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Reflections on the Reality of "Chinese Plea Bargaining"

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***Abstract*—In order to promote the institutionalization of the realization of the "perfection lenient system of pleading guilty", some local judicial authorities began to explore "the plea consultation system" between pro secution and defense based on the plea bargaining. However, the emergence and development of plea bargaining is closely related to its rooted legal system. If it does not have the applicable soil of consultative justice, due to the realistic factors such as the value of criminal procedure of state standard and the lower rate of defense attorney, simple migration of Plea bargaining is likely to result in deliberate neglect of the facts of the case and weakening the connection between the facts and the penalty which is contradictory with the existing legal provisions . Therefore, we should proceed from two aspects of the entity and the procedure and make the criminal policy be better implemented through the construction of the positive evaluation of the trial, the application of diversion procedures and other aspects.**

Keywords—lenient system of pleading guilty; plea bargaining; plea consultation judicial reform

I. INTRODUCTION

"Leniency for those who confess; severity for those who resist." is a long-term criminal policy of leniency with mercy in China. However, due to the lack of construction of the penalty level in the substantive law, in the procedural law it is only a summary procedure and one of prerequisites for accelerated criminal justice cases that defendant pleads guilty which makes this criminal policy difficult to fall in practice. The "Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensive Promotion of Ruling Country by Law" (hereinafter referred to as "the Decision") adopted by The Fourth Plenary Session of the 18th CPC Central Committee clearly put forward "perfect lenient system of pleading guilty in criminal procedure". Then, the supreme people's court and the supreme people's procuratorate respectively establish the implementation and improvement of the reform objectives of the system in the "Reform Outline of the Fourth Five-Year of People's Court(2014-2018)", "Opinions on deepening the prosecutorial reform (2013-2017 Work Plan)".Earlier this year, the Work Conference of Central Political and Law also put forward specific requirements about "paying close attention to study and submit pilot program of lenient system of pleading guilty" and "selecting the applicable place to carry out the pilot".[1] Correspondingly, the Supreme People's Procuratorate also actively began to explore the establishment of pleading guilty and sentencing consultation system with the participation of defense lawyer in the procuratorial work. In practice, some procuratorial organs have begun to explore the implementation of the "plea consultation mechanism" in line with the process of the accelerated criminal justice cases. The procuratorate of Chaoyang District of Beijing applied the mechanism for the first time in a dangerous driving case at the end of 2015 and further popularized it. [2] In fact, the exploration of pleading guilty and sentencing consultation process between the Procuratorate and the accused appeared as early as 2002, when the Railway Transport Procuratorate and the Railway Transport Court of Mudanjiang City of Heilongjiang Province take the way of "plea bargain" concluded Meng Guanghu intentional injury case known as the "first case of Chinese plea bargain" after consultation and reported to the High Court for approval, which attracted great attention of all circles in the society.

Although the concept of "plea bargaining" has been deliberately avoided in the experimental reform, the "plea consultation" mechanism does draw on some parts of the plea bargaining in Anglo-American law system. Compared to the voice of praise from some scholars about punishing crimes in a timely manner and saving judicial resources of this system. [3] The author believes that, it is not consistent with China's current national conditions by drawing on and transplanting plea bargaining system to achieve lenient system of plea consultation of the defendant in our country's judicial soil. Rash promotion of the system may even bring about counter-productive effect. The following will analyze reasons why our country should not transplant plea bargaining through the institutional basis, the applicable conditions and other aspects, and further reflect on how China will apply lenient system of pleading guilty to consult colleagues.

II. ANALYSIS OF THE REASON WHY PLEA BARGAINING SHOULD NOT BE ADOPTED IN CHINA

A. The Lack of Institutional Basis

The plea bargaining system raised and developed in the United States is an alternative procedure for adversarial criminal trial. In the adversarial trial mode, the checks and balances of power between the prosecution and the defense is not obvious based on the defendant's rights protection system, the high unpredictability of the final outcome of the criminal trial and the high judicial costs caused by the complexity and

antagonism of the trial make the three parties have the strong rational motivation to choose plea bargaining and avoid to enter the trial procedures. The excessively high and intense criminal trial is ultimately seen as an exceptional way of dealing with criminal cases, a kind of zero-sum game that can only be resorted to when the case is not likely to achieve a satisfactory transaction. It can be said that the application of plea bargaining is inseparable from the characteristics and serious problems of the contemporary adversarial trial system in America, and it can be popular only when the formal trial is too complicated and costly. Thus, the dissemination abroad of this system is not widely adopted as in the United States. The acceptability and the degree of institutionalization vary from countries to countries, even in the same common law system in the United Kingdom, the scope of plea bargaining is reduced to alleged transactions rather than sentencing transactions. In civil law countries, the antagonism and complexity of formal trial are relatively limited and the cost of justice is under control. The majority of the cases can be settled by more economical ordinary or summary procedure, and there is no necessity for the application of plea bargaining for a substitute trial.

From the system in which the procedure rooted, it can be seen that the basic application premise of plea bargaining is that the criminal trial is too long and complex in the adversarial trial system, which may not only consume judicial resources excessively, but also make the prosecution and the defense fall into panic. Plea bargaining is thus an alternative procedure for this over costly adversarial system. But countries can solve most of the criminal cases by plea bargaining do not have a suitable judicial soil for costs of common criminal procedure.

In China, in the case of facts without controversy, the relatively short time-consuming trial with simple and ordinary procedures has become a common phenomenon, so there is no necessity and sufficiency to implement the negotiation between the prosecution and the defense because of too high costs of judge (trial).

B. Negative Effects on the Identification of Facts

Since the main purpose of the prosecution and the defense in the adversarial trial is to win a lawsuit rather than discover the truth. Once the plea bargaining is applied between the prosecution and the defense, the case will not be concluded through the criminal trial procedure, which means that it formed a unilateral recognition of the evidence from the prosecution in fact without interpellation and ascertaining of case fact in the adversarial trial, leading to the adoption of relatively weak evidence of the prosecution. This is also an important reason why the plea bargaining has been controversial since its establishment. Critics argue that the plea bargaining is in fact a choice for the defendant to choose between a potentially severe sentence and a relatively light sentence, which will force the vast majority, whether guilty or not, to choose a compromise because of the uncertainty of the trial, in exchange for lighter penalties. Thereby it increases the possibility of the innocent or minor criminals being guilty or accepting serious punishment, which may increase the possibility of miscarriage of justice and at the same time improve the difficulty of protecting the human rights of the accused.

In the context of the obvious authority characteristics of the criminal proceedings, the criminal cases in China have more emphasis on the unilateral power from the public power in the investigation and prosecution, which tends to emphasize the purpose of punishment to the criminals and neglects the rights protection of the accused. Under the premise of the evidence identification being unilateral and lack of restriction, the plea bargaining between the prosecution and the defense with unequal status has actually formed the situation that the burden of proof of the prosecution is reduced by negotiating with the defendant to plead guilty, which leads to allegations of the prosecution and evidence of fact lack of review mechanisms of advance, going on, afterwards, weakens the connections between conviction and sentencing and the facts of the case, and contradicts with the "facts-based" requirement of the Code of Criminal Procedure. Although in the current pilot trial of "plea consultation system" did not omit the criminal proceedings in the court, the trial time will be greatly reduced in the case of plea consultation agreement and the identification of the truth of the case by the court easily become formalized, which is extremely dangerous to apply in the present judicial context of our country.

C. The Lack of Involvement of Lawyers

Another basis for the realization of plea bargaining is the general involvement of lawyers. Under the adversarial system of the United States, the professional role of lawyers is extremely important based on the protection of the defendant's constitutional rights. Since the lawyer's defense is aimed at maximizing the immunity of the accused from criminal penalties, the lawyer, usually acting as mediator with the prosecution, actively promotes the realization of defendant’s interests according to the way defined by the defendant in the plea bargaining. It can be considered that plea bargaining is not only difficult to achieve but also easily questionable without general participation by lawyers. In contrast, one of the characteristics of criminal proceedings in China is the low rate of lawyer's defense. Although it is impossible to find out the participation rate of lawyer's defense in the case of application of plea consultation in Chaoyang District People's Procuratorate from the available information, the participation rate of lawyers is far from the proportion of lawyers participating in criminal cases in the Anglo-American law system with a view to the characteristics of accelerated criminal justice cases. If this plea bargaining process in consultation with the prosecution lacks the professional help and involvement from the lawyers, the defendant is difficult to make a really useful and valuable judgments in the process of game with the prosecution with a large power difference, which is easy to make the plea bargaining evolve into a one-party play. On the other hand, unlike the non-responsibility and professionalism requirements of lawyers in the cooperative justice model, even in the plea bargaining with lawyers involved, the rights of lawyers in some judicial proceedings are restricted or even excluded under the influence of the characteristics of the national policy's smooth implementation in the bureaucratic judicial procedure of our

country, resulting in contending with the prosecution in a clear disadvantage which is very likely to restrict the exercise of the defense right of lawyers and the effectiveness of the plea bargaining itself will also be affected.

In general, although plea bargaining is widely used in criminal justice in the United States and embodies the concept of restorative justice in which the defendant actively participates in resolving criminal practice, the voices of doubt have appeared for long time. Therefore, while exploring the advantages of the plea bargaining system, such as saving judicial cost, we should also discover the judicial worries behind the soil and institution rooted in the system, and should not hope to achieve the desired reform effect through the simple transplanting procedure.

III. The Countermeasures: How To Achieve Lenient System Of Plea Guilty

It can be said that the Fourth Plenary Session of the 18th CPC Central Committee adopted the "Decision" to reaffirm the necessity of the perfection for lenient system of plea guilty, and breeding the trial procedure of lenient system of plea guilty in the current round of judicial reform with "plea consultation" as the representative. But through careful analysis of the current trial it is not difficult to discover that the procedure of pleading guilty and sentencing consultation under the guidance of the public prosecution is hard to find the supporting point in the existing laws and regulations and it may violate the relevant provisions in the Criminal Procedure Law that if there is only the defendant confession, the defendant can not be found guilty and punished without other evidence". The main difficulty in the implementation of the current restriction system lies in the lack of substantive punishment mechanism and the corresponding criminal procedure returning to the lenient system of plea guilty itself. Specifically, the defendant pleading guilty does not mean that the inevitable reduction of punishment. "The Criminal Code" and its amendments bring the defendant "truthfully confession of their own crimes" into the discretion of the sentencing of "lenient punishment". Whether or not to reduce the penalty is depending on the judge who exercises the discretion in the overall situation of the consolidated cases. The procedure also has no corresponding diversion mechanism. In addition to considering whether the accused has no objection to the alleged crime, the application of criminal summary procedures has to examine whether the case reached a standard of clear fact and insufficient evidence. Similarly, the accelerated criminal trial procedures which are being piloted in various regions only put plea guilty of the defendant as one of the applicable conditions. Even if the defendant, who is under the jurisdiction of intermediate or higher court and likely to be sentenced to a longer term of penalty, has pleaded guilty, he can not be able to get procedural distinctions and still has to go through a relatively long trial of ordinary criminal proceedings. The enthusiasm of the defendant for the application of plea guilty is clearly not high and the effect of the application is naturally self-evident.

Therefore, from the perspective of further implementing and perfecting the system of pleading guilty, it is necessary to construct corresponding distinguishing systems at the level of substantive law and procedural law. In view of the plea guilty as one of the important criteria to judge the defendant with subjective vicious, the author suggests that the judge in the trial of the case that the defendant pleads guilty should change the discretion power of whether to make commuted sentence by the judge currently to compulsory mitigation or mitigation of criminal penalties, establish a positive effect evaluation through the trial, enhance the casual connection between the plea guilty and the application of a lighter or reduced sentencing, and encourage defendants surrender and confess guilty.

In addition, pleading guilty of the defendant should be taken more rapid and simple criminal procedures in the application of the procedure, and the application scope of summary procedure should be further expanded for pleading guilty of the defendant. Under the premise of making sure that the pleading guilty of the defendant is voluntary and has a factual basis, the pleading guilty of the defendant can be the criteria of criminal trial diversion with application of relatively fast trial mode so that the defendant can receive effective income for procedures.

IV. Conclusion

In summary, in the present context of our country, there are still many practical obstacles to perfect the lenient system of pleading guilty of the defendant by referring to the plea bargaining. We should treat the pilot promotion of "plea bargaining" with caution, and it is not advisable to regard the negotiating plea and sentencing system of the prosecution and the defense as the best way to achieve the reform goal. But we should focus on the construction and improvement of the different manifestation of the physical punishment and procedural application corresponding to pleading guilty of the defendant, so that the criminal policy of temper justice with mercy can be institutionalized to better realize the reform target of lenient system of pleading guilty of the defendant.

Reference

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