

On the Regulation and Improvement of the Right of Prosecutorial Counter-Appeal in Plea Bargaining

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Abstract

Plea bargaining, one of the top-level system design priorities in China's judicial reform, was officially written into the 2018 amended Criminal Procedure Law of the People's Republic of China. A comprehensive legal system of substantive and procedural regulations combined, plea bargaining has undoubtedly set off a craze for the theoretical study of criminal procedure and made invaluable assets in it. In plea bargaining, however, how prosecuting authorities exercise the power of supervision is rarely learned. Given that, this paper will explore how prosecuting authorities deal with cases where the accused appeal for a lenient sentence after agreed plea bargains and how they exercise the power of supervision to avoid the dilemma of "prosecutorial counter-appeals in response to appeals" and get rid of misunderstandings of trial supervision.

Key words: Plea bargaining; Right of appeal; Right of prosecutorial counter-appeal; Legal supervision

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1. PRACTICES OF PROSECUTORIAL COUNTER-APPEALS IN PLEA BARGAINING

In September, 2016, the Standing Committee of China's

National People's Congress decided that 18 cities across the country will pilot plea bargaining in criminal cases in a two-year period. It turns out that the appeal rate of plea bargaining has since stayed at a low level compared to other cases. Statistics from the interim report of the pilot program by the Supreme People's Court and Supreme People's Procuratorate reveal that of all cases involving plea bargaining, appeals by plaintiffs in an incidental civil action takes up less than 0.1% of the total, defendants' appeals as low as 3.6% and prosecutorial counter-appeals an astonishing 0.04%.¹ What is unexpected by the prosecuting authorities is that some of the defendants have appealed against the sentence in the verdict after pleading guilty with a sentence bargain since 2018 when plea bargaining was initially put into effect. This practice is further followed by more defendants in the Lucifer Effect, which in a way disrupts the authority of plea bargain agreements and offsets the procedural convenience and efficiency brought by the scheme. This kind of dilemma was tackled office by office as it took a piddling proportion and the problem failed to reach the decision-making panel at the initial phase of the implementation. But prosecutors should not be steered away, as Prosecutor Zhang Jun puts it, from diving deep into every individual case with the professional sensitivity and responsibility that prosecutorial experts sport (Zhang, 2019, pp.5-11). Therefore, prosecutors handling such cases should be wary of irregular practices like prosecutorial counter-appealing immediately following defendants' appeals and work to prevent potential expansions.

¹ See "Interim Report on the Pilot Program of Plea Bargaining in Criminal Cases in Selected Regions" delivered by the President of the Supreme People's Court Zhou Qiang to the Supreme People's Court and Supreme People's Procuratorate at the 31st Session of the Standing Committee of the 12th the National People's Congress (NPC) on December 23, 2017.

1.1 Causes of Prosecutorial Counter-Appeals in Plea Bargaining

A. The prosecuting authorities file counter-appeals in response to the defendants' appeals. It has proved that prosecuting authorities may file counter-appeals to the defendants' appeals against the sentencing in plea bargaining.

a. Appeal for Potential Sentence Serving in Detention Centers.

This kind of behavior is called technical appeals, where the defendant, without any substantial objection to the sentence determined by the people's court of first instance, takes advantage of the time span of the second instance and the principle of no heavier sentencing for appeal and appeals against the sentencing to delay the litigation time span and the term of custody before finally spared from prison labor when the term of imprisonment, with the term of detention deducted, meet the conditions of serving sentences in detention centers (Dong, 2019, pp.117-124). In reality, there are cases where the defendant appeals in the name of a lesser sentence for potential serving in detention centers. Under such circumstances, prosecuting authorities tend to conditionally opt for a counter-appeal for the absence of universal standards in order to observe the authority of the legal system of the plea bargaining by exemplifying litigation trust and, on the other, suppress similar practices for efficient and economical litigation and further the grouping of complicated and common cases of plea bargaining.

b. Appeal For a Sentence Discount.

For cases where the accused file an appeal for a deducted sentence following the sentence by the people's court of first instance, such practices can be deemed as subversion to the fundamental of plea bargaining, betrayal of agreement with prosecuting authorities and disruption to the basis of legal theory. To ensure plea bargaining is consistently put in force, prosecuting authorities are inclined to file a counter-appeal in court, requesting a heavier sentence as the punishment for their breach of trust, which is expected to serve as a warning.

