

Research on the Negotiation Mechanism of Prosecution and Defense in the System of Guilty Pleas and Accepting Punishment

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Abstract:

The negotiation between prosecution and defense is the key link between the defendant's expression of willingness to guilty pleas and punishment accepting, and the final judgment of the judiciary, and it is also the core of Leniency System of Guilty Pleas. The voluntariness and authenticity of the negotiation are the top priorities of the guilty pleas and punishment system. The negotiation mechanism between the prosecution and defense is to ensure the voluntary and authenticity of the negotiation between the defendants and the prosecutors. However, in practice, the negotiation mechanism led by the prosecution exposes the lack of negotiation, and other issues, which violates the legitimate rights and interests of the defendant. Based on the concept of solid prosecution and defense negotiation, this paper focuses on analyzing the problems existing in the current prosecution and defense negotiation to discuss the development mechanism of the prosecution and defense negotiation, in order to provide assistance for the implementation of the leniency system for guilty pleas.

Keywords:

Negotiation of Prosecution and Defense, Duty Lawyer, Guilty Pleas and Punishment Accepting

1. Introduction

In 2014, the relevant central authorities officially incorporated the system of guilty plea and leniency into the framework of judicial system reform. Subsequently, from 2014 to 2016, the Supreme People's court and the Supreme People's Procuratorate carried out the pilot reform of "criminal quick adjudication procedure" in some cities. With the continuous accumulation of practical experience, from 2016 to 2018, the Supreme People's court and the Supreme People's Procuratorate launched a pilot reform of the 'Leniency system for guilty plea and punishment' in some regions. In 2018, the Standing Committee of the National People's Congress adopted the revised

criminal procedure law, formally establishing the principle of “Leniency in admitting guilt and punishment” as the principle of the criminal procedure law, and supporting the systems of “rapid adjudication procedure” and “lawyer on duty”. In 2019, the Supreme People’s court and the Supreme People’s Procuratorate, together with other departments, issued the guiding opinions on the application of the leniency system for guilty plea and punishment. On February 4, 2021, the Supreme People’s Court issued the interpretation of the Supreme People’s Court on the application of the criminal procedure law of the People’s Republic of China, which incorporated the spirit of the guiding opinions into the judicial interpretation, and solved some of the controversial issues that have existed since the pilot of the system. The accompanying negotiation system of prosecution and defense aroused extensive discussion in the academia. Some scholars believe that in fact the consensus procedure of accusation and defense marked by “listen to opinions” is more inclined to an “offer + consent” mechanism, that is, for a case of pleading guilty and accepting punishment, the prosecuting authorities will, on the basis of comprehensive consideration of the all circumstances of the case, provide the defense with sentencing recommendations and the “offer” applicable to the procedure *ex officio*. The defense can only voluntarily choose to agree or not, and they cannot “bargaining” negotiations with the prosecution. [1] There are also scholars who believe that the prosecution and defense negotiation mechanism learned from the Common Law System has become a prosecution and defense negotiation mechanism with Chinese characteristics after being transferred into China, that is the in judicial practice, a “confirmation and approval model” has gradually developed. The “confirmation and approval model” refers to the litigation mode in which the sentencing recommendations led by the prosecutor is confirmed by the defense, approved by the judge and the judge then makes a ruling. [2] The two understandings to the prosecution and defense negotiation mechanism actually reflect two major problems. The problem reflected in the “offer + consent” prosecution and defense negotiation mechanism is that it leaves little room for the defense to negotiate, therefore there is significant deficiency for the negotiation, which is a kind of “authority-style” leniency. The problem reflected in the "confirmation and approval model" is that the jurisdiction intervenes too late and tends to be formalism. A series of laws and regulations, such as the judicial interpretation promulgated in 2021, all emphasize that the court's stand is to review the key content of pleas cases, but this institutional arrangement actually tends to be a kind of “prosecution-centrism”.

