaining cases as in normal ones, and the judges have to follow the same standards on the discovery of truth in plea bargaining cases, as in cases with normal processes. In addition, the judges have to confirm the reliability of the confessions of defendants in plea bargaining cases (BVerfG (NJW), 1987: 2662, 2663; BGH, 28.08.1997). On the other hand, the organization of plea bargaining follows the U.S. model, where prosecutors take leading roles during the plea bargaining negotiations (LaFave, Israel, King, & Kerr, 2019: § 21.1 (a)). The current discussions on the role of Chinese prosecutors mainly focus on the content of sentencing recommendation and its effect on judges (such as Li, 2020; Bian & Li, 2021; Zhu, 2021; Li, 2021; Xiao & Gong, 2021; Sun, 2021). It is commonly suggested in the literature that the role of Chinese prosecutors in plea bargaining should be further enhanced (He, 2020; Yan, 2020) and the recommended sentence should be more accurate (such as Cheng & Yu, 2020; Zhou, 2021; Li, 2021). This paper, however, will challenge such a view from a comparative perspective and argue for a more restricted role of Chinese prosecutors in plea bargaining. It is time to consider the disadvantages and risk of the current arrangement for Chinese prosecutors in a plea bargaining system which is a mixture of German and U.S. system.

2. The Leading Role of Chinese Prosecutors in Plea Bargaining

The plea bargaining as a relatively new system has drawn much attention in the past few years and is being discussed from various perspectives. When the key word "plea bargaining" is searched in database CNKI, more than three thousand

journal articles can be found since 2016. Topics cover, such as the effect of evidence in plea bargaining (Wang, 2018a), the structure (Wei, 2019) and the role of defense lawyers in plea bargaining (Cheng & Yu, 2020), etc. Among such discussions, the role of prosecutors in plea bargaining deserves a special treatment due to the fact that the plea bargaining mechanism provided for in the CCPL grants Chinese prosecutors a leading role, which is guaranteed by various authorities.

First of all, in accordance with Art. 172 CCPL, it is prosecutors that decide whether the case is suitable for plea bargaining and which type of process, such as the normal process or the fast-track process, should be used. Although it is common for the plea bargaining to have already been considered during the investigation under Art. 120 CCPL (Zhu, 2018; You & Li, 2018), prosecutors will take the final decision of whether the rules on plea bargaining apply.

Second, Art. 173 II CCPL provides that prosecutors can discuss with the suspects and their representatives about the charged facts, crime and the application of law; recommendations on sentencing, such as on lightened or mitigated punishment or exemption from punishment; procedures applicable to trials after a plea of guilty; and other relevant issues. Although it is prohibited to negotiate on charged criminal norms, prosecutors have comprehensive discretion on the contents of plea bargaining agreements with suspects (Liu, 2020).

Another powerful leverage which prosecutors can use to negotiate with suspects is their authority on recommending sentence due to the fact that a lesser sentence is the main motivation for suspects entering a plea of guilty. Art. 176 II CCPL provides "[f]or a criminal suspect who pleads guilty and accepts punishment, prosecutors shall make sentencing recommendations on principal penalty, accessory penalty, whether the probation is applicable…" It shows that it is an obligation for prosecutors to make sentencing recommendations in a plea-bargaining case, while it is only an optional task in non-plea-bargaining cases. Moreover, in the plea bargaining process, judges "shall in principle" follow such sentencing recommendations in accordance with Art. 201 CCPL (Li, 2020; Bian & Li, 2021). This means that prosecutors have a quasi-final say on sentencing issues in plea bargaining cases (Yan, 2020; Zhu, 2021). On the one hand, such a rule is necessary to guarantee the accountability of the prosecutors (Bian & Li, 2021); on the other hand, it is criticized because it supersedes the judges' discretion on sentencing issues (Wei, 2019; Sun, 2021). According to a middle-term report on the two-year experiment mentioned at the very beginning of this article, the courts accepted 92.1% of all sentencing recommendations (Zhou, 2017). This rate remains more than 90% in the final report (Zhou, 2017: pp. 271-286).

