Research on the Existence Basis and Essence of Criminal Negotiation from the Perspective of Comparative Law

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Abstract: At present, the construction and development of consultative justice has gradually become the "normal" of international criminal justice. Although there are big differences in litigation modes and philosophies in various countries, especially the fundamental difference between authority doctrine and litigant doctrine, the two The choice of specific systems also shows a certain trend of convergence, and the guilty plea negotiation system is a typical embodiment of this. This is mainly due to the fact that although the actual situations faced by countries are very different, they are jointly coping with the pressure of litigation brought about by the surge in the number of cases on a global scale. The urgent need to open up some cases to handle the "fast lane" is the same, and guilty negotiations are negotiated. Appearance can meet the needs of actual development to a certain extent. Moreover, deep-level theoretical and conceptual changes also gave birth to the "global practice" of the criminal negotiation system to a certain extent.

1. Introduction

The Direct Cause Of Negotiation

At present, a major dilemma facing criminal justice worldwide is that the rapid increase in the number of cases has made the judicial system overwhelmed. With the development of science and technology, crime and criminal methods have increasingly shown a complex trend, which inevitably increases the pressure of investigation and trial. As far as the trial group is concerned, judges with a limited number and limited energy are often overwhelmed in dealing with these intertwined cases of old and new types. The expansion of the group of judges is insignificant in the face of the ever-expanding number of cases. For the prolonged delay of cases due to limited judicial resources, it is also a manifestation of substantial injustice: First, for the prosecutor, the prosecution has been shackled by the criminal procedure for a long time and cannot be obtained. The deterministic judgment result is a kind of "punishment" in itself, and this kind of "punishment" is especially manifested in some misdemeanor cases. In the United States, research data conducted by scholars shows that the pretrial detention rate of defendants in misdemeanor cases is about four times that of convicted defendants. It can be seen that the slowness of the procedure has aggravated the punishment of the accused, although it is not justified in theory, but it does exist widely in practice. Secondly, for the victim, the definitive judgment on the defendant is undoubtedly the best comfort for him. However, the procedural delay caused by the pressure of the lawsuit will make the victim's expectation change in the day-to-day delay in the lawsuit. Impatience, to a certain extent, makes the victim question the validity of the public judgment, and even may go to an extreme private retaliation path. Thirdly, for the restoration and stability of social order, the state promotes the stability of social order by fighting crimes and restoring social relations destroyed by crimes. The prolonged delay of cases obviously conflicts with this goal.

Therefore, in addition to the traditional concept of justice, "efficiency" also occupies a place in modern criminal justice. The pursuit of efficiency is not only the need for judicial staff to "save" from the numerous criminal cases, but also the common value goal pursued by all parties in the litigation. The American plea bargaining system can be said to have opened up a typical application of the "fast lane" in some cases. About 90% of criminal cases in the United States are resolved through the plea bargaining system, which has become an indisputable fact in practice. This seems to be because the plea bargaining is more in line with the litigation model of litigants, and the

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concept of consultative justice is more easily accepted by the public under this model. Subsequently, this system took root in adversarialism (such as Italy) and even authoritarian countries. To a certain extent, Germany's guilty pleas consultation system also responded to the country's shortage of judicial resources and the tension between criminal cases. There are fundamental contradictions and conflicts in the interrogation tradition, and it has also been criticized by the theoretical circle. For example, Professor Weigent believes that there is no agreement in the absolute sense of criminal negotiation in Germany. The idea of consensus is only minimally embedded in the functional litigation system, and to a certain extent it still serves the functional litigation system." Despite these criticisms, the actual application of the German guilty pleas and negotiation system has accounted for a relatively large proportion. According to unofficial statistics, about 50% of the litigation procedures apply this system, and this system is used in major economic criminal cases. The ratio is even more obvious, reaching 90% at one point. It can be said that this consultation mechanism has developed and gradually gained a foothold in countries with a strong tradition of authority. The establishment of the guilty pleas and negotiation system has led to a trend of mutual integration between the two litigation modes of authority doctrine and party doctrine. "The legal reforms in almost all countries have greatly changed the interrogation and confrontation systems. The system is also more similar than before. However, there are still significant differences between them. The two systems may be'closer', but they are far from'combined'".