2. Current Status and Discussion

The prosecution authorities play a pivotal and leading role in the leniency system for guilty pleas, and this has always been related to the legislative thought of authority-orientated in China. This kind of legislative thoughts neglect the subject status of criminal suspects and defendants and their legal guarantees. Especially in the negotiation mechanism of guilty pleas of prosecution and defense, the prosecution takes an absolute dominant position, the defense is in a passive and negative position, so the negotiation between the prosecution and defense is established in an unequal pattern from the very beginning. The key to the negotiation mechanism of the prosecution and defense lies in the “chips” and the “chips” of the defense. However, the defense does not have too many "chips" that can affect the negotiation of the prosecution. The negotiation between the prosecution and the defense is more of an authority-style negotiation of the prosecution. The “chips” of the defense are summarized by scholars into the following five categories: firstly, the defense points out the fact that there exists illegal evidence collection or procedural flaws conducted

by investigators, and raises a request to exclude illegal evidence; secondly, the defense points out that the evidence collected by the investigative agency has deficiencies in probative force; thirdly, the defense put forward that in the case facts determined by the investigative agency, there is an incomplete situation in the chain of evidence and the proof system, so the case has not reached the level of beyond reasonable doubt; fourthly, a similar but more authoritative case is proposed to prove that the prosecutor's high-level sentencing recommendation has no factual or legal basis; Lastly, if the defendant does not confess guilt, or chooses a defense of innocence, the case will not be able to apply the plea procedure. [3] These five types can be classified into two categories, namely, the defendant voluntarily and truthfully confesses by giving up the right of self-incrimination, and the defendant voluntarily giving up the substantive trial. These two types of "chips" correspond to the right of silence and the substantive trial in the Common Law System, respectively. The right to remain silent from the Common Law System guarantees the right of defense attorney to be present, prevents the prosecution from obtaining confessions from criminal suspects, and finds a convenient way to break through. As a result, the prosecution does not have sufficient evidence to charge, and the case inevitably falls into the category of suspected crimes, this provides the defense with great chance for equal or even active negotiation. The substantive trial of the Common Law System is protracted and the jury system is applied, hence the prosecution and the defense are equal to each other. It is also impossible to grasp the direction of the court trial, so the prosecution prefers to negotiate the case through negotiation between the prosecution and the defense instead, which is very different from the defendant in China who gave up the right to self-incriminate and voluntarily confessed and the defendant voluntarily gave up the substantive trial. The "chips" in the hands of the defense are actually related to the litigation structure in China. In the litigation structure in China, although the rights of the defense have attracted some attention, there is still more room for development. In order to make the "chips" in hand play their role, we should effectively protect the right of defense attorney participating in the procedure.

In judicial practice, the rate of pretrial detention remains high, and criminal suspects have been taken coercive measures at a very early stage. Since there is not an established system for attorneys to be present during interrogation, criminal suspects subject to coercive measures often lack court experience and legal knowledge, and there is no opportunity to review the files, and under this serious information asymmetry situation, the suspects tend to compromise to the prosecution against their wills. In this case, it is particularly important to protect the defense attorney's right to participate in the procedure. In fact, in order to cooperate with the implementation of the leniency system for guilty pleas, the law stipulates the "duty lawyer" system to protect the legitimate rights and interests of criminal suspects and defendants. In the judicial interpretation of the new Criminal Procedure Law, the duty lawyer's right to read files is established and clarified so that the duty lawyer can better assist the leniency system for guilty pleas. The original intention of establishing the duty lawyer system is good if it can really exert its proper effect, but alienation has appeared in judicial practice. Duty lawyers cannot serve as defenders, so they can only be treated as "legal helpers". In such an awkward position, it is difficult to play their due role of duty lawyers. In practice, they are witnesses and even become attorneys of the prosecution and work for the prosecution authorities. The alienation of this system, of course, is also related to the management system of the duty lawyers: the judicial and administrative authorities have limited budget and cannot offer competitive salary to the duty lawyers; the position of duty lawyer lacks stability and their legal relationship

with the criminal suspects is hard to established. Therefore, it is difficult for duty lawyers to have a high-standard professional ethics and take the interests of criminal suspects and defendants as their starting point and foothold like defense lawyers do. Some scholars argue that, “From a comparative perspective, duty lawyers are equivalent to emergency physicians, while legal aid defense lawyers are equivalent to family doctors. There is a clear difference between the two.” [4]

3. Solutions

Since there is a distinguished difference between the two, it is necessary to take a serious look at the issue of the participation of defense lawyers in the negotiation mechanism of guilty pleas. With the help of defense lawyers, criminal suspects and defendants can better safeguard their legal rights to the greatest extent within the framework of the criminal policy of combining leniency with strictness. When the prosecution and the defense conduct substantive negotiations, the ideal state is that the defense lawyer’s right to be present has been implemented. Nevertheless, the establishment of this system still faces great resistance and it requires us to activate other systems to maximize the effect of defense lawyers’ presence.