B. Sentencing recommendations are denied by courts. In practice, with plea bargaining agreement settled between both parties, sentence recommended by prosecuting authorities will have to go through the procedural examination by courts before being approved and adopted. Nevertheless, a small number of cases have seen the courts' refusal to adopt the sentences recommended by public prosecuting authorities in consideration of its own discretionary power (Li, 2020) or sentence recommendation deemed as infringement of the individualization of sentencing. In this case, it is the courts' false sentencing that the prosecuting authorities counter-appeal for. What this kind of prosecutorial

counter-appeals reveals is a wrestling contest between jurisdiction and public prosecution that vie to domineer in the sentencing of cases involving plea bargaining. Therefore, this category of cases in plea bargaining will not be given further explanation in the rest of the paper.

1.2 Practice of Unreasonable Legal Supervision

Firstly, according to Article 228 of Criminal Procedure Law of the People's Republic of China, a defendant who pleads guilty and agree with the sentence recommendation with a recognizance signed in the prosecution phase based on his or her will find his or her appeal ruled as an objection to sentence even on the ground of disproportionality between guilt and sentencing. The ruling suggests that the previous sentencing by the people's court of first instance, which is based on the facts of a crime, is reasonable. Prosecutorial counter-appeals on the ground that "a defendant who refuses to agree with the previously settled sentence shall be given severer penalty", which is theoretically in line with the principle of "denying of the previously settled sentencing guarantees no sentence discounts", are not solidly grounded because of the absence of errors committed by judges or mistakes caused indirectly by the defendant's exercise of the right of appeal.

Secondly, in legal practice, prosecuting authorities tend to avoid counter-appeals in criminal cases where plea bargaining is not applicable accompanied by a withdrawal of confession by the defendant after the sentencing in the first instance. Despite the fact that the defendant's confession is not ascertained in the second instance, his or her appeal can only be dismissed. In common criminal offences where plea bargaining is not applicable, especially those should have adopted the scheme of plea bargaining for the defendant's plea of guilt, prosecuting authorities would not even, in the second instance, request the deprivation of sentence discounts enjoyed by the defendant in the first instance due to his or her appeal when the criminal investigators are working with a heavy workload or the term of sentence does not meet the minimal requirement of plea bargaining. By this measure, how can a counter-appeal be filed against the defendant for the mere reason that a recognizance has been signed?

In my opinion, in the event of improper use of prosecutorial counter-appeals under the current legal framework, the practice of this counter-appealing power should temporarily be steered to comply with the principle of parsimony to avoid the realization of substantive justice at the expense of procedural justice. Otherwise, the credibility of legal supervision will, to some extent, be disrupted by the consistent practice of prosecutorial counter-appealing with consequential impeded implementation of plea bargaining.

2. REFLECTION ON THE LEGITIMACY OF PROSECUTORIAL COUNTER-APPEALS

From the perspective of prosecuting authorities, a set of performance evaluation standards involving case assessment, represented by the “ratio of case to action”², has been universally adopted by prosecuting authorities throughout the country. With such a strict evaluation system, some public prosecutors still risk filing counter-appeals against defendants. Following are some of the supporting viewpoints of prosecutorial counter-appeals and their interpretation.

2.1 Supporting Arguments

A. Proponents reckon that an appeal represents a denial of the ascertained facts, charges or the sentencing in the first instance and in substance, a subversion of the fact of the defendant’s plea of guilt and acceptance of sentence in the verdict. As they argue, this is one of the situations where “there is new-found evidence to prove that the verdict or the facts ascertained in the verdict are indeed wrong” stipulated in the Opinions of the Supreme People’s Procuratorate on Strengthening and Improving the Exercise of Prosecutorial Counter-appeal in Criminal Cases. In this case, prosecuting authorities should file a counter-appeal according to Article 217 in the Criminal Procedure Law.

But the question is whether this kind of denial belongs to the situations where “there is new-found evidence to prove that the verdict or the facts ascertained in the verdict are indeed wrong”. As far as I am concerned, the answer is a no. First of all, the facts of the case should not be interpreted extensively to the detriment of the accused. This means facts should be confined to those occurring prior to trial regardless of whether they are discovered at the time of trial rather than those occurring after trial. What the procedures for prosecutorial counter-appeal and trial supervision target are those have occurred already yet escaped discovery. Otherwise, judicial decisions will never be settled if facts occurring subsequent to trial are included. Secondly, a strict set of criteria should be established for the identification of errors. In court, a judicial decision is made based on the facts and evidence at the time of trial. According to the principle that an ex post action shall not retroactively change the legal

consequences of actions that were committed, the previous verdict should not be deemed as wrong. Last but not least, public authorities have been following the administrative principle that everything which is not allowed is forbidden. With the absence of established guidelines for prosecutorial counter-appealing, prosecuting authorities that file counter-appeals at the risk of breach of law will inevitably give an image of answering injustice with injustice when seen from the perspective of prosecutors who tend to appeal for breach of agreement. In addition, some of the accused who are wily enough to take full advantage of the loopholes in the existing procedure of legal documents delivery would file an appeal on the last day of the statutory period for appealing. At this point, any desire to file an application for counter-appeal will be dampened by the extremely limited time span, let alone reexamining the files and composing a document of counter-appeal suggestions.

B. Some also believe that it is an imperative for prosecuting authorities to deter with counter-appeals the defendants’ attempted evasion from legal sanctions by means of plea bargaining in order to maintain consistent implementation of legal systems and how solemn a plea of guilty and acceptance of punishment should be. The fact is that the principle of no heavier sentencing for appeal leaves room for the accused to deny a confessed crime at precious little expense and even to earn a further lenient sentence from the court. In practice, some courts and judges support prosecuting authorities in lodging protests against such appeals for a decreased appeal rate and increased efficiency of trial resources. Furthermore, either a counter-appeal or a modification of the original sentence in such cases will not impose an impact on how courts and judges will be evaluated in terms of their performance (Bao & Chen, 2019, pp. 57-60).

I would express reservations about the potential impacts on the implementation of the scheme as expressed in this viewpoint. The right of prosecutorial counter-appeals, one of the essential, rigid ways for prosecuting authorities to conduct supervision, must be strictly restricted and prudently exercised, or its abuse or generalization will inflict damage to its legitimacy and authority as well as the legal and social effects brought when it is properly exercised. Firstly, cases concerning pleaded guilt and punishment are normally simple ones, which will not necessarily bring excessive workload to judicial authorities even when there are appeals filed, while cases involving prosecutorial counter-appeals require a procedure of higher standards, which will complicate simple issues by greatly adding to judicial expenses and burdening the parties. Secondly, excessive prosecutorial counter-appeals will disrupt judicial credibility. On one hand, a certain level of tensions has been seen between practicing the right of prosecutorial counter-appeals and upholding the authority of judicial decisions. Because of it, most countries have established

² “Case” refers to the total number of cases of arrest under review accepted and cases of prosecution under review with those involving mandatory measures of arrest excluded, while “action” refers to services prosecuting authorities conduct for a case, including reconsideration for non-arrest decision, review for non-arrest decision, appeal for (non) arrest, investigative detention time extension, supplementary investigation, reconsideration for non-prosecution decision, review for non-prosecution decision, suggested adjourning trial, criminal appeal, prosecutorial counter-appeal, counter-appeal in trial supervision procedure, retrial, appeal against non-prosecution decision and criminal appeal against trial, etc.

draconian restrictions on the right of prosecutorial counter-appeals, so normally only trials that apparently violate the due process will be responded with a prosecutorial counter-appeal. On the other, prosecutorial counter-appeals will be exposed to a lot of uncertainty if their filing depends solely on the defendants' appeals. For instance, once a defendant withdraws the appeal, the seriousness of prosecutorial counter-appeal will suffer. Thirdly, attempts to strive for substantive justice through prosecutorial counter-appeals in such cases may backfire. In modern criminal lawsuit philosophy, the idea of "safeguard human rights" outweighs the one of "crack down on criminal crimes". The commanding exercise of state power for justice in individual cases can undisputedly deter some speculators from ill intentions, but it will also bring much burden to the defendants who consequently dare not exercise the right of appeal granted by law to protect his or her own rights and interests, thus damaging the judicial justice. In one of Nietzsche's works, a classic quote reads, whoever fights monsters should see to it that in the process he does not become a monster; and if you gaze long enough into an abyss, the abyss will gaze back to you.³ Therefore, prosecutors should be vigilant for the situations where they are subject to arbitrary exercise of power and overstep the limits of due procedures in order to achieve substantive justice.

C. Some supporters believe that prosecuting authorities should answer defendants' appealing with counter-appealing as both parties are equal in front of law. As the verdict comes from the negotiation between both parties, a recognizance will take effect as three way an agreement works, which requires both parties to follow as obliged. As they argue, since the accused can tear apart the previously signed agreement by means of appealing, prosecuting authorities can take a same approach in response.

From the perspectives of attribute, theoretical foundation and function, prosecutorial counter-appeals, one of the ways trials are supervised, is firstly a significant power that prosecuting authorities exercise to urge judicial authorities to correct their mistakes. Furthermore, the principle of checks and balances and legal supervision underpinning prosecutorial counter-appeals are both aimed at the division and orderly exercise of state powers to further check powers and protect legitimate rights. Therefore, it defies the theoretical foundation when prosecutorial counter-appeals are filed based on the equal status of both parties. Also, what prosecutorial counter-appeals in criminal cases serve have evolved from a singularity of litigation supervision to a multifunctional combination of litigation supervision, substantive justice, human rights protection and procedural remedy, but litigation supervision remains the primary function. Lastly, prosecutorial counter-appeals target trials by courts

to restrict the way judicial power is exercised. Logically, it is trying to realize judicial justice by correcting erroneous trials, while responding to a defendant's denial of his or her previous confessed guilts and accepted sentence terms with a prosecutorial counter-appeal is essentially a practice of suspicious judicial hegemony in the name of trial supervision, rather than an effort to go against the erroneous trials by courts as it seems to be. In this case, what supervision and checks of power truly serve is neglected and the definitions of how prosecutorial counter-appealing is positioned, what it serves and what it pursues are all undoubtedly defied.

2.2 Causes of Prosecutorial Counter-Appeals in Response to Defendants' Appeals

2.2.1 Demanding Targets in Plea Bargaining

At the initial stage, the number of the cases involving prosecutorial counter-appeals remained at a low level in pilot areas for two reasons. The first one is, with relevant regulations still improving, prosecuting authorities have trodden cautiously when it came to whether to file a prosecutorial counter-appeal. A counter-appeal independent from thorough considerations will bring a blurring picture of how the system of plea bargaining works in pilot areas. This requires prosecuting authorities to react discreetly as they play an important role in the pilot program to ensure the consistent implementation of the system. Then, in place of the pressure-free performance evaluation scheme, a target that seven out of every 10 criminal cases are applied with plea bargaining was raised by the Supreme People's Procuratorate, China's highest prosecuting authority, at the Conference on Criminal Prosecution in August, 2019 after the amended Criminal Procedure Law officially was put in force (Chen, 2020). The target is entailed to reach 80% in two years. That explains why prosecuting authorities of varied levels answered defendants' appeals with counter-appeals at the initial stage of the implementation of plea bargaining trying to exemplify litigation trust.⁴

2.2.2 Incomprehensive Interpretations of Plea Bargaining by Some Prosecuting Authorities

At the core of China's system of plea bargaining is leniency in substantive due process and efficiency in procedural due process on the premise of the voluntary confession of defendants. In the journey to the perfection of plea bargaining in criminal litigation, litigation efficiency should be maximized on the basis of fundamental justice to achieve the dual goals of criminal punishment and human rights protection in an elevated level. Currently, prosecuting authorities are stepping up efforts in determinate sentencing, but the fact is with

³ See the website <https://www.goodreads.com/quotes/18463-whoever-fights-monsters-should-see-to-it-that-in-the>.

⁴ See the article titled "A Counter-appeal by the Tianhe Prosecuting authority in Response to the Defendant's Appeal after Pleading Guilty Was Accepted" on Wechat official account Tianhe Prosecution published on 4 April, 2019.

indeterminate sentencing still pervasive in legal practice, determinate sentencing would be a transient advance if it is implemented without similar cases offering insights and the support of a penal of professional investigators.

2.2.3 Absence of Supporting Laws

With the