Then, in the face of these judicial dilemmas, why has the negotiation mechanism emerged as a common choice in many countries? In fact, this depends on the natural advantages of the negotiation mechanism: on the one hand, the negotiation system has intuitive advantages such as accelerating the process of litigation, saving litigation resources, and optimizing the allocation of judicial resources. Consultative justice is a judicial mechanism that "kung fu is outside the poem". The delimitation of the responsibility of the prosecutor is appropriately advanced by the main trial field, thus appropriately shortening the time-consuming trial, and accelerating the litigation process in all links. Judicial resources are saved to a certain extent, and this can also promote the reorganization and integration of litigation resources, which is conducive to placing more resources in the trial of major and difficult cases, and promotes the realization of the principle of "cautious judgment of doubtful cases and quick judgment of clear cases". "Prosecutors and judges can focus their time and energy on cumbersome cases, clarify the facts, and investigate the truth." On the other hand, the negotiation system has the potential advantage of alleviating the pressure of some difficult cases. Although modern criminal justice focuses on avoiding the risk of wrongful cases that may be caused by "confessions alone", it is undeniable that the prosecuted confession is still an important clue in the current investigation stage and one of the important evidences in the trial stage. The defendant volunteered the guilty plea is "evidence of extremely high value for the accurate determination of the facts of the case", and therefore, there is still strong concern about the prosecution's confession. The establishment of the negotiation mechanism clarified to a certain extent a new way to break through the confession, that is, by offering attractive entities and procedural preferences in exchange for the prosecutor's guilty confession, which provides the possibility for the detection of the case.

2. The Underlying Reasons and Essence of the Negotiation

It can be said that the lack of litigation resources caused by the increase in the number of criminal cases in the international community has become a direct motive for the development of consultative justice mechanisms. However, in fact, under the influence of various thoughts and concepts, the emergence and rise of guilty pleas consultation has a more profound effect. Internal reason.

2.1 The Surge of Thoughts in Communication and Dialogue between Power and Power/Power.

This kind of dialogue is mainly manifested in two levels: on the one hand, it is the communication between public power and individual rights, or it can be called "negotiation" in an incomplete sense. Different from the criminal prosecution activities initiated by state agencies

earlier, modern criminal litigation increasingly emphasizes the respect for the status of the prosecutor and the expression of demands. The prosecutor is no longer an “object at the mercy of others”, but has Participants in litigation that express legitimate rights and appeals. There is still a certain gap between the recognition of the rights and interests of the prosecutor and the realization of the protection of the rights and interests of the prosecutor. This requires the establishment of a certain communication and protection mechanism, not only to achieve the legal and legitimate protection of the rights and interests of the prosecutor, but also As far as possible, promote the realization of the above objectives in a manner acceptable to all parties in the litigation. Therefore, “negotiation” has gradually become a boom in the field of criminal litigation, and the termination of cases through criminal negotiation has gradually become a new trend in criminal litigation worldwide. The typical negotiation is the communication and dialogue between the public power represented by the state power and the private power of the prosecuted party, which weakens the antagonism in the field of criminal litigation and promotes more cases to be included in the “fast lane” of negotiation. Instead of advocating the confrontation between public power and private rights, the opposition between the prosecution agency and the person being prosecuted, it is better for both parties to stand on the'same' level and pursue the dialogue of power and rights, the use of equal negotiation, honesty and credibility, and other contractual justice The spirit and its negotiation mechanism will be resolved, and ultimately a “win-win” will be achieved.” If the law is an art of communication and dialogue, then the dialogue and communication between the prosecution and the defense in criminal proceedings is a wonderful part of this art. Communication and negotiation in the field of private law are not uncommon. The introduction of negotiation in the field of public law undoubtedly breaks the monopoly of public power in criminal justice in a certain sense, so that the prosecuted party is not afraid of “power dominance”, and both parties “discuss and negotiate in good faith. Exchange opinions and try wholeheartedly to understand each other’s views” and finally reached a consensus.