First of all, Article 29 of “The Instructions” states that the People’s Procuratorate can explore the evidence disclosure system according to the specific circumstances of the case. The gradual establishment of an evidence disclosure system is obviously of great significance to safeguarding criminal suspects’ right to know and the voluntariness and authenticity of confession and punishment.

Secondly, it is necessary to protect the right of defense lawyers’ providing their opinions. Although “The Instructions” stipulates that the opinions of defense lawyers need to be heard and attached to a file, this is a principled regulation and it does not specify how to listen, when to listen, or responsibility mechanism after the fact. In other words, this actually becomes a moral obligation instead of a legal obligation. In order to prevent the phenomenon of “listening but not taking”, whether it is accepted or rejected, it should be reflected in the sentencing recommendations. For those who don’t take the suggestion from the attorneys, the reasons must be provided.

Major adjustments have been made to the pretrial conference in the newly promulgated Criminal Procedure Interpretation, and the pretrial conference has begun to play a more important role. Taking Article 232 of the Criminal Procedure Interpretation as an example, some substantive issues can even be involved in the pretrial conference. For the defense of the prosecution defense negotiation mechanism, it increases the opportunity for substantive defense, especially in the three-party structure of the prosecution, defense, and trial, the defense's right of opinion can attract more attention of the prosecution and the trial party.

4. Conclusions

If the above measures can be effectively implemented, the problem of insufficient negotiation can be alleviated. However, the prosecution defense negotiation mechanism led by the prosecution can hardly guarantee equal consultation between defense and prosecution. If the problem needs to be completely solved, the judicial authorities should be allowed to intervene as soon as possible to lenient punishment of guilty pleas and accepting punishment, and to transform the linear “confirmation and approval model” into litigation. The court, as a neutral third party, can play a supervisory role, regulate the behavior of the prosecution, and ensure the autonomy of

the defense in the negotiation, so that it guarantees the equality and fairness of negotiation. Its rationality is as follows.

First, the prosecution led prosecution defense negotiation mechanism is difficult to guarantee equal consultation with the defense. The defense's right to know and the defense lawyer's right to help are not clear. The defense can hardly be called a voluntary confession of guilt and punishment. The court, as a neutral third party, can play a supervisory role, regulate the prosecution's behavior, and ensure the autonomy of the defense's negotiation to a certain extent.

Second, the guiding opinions and other legal normative documents require the prosecution to undertake litigation care obligations, such as the obligation to inform and explain, the obligation to provide necessary facilities such as meetings, and the obligation to disclose evidence, which goes beyond the position of the prosecution to a certain extent. As a prosecutor, his main responsibility is to pursue the punishment of the suspect, especially the performance appraisal, which is linked to the prosecution rate. Based on his professional instinct, It is inevitable that it is impossible to maintain an objective position and fully protect the rights of suspect. In this way, the intervention of judicial power becomes more important, because judicial power is more neutral than the right of prosecution, and the court is more able to undertake the obligation of litigation care than the procuratorate, which can better ensure the voluntary and authenticity of the confession of suspect and defendants.

Third, the early intervention of judicial power has formed a sentencing consultation mechanism with the joint participation of the prosecution, defense and adjudication. The sentencing leniency opinion formed after the substantive consultation of the three parties will no longer break out sharp contradictions with the judicial authorities like the leniency opinion under the confirmation Approval Mode (Yu Jinping case), making the defendant a victim of judicial disputes, At the same time, reaching an agreement is also more conducive to the stability of the law and the credibility of the judiciary.

Fourth, it is confirmed that the process of the prosecution defense negotiation mechanism under the approval mode is secret and not open. Only the dual subjects of prosecution and defense participate in the process, which is prone to power rent-seeking, judicial corruption and other problems. For the victims of the other subject of criminal proceedings, it is difficult to believe the legality of sentencing, and it is easy to cause secondary harm to the victims. Some scholars once said that "prosecution defense negotiation is incompatible with China's judicial tradition of substantive truth, ignoring the truth leads to unjust, false and wrong cases, and both sides only focus on benefits" [5]. If the judicial power is involved, a ternary negotiation mechanism will be formed, which will eliminate judicial corruption to the greatest extent and pursue substantive truth.

Conflicts of Interest

The author declares that there is no conflict of interest regarding the publication of this article.

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