3. Problems with the Prosecutors' Leading Role in Plea Bargaining

The leading role of Chinese prosecutors in plea bargaining can be regarded as a

transplantation from the U.S. plea bargaining system where it is one of the main characteristics. To be emphasized, the role of U.S. prosecutors in its plea bargaining system is an outcome of the adversarial model of its criminal procedure, thus is closely related with other rules under adversarial model (LaFave, Israel, King, & Kerr, 2019: § 21.1 (a)). It is thus questionable whether it will have the same effect in other systems, especially in an inquisitorial model. Despite that some rules with adversarial characteristics have been introduced in recent years, Chinese criminal procedure is still mainly organized inquisitorially (Shi, 2020a). Therefore, this section will give a close review of whether such an adversarial arrangement—granting a leading role to prosecutors—will be consistent with the Chinese inquisitorial model. At a general level, the current wide-ranging practice of plea bargaining in China goes against the principle of fair trial; and at a specific level, the strong position of Chinese prosecutors in plea bargaining cases not only undermines the judicial power of judges, but also place suspects/defendants in a more risky and more vulnerable situation.

3.1. Conflicts between Fairness and Efficiency

The argument that the plea bargaining system derogates the fairness of justice is the most common criticism directed towards plea bargaining, wherever such system is introduced, no matter how it is designed (Sun, 2021: p. 4). For example, plea bargaining was accused of violating fair trial and rule of law, was thus complained to the German Constitutional Court in 1987 (BVerfG (NJW), 1987: 2662, 2663). According to German Constitutional Court, plea bargaining is not *per se* unconstitutional, as long as it guarantees the procedural rights and takes effective measures to prevent arbitrary treatment. Fair trial and the rule of law have to be taken seriously into consideration even during plea bargaining (BVerfG (NJW), 1987: 2662, 2663; Murmann, 2009; BGHSt, 43, 195: Rn. 11).

The same principle should apply to Chinese plea bargaining. The justifications of plea bargaining in China and in many other jurisdictions are the needs to improve judicial efficiency and to reduce judicial costs (Meng, 2014: p. 66). The pursuit of judicial efficiency *per se* does not go against fairness of justice (Chen, 2016), as the saying goes: "Justice delayed is justice denied". The plea bargaining system, however, is normally criticized for prioritizing efficiency too much; for example, when the facts are not examined closely, a lot of evidence is not reviewed at trial and trials are shortened (Li & Xu, 2021: p. 124), etc.

When discussing the need for efficiency in the legal system, one important issue to be emphasized is that plea bargaining should only be used when the duration of normal process seriously blocks the function of judiciary. Or to put it another way, the plea bargaining process should be applied cautiously, as a "Plan B" instead of as a "Plan A". "Plan A" should always be given consideration first. Given the heavy workload of judges and limited judicial resources, plea bargaining was introduced merely to meet practical needs (Chen, 2016: p. 51). Therefore, it is doubtful whether it is justified to provide for plea bargaining as a prin-

ciple of law in Art. 15 CCPL.

3.2. The Undermining of the Trial Process

It is widely recognized that judges play a central role in criminal procedure, especially in the inquisitorial model (Cai, 2020; Shi, 2020a; Wei, 2020). The full discretion of judges at trial guarantees their dominant position, for example, Art. 238 of *German Criminal Procedure Code* (hereafter referred as GCPC) grants judges to lead trials. Judges in an inquisitorial model frequently have more power and play a more active role than those in an adversarial model. In a well-run trial, judges review evidence, discover facts, protect procedural rights, hear arguments and finally make their decisions (Chinese Supreme Court, 02/17/2017).