On the other hand, the division and checks and balances between powers. The communication and dialogue between public power and private power has further promoted the mutual checks and balances between public powers, the most notable of which is the prominence of the status of procuratorial organs. The direct reason for the emergence of this power change is the huge “temptation” of “negotiation” itself. The most intuitive way is to obtain the guilty confession of the prosecutor through negotiation. Then the prosecutor can face numerous complicated criminal cases. At the same time, try to avoid the risk of losing the case, and to a certain extent eliminate the evidence flaws caused by irregular investigative behavior and the risk that the evidence will eventually be denied. Therefore, negotiation has gradually become the only choice of prosecutors. In most criminal negotiations, whether it is the American plea bargaining system, my country's plea bargaining system, or my country's Taiwan guilty plea negotiation system, most prosecutors negotiate with the prosecuted party to reach an agreement. It is undeniable that the specific systems under the litigation model of adversary doctrine and competence doctrine are all constructed on the basis of state prosecution doctrine and adversarial justice, and the judge is still the subject of the final ruling. However, since most cases have reached a “consensus” in the pretrial stage, the final trial stage is often to confirm the authenticity and legality of this “consensus”. Compared with ordinary cases, the status of judges is “declining”. In other stages, the dialogue and negotiation between public power and private rights affects the formation of judges' judgments, which in essence is also a manifestation of the balance between powers.

2.2 Changes in Penal Thinking

The purpose of penalties changed from unity to pluralism. In the past, penalties paid more attention to the punishment of offenders. It was believed that penalties were used to inflict painful feelings on offenders to offset or partially offset the harm caused by criminal acts to victims and society, and to restore victims and society. The public's psychology gradually evolved into the theory of retribution. However, the fatal weakness of the theory of retribution is that punishment is only used as a means to retaliate against the offender, while ignoring other legitimate purposes of

punishment. Compared with individual revenge, the theory of retribution only raises the subject of "revenge" to the national level, and the individual revenge model has a legal prerequisite under the cloak of nationalization. The state is responsible for the punishment of offenders. This view has obviously lost its convincing power under the circumstance of increasingly diversified goals of punishment, and it has also received many criticisms. In fact, in addition to retaliation against the offender, the purpose of punishment lies in many other aspects. The view that defines the purpose of punishment as pure retribution can no longer meet the needs of real development. In judicial practice, even if it is implemented objectively the persons prosecuted for criminal acts should also receive fair, equal treatment and basic respect. This is the consensus of the academic and practical circles. So, as far as punishment is concerned, in addition to the function of fighting crime, it should also play a more important role to meet the deep-seated requirements of the development of this era. This gave birth to a pluralistic theory of the purpose of punishment to make up for the inadequacy of the theory of punishment of retribution.

On the one hand, there are more than just punishments for criminal acts and criminals. Compared with strong punishments, there are other ways to punish and reform criminals. In a sense, punishment, as the most severe means, cannot arbitrarily intervene in all activities of citizens, but can only be used as the country's compelling "last resort" to protect legal interests and maintain legal order. This view of non-criminalism has promoted the creation and construction of diversified punishment mechanisms. While determining their own criminal policies, countries have also changed their past practices of unilateral retaliation. For example, the implementation of the leniency system for confessing guilt and punishment in our country has its goals. One is to implement the criminal policy of combining leniency and strictness, and the core connotation of combining leniency and strictness is "the leniency is to be lenient, when strict is strict, and the lenient and strict are moderate", it is no longer a mere pursuit of retaliation against the accused. On the other hand, punishment is only a means and not an end, and retribution is no longer the purpose of punishment itself, but an important method to maintain the rule of law. Contemporary criminal legislation and criminal policies are gradually focusing on reforming the defendant and promoting his better return to society. In consultative justice, "negotiation" itself is the process of educating, probating and punishing the accused. The respondent's participation in the negotiation process is often through the process of negotiating with the prosecution. He is aware of the harm that his criminal act has caused to the victim and the society, and he can actually feel the victim's suffering through compensation for losses, an apology, etc. Such participation can make the accused truly realize the seriousness and harmfulness of the criminal act committed, which is really beneficial to its reform, and realizes the punishment and probation from the punishment of the result of the litigation to the whole process of the litigation. The above all show that the thought and theory of penalty has gradually shifted from the single "retaliation" type in the past to a complex of multiple purposes such as "punishment", "education" and "probation", and the role of punishment has gradually changed from the past in punishing the accused. Realize the integration of punishment, education reform and social reintegration.

2.3 Appropriate Compromise and Loosening of Authority

As soon as the negotiation system emerged, it was strongly rejected by authoritarian countries. This is more obvious in the German civil law system. Due to the consideration of the uneven ratio of case pressure and litigation resources, although the early legislative level did not recognize the legitimacy of negotiation, negotiation in judicial practice has gradually developed as a secret transaction. Until March 19, 2013, the German Federal Constitutional Court confirmed the constitutionality of the criminal consultation system through a judgment. This is the first time that the consultation system has been recognized at the legislative level for the "secret operation" of the consultation system in more than 40 years. There are two reasons for the gradual rise of the negotiation system in the authoritarian countries.

On the one hand, the global flow of ideas promoted the renewal of litigation models in a certain sense. Some scholars pointed out that discussing the litigation mode of a certain country or region is

based on the procedures that dominate the country or region or reflect the core of its litigation philosophy. At the same time, the establishment of a litigation model is not static. Even for a country that has implemented a certain litigation model for a long time, subtle changes will occur within its specific model. The most obvious lies in the mutual absorption and reference of party doctrine and authority doctrine. As far as my country's Taiwan region is pursuing the tradition of authority doctrine, "absorbing reasonable elements of party doctrine is not only a remarkable achievement in the criminal justice reform of the mainland and Taiwan in the past two decades, but also the basic direction for future reforms." It is precisely because of the flow of various ideological trends between regions that have promoted the renewal of the development of the concept and practice of litigation models in various countries. Early civil law countries mostly adopted a lawsuit model of coercive power, which was accompanied by a relatively strong power of prosecution, and even regarded the prosecutor as the object of criminal prosecution to a certain extent. At the same time, it strictly followed the principle of substantive truth. It is a constitutional responsibility for the judge to examine and prove the actual truth. With the gradual development of the adversarial concept of adversaryism, countries with a strong tradition of power authority are gradually reflecting on and absorbing the excellent genes of confrontation to make corresponding changes in their own judicial systems. The change from coercive power doctrine to authority doctrine provides space for the integration of consultative justice.

On the other hand, the appropriate changes in litigation models have promoted the development of traditional litigation concepts. Take the principle of substantive truth as an example. Although it has always been strictly abided by the authority-based countries, and has even become the dominant principle of a country to some extent, with the influx of consultative justice, the concept of "consensual truth" has gradually been adopted. The public accepts, of course, this does not mean that all countries that adhere to the principle of substantive truth will be renamed to adhere to consensual truth, but that the reasonable core of consensual truth has impacted the traditional concept of substantive truth to a certain extent. While following the principle of substantive truth, the academic and practical circles are also reflecting on whether its connotation should also develop with the changes of the times. Closely related to the principle of substantive truth is the issue of the standard of proof. Take this as an example, as some scholars have pointed out, criminal negotiation essentially reduces the difficulty of proof, not the standard of proof. Some scholars also pointed out that substantive reality has a dual function, one is to fight crime, the other is to protect the innocent from abuse of prosecution, but in China more emphasis is placed on the realization of the former function, so it should return from "active discoveryism of substantive reality" "Negative real discovery doctrine" to prevent improper behavior of public power from escaping into the realm of private power and causing harm. So, in this regard, this revised theory of substantive truth also absorbs the benign genes in the party doctrine to a certain extent, ensuring that the protection of the innocent is also emphasized in the investigation and crackdown of crimes. From the one-dimensional attack on criminal acts to the emphasis on the protection of the innocent, this in itself reflects to a certain extent the connotation of human rights protection and respect for private rights. Therefore, under this change, negotiation enters traditional powers. The realm of ism becomes possible.