The introduction of plea bargaining into Chinese Criminal Procedure challenges the central role of judges. The core issues for a case which are normally dealt with at trial, such as the reliability of evidence, facts, committed crimes, sentences, are now settled before trial between the suspects and the prosecutors by a plea bargaining agreement. Correspondingly, plea bargaining cases avoid cross-examination, the review of evidence, where judges only confirm the willingness of a defendant to plead guilty. As well as these issues, it is common for judges to only ask some "yes-or-no" questions. In many cases involving plea bargaining, the whole trial commonly lasts no more than a few minutes (Li & Xu, 2021: p. 124).

Such a quick trial fails in its tasks not only in terms of finding the truth, but also in terms of educating defendants. Such defendants can come away with a dismissive attitude towards the criminal justice system; they might perceive the law as being something they can negotiate. In the longer term, the law will lose its accountability.

Given the factors discussed above, we can see how plea bargaining can lead to the function of trials being derogated and undermined (Lu & Zeng, 2018; Sun, 2021); judges become "figureheads", merely rubber-stamping the plea bargaining agreements submitted by prosecutors. The decision-making on core issues is moved forwards to the pre-trial period. Under the plea bargaining system, prosecutors start to substitute judges and pre-trial substitutes trial (Sun, 2021: pp. 3-6). One of the main problems in Chinese criminal procedure is that the status of Chinese judges is too weak, rather than too strong. It would not be effective to restrict judges' judicial power further at the current time, as this would only increase the crisis of the nonindependence of judges in China.

3.3. The Procedural Rights of Defendants at Risks

In plea bargaining cases, the decisive power is in the hands of prosecutors. Given the weak position of suspects by contrast with prosecutors, a fair negotiation is almost impossible. First of all, it is hard to guarantee that suspects have entered the plea of guilty voluntarily; second, suspects may not have been given the opportunity to negotiate on the offer made by the prosecutors, rather they have

faced a "take it or leave it" scenario (Sun, 2021: pp. 9-10). When suspects have wished to suggest alternative deals, prosecutors frequently overrule them and define the suspect as pleading "not guilty" (Hu, 2018: p. 280).

In the U.S. adversary system, where prosecutors also take a leading role in plea bargaining, the equality of arms between prosecutors and defense lawyers is always emphasized (Silver, 1990; Knoops, 2005) and many procedural rules are designed to guarantee such an equality, for example, to grant more authority to defense lawyers during the investigative process and the prosecution. In the U.S., defense lawyers can investigate cases and collect evidence on their own (such as American Bar Association, 2017). In a plea bargaining case, through the involvement of defense lawyers, the suspects could obtain a stronger position with which to negotiate with prosecutors and their procedural rights can be guaranteed to a certain degree.

This is not, however, the situation in Chinese criminal procedure. The defense lawyers in China have much less authority than those in the U.S., and the rate of representation at trial is rather low, and even lower in the pre-trial period (Wang, 2018b: p. 135). Moreover, no legal provisions require Chinese prosecutors to show defendants and their lawyers what evidence they have obtained before negotiations. In such a situation, the defense lawyers do not know what "leverage" they have and thus cannot counterbalance the power of the prosecutors or effectively support the suspect to get a better plea bargaining agreement, as in the U.S.

In an inquisitorial model, the emphasis is placed upon judges to supervise the legalities of activities of the prosecutors and the police (Cai, 2020), in accordance with their central role in the criminal procedure; while in an adversarial model, defense lawyers play an important role through their strong involvement in the legal procedure. According to the design of the Chinese plea bargaining system, however, the function of judges and defense lawyers are both restricted, and no one can supervise the activities of prosecutors. Therefore, the procedural rights of defendants are at risk.

To transplant the design of plea bargaining from the U.S. model into an inquisitorial model should be extremely careful because the legal system normally operates as a whole, any single arrangement may not work out or causes obvious disadvantages when introduced into other jurisdictions.

4. The Inquisitorial Method of Plea Bargaining—The German Model

4.1. The Leading Role of Judges in Plea Bargaining

German method of plea bargaining in its Criminal Procedure Code has very strong inquisitorial characteristics. Art. 257c I of the GCPC provides that "[i]n suitable cases, the court may reach an agreement with the parties on the further course and outcome of the proceedings in accordance with the following subsections." The negotiations occur mainly between judges and defendants. Once a

plea bargaining agreement is reached, judges are bound by their own promise—not by prosecutors' as in China—except when important facts have been ignored or new facts are discovered (Art. 257c IV GCPC).

Moreover, German judges decide whether to initiate plea bargaining and only do so when they think plea bargaining is suitable for the case in hand (Stuckenberg, 2012: §257c Rn. 47). In accordance with Art. 257c II and III GCPC, judges have discretion on what matters to negotiate on with defendants, after hearing the opinions of the defendants and the prosecutors, except those issues prohibited from negotiation by law. The most important issue in a plea bargaining agreement is sentencing, which is also suggested by German judges. Even though the sentencing is imposed by the judges themselves, in order to protect the free discretion of judges on sentencing issues in final decisions, judges are only allowed to propose the upper limit and lower limit of sentencing in a plea bargaining agreement (Niemöller, Schlothauer, & Weider, 2010: §257c Rn. 46). Different views can be found at Nahrwold, 2014: pp. 64-65. Prosecutors are allowed to suggest limits to the sentence, however, it is not legally binding (Nahrwold, 2014: p. 193). In Germany, it is widely agreed that no accurate term of sentence should be proposed until the final judgement is reached (BGH, 27.07.2010).

In summary, Art. 257c GCPC is the core provision for the German plea bargaining system, which only applies to trials. It grants German judges a leading role, which ensures that plea bargaining begins only after the case goes to court. Judges decide whether to initiate the plea bargaining process, what can be negotiated and are responsible for proposing a plea bargaining agreement.

4.2. German Prosecutors as Safeguards of Plea Bargaining

The German legislature envisages prosecutors as the safeguards of the plea bargaining system, who guarantee its legality; for instance, to ensure that judges have properly carried out their obligations, such as to inform defendants of their rights and obligations in terms of plea bargaining (Nahrwold, 2014: p. 193). Moreover, Art. 257c III GCPC provides that "[t]he negotiated agreement shall come into existence if the defendant and the prosecutor agree to the court's proposal". It grants prosecutors a veto on the plea bargaining agreement proposed by judges. Once prosecutors do not agree with the agreements, the agreements cannot become valid (BVerfGE, 2013: 1058, 1066). Therefore prosecutors have the opportunity to review, for instance, whether the suggested sentence in the agreement is proportional to the committed crime.

According to the GCPC, German prosecutors take no active interest in the plea bargaining process, therefore they do not involve themselves comprehensively with it and hold back (**Table 2**). From the point of view of German prosecutors, their work is more or less restricted to delivering an effective prosecution and it is the judges' task to decide on the direction of the further proceedings. This attitude is a direct consequence of the strong tradition of the inquisi-

torial system in Germany.

4.3. German Prosecutors' Participation in Plea Bargaining—Empirical Report

In 2012, Professor Altenhain and other three Professors were commissioned by the German Constitutional Court to conduct empirical research on Art. 257c GCPC where judges, prosecutors and defense lawyers were interviewed. The results were published in 2013 (Karsten, Frank, & Markus, 2013: p. 67 and following pages).

As part of this empirical research, prosecutors were asked whether they had ever participated in any negotiations relating to plea bargaining. According to Table 1, 82.4% of the interviewed prosecutors had participated in the plea bargaining process.

Prosecutors were also asked about who suggested initiating the plea bargaining process most frequently during trials. Table 2 shows that defense lawyers have the strongest motivation to reach a plea bargaining agreement, followed by judges. By contrast, prosecutors showed a very low interest in doing so (Karsten, Frank, & Markus, 2013: p. 69).

30.9% (21 out of 68) of the prosecutors stated that they felt that the recommended sentence offered judges in a plea bargaining agreements was too light. This shows the degree of disparity between the opinions of prosecutors and judges on sentencing. Although it is prosecutors that recommend sentences in China, a similar disparity between Chinese prosecutors and judges might exist.

Table 1. The rate of prosecutors' participation on plea bargaining[a].

	Number of Prosecutors	Rate (%)
Yes	70	82.4
No	15	17.6
Total	85	100.0

[a]Karsten, Frank, & Markus, 2013: p. 28.

Table 2. The suggestion to initiate plea bargaining[b].

Professions	Number of Persons	Rate (%)
Chief Judge	19	27.9
Defense Lawyer	22	32.4
Defendant	0	0.0
Prosecutor	1	1.5
Other Judges	0	0.0
Various Persons	25	36.8
No Experience	1	1.5
Total	68	100

[b]Karsten, Frank, & Markus, 2013: p. 68.

Germany as a classical example of the inquisitorial model grants judges a leading role in its plea bargaining system while German prosecutors, as "safeguards", do not participate in plea bargaining actively. Exactly speaking, German judges decide on the initiation of a negotiation, the contents of a plea bargaining agreement and sentence recommendations at trials. This guarantees the central role of judges in making final decisions even in a plea bargaining case. Such an arrangement goes in line with the inquisitorial model as a whole, thus causes fewer problems. On the contrary, a leading role of Chinese prosecutors in plea bargaining challenges the general structure of its inquisitorial model, therefore, leads to conflicts and disadvantages as mentioned above.

5. Conclusion

The Chinese plea bargaining system has contributed to the improvement of judicial efficiency since its introduction in 2018. Prosecutors play a leading role in the plea bargaining system and successfully separate less significant cases from more complicated cases at an early stage (Hu & Song, 2017: p. 34). Prosecutors can dismiss the charges, or opt for a fast-track procedure in plea bargaining cases to reduce the workload of judges and to pursue normal procedures for more complicated cases. Such a strong position of Chinese prosecutors causes serious problems as well. First of all, the wide-range practice of plea bargaining is far-reaching and derogates the fair trial and justice. Second, the quasi-binding effect of the sentence recommendations proposed by prosecutors challenges the central role of trials in criminal procedure and further undermines the judicial power of judges. Moreover, without much support from defense lawyers during plea bargaining, suspects/defendants are in a more vulnerable position when confronted with stronger prosecutors and their procedural rights cannot be well guaranteed. It is doubtful, therefore, whether it is advisable to encourage prosecutors to seek plea bargaining whenever possible, as the on-going reform of the Chinese legal system currently does (Sun, 2021: p. 13). It should not be forgotten that the overarching priority of criminal procedure is fairness and justice in all cases, rather than efficiency. Efficiency should serve fairness and justice, instead of the other way around.

The structure of the Chinese plea bargaining system has now been formally resolved by the CCPL and any further improvements can only be achieved from within this structure. Although Chinese prosecutors are granted a leading role in plea bargaining, their authority should be restricted and judges should have opportunities to review their activities during the plea bargaining process. For example, prosecutors should make detailed records of the process of their negotiations with suspects and their defense lawyers, including but not limited to, the time and the contents of any conversations concerning plea bargaining, the confession of defendants, the plea bargaining agreements, etc. Such records should be submitted to judges for review. They are important materials with which judges can decide whether defendants have voluntarily entered the plea of guilty

and whether prosecutors have undertaken plea bargaining in a legal way. In addition, defense lawyers should have greater participation in the investigation and prosecution period during which plea bargaining occurs. Last but not least, prosecutors should only be allowed to recommend a range of sentence and the binding effects of such recommendation upon judges should be abolished, in order to guarantee judges to decide on the final sentence. Generally speaking, the activities of prosecutors should be under more judicial review and the authority to make final decisions on cases should always be in the hand of judges.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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