References

[1] Bian Jianlin, Xie Shu: "Leniency in Pleading Guilt and Punishment in the Litigation Model of Authoritarianism: Taking Chinese and German Criminal Justice Theory and Practice as Clues", in Comparative Law Research, Issue 3, 2018.

[2] [America] Malcolm M. Philly: "Procedure is Punishment-Case Handling in Basic Criminal Courts", translated by Xiaona Wei, China University of Political Science and Law Press, 2013 edition.

[3] Vgl. Weigend, Unverzichtbares im Strafverfahrensrecht, ZStW 113(2001), S.304.

[4] Du Lei: “The Power Logic and Negotiation Logic in the Application of the Leniency System of Pleading Guilty and Punishment”, published in China Law Science, Issue 4, 2020.

[5] Xu Meijun: “Practice and Enlightenment of German Plea Bargaining”, published in “Jurists”, No. 2, 2009.

[6] [America] Freud Fini, [German] Joachim Herman, Yue Liling: “One Case, Two Systems-A Comparison of Criminal Justice between Virtues and Germany”, translated by Guo Zhiyuan, China Legal Publishing Society 2006 edition.

[7] Zhang Xihuai: “Introduction and Practice of Negotiation in the Criminal Procedure System in Taiwan: Focusing on Prosecutorial Practices”, published in “Modern Rule of Law Research” 2017 Issue 3.

[8] Bian Jianlin: “The Evolution and Change of Criminal Proceeding Models-Taking the Criminal Justice Reform on Both Sides of the Taiwan Straits as a Clue”, published in “Politics and Law Forum”, Issue 1, 2019.

[9] Liu Tao: “On the Subject of Criminal Procedure”, China People's Public Security University Press, 2005 edition.

[10] Wang Zhaopeng: “New Criminal Prosecution·New Thinking”, Taiwan Yuanzhao Publishing Co., Ltd. 2005 edition.

[11] Yang Jiwen, Ren Kaizhi, Zhang Hua: “The Contractual Judicial Model of the Leniency System for Plea and Punishment”, published in “Journal of Nanchang University (Humanities and Social Sciences Edition)”, Issue 4, 2020.

[12] Chen Hongyi: “The Rule of Law, Enlightenment and the Spirit of Modern Law”, China University of Political Science and Law Press, 1998 edition.

[13] Wang Ruijian: “The Compromise of Substantial Authenticism: A Theoretical Investigation of the German Criminal Negotiation System”, published in “Journal of Soochow University (Philosophy and Social Sciences Edition)”, Issue 3, 2020.

[14] Wu Xiaohui: “On the Criminal Judicial Consultation Mechanism from the Perspective of Comparative Law”, published in “Chinese Journal of Criminal Law” 2013, Issue 11.

[15] Wu Siyuan: “From One-Way Empowerment to Dual Interaction: Re-discussion on the Connotation of Criminal Negotiation”, in “Juvenile Delinquency Issues”, Issue 1, 2021.

[16] [German] Franz von Liszt: “German Criminal Law Textbook”, translated by Xu Jiusheng, 2006 edition of Law Press.

[17] Wang Haiyan: “The Evolution of Criminal Procedure Mode”, China People's Public Security University Press, 2004 edition.

[18] Sun Changyong: “Criteria for Proof of Guilty and Punishment Cases”, published in “Legal Studies”, Issue 1, 2018.

[19] Zhang Jianwei: “From Positive to Negative Substantive True Discovery”, in “Chinese Law”, Issue 4, 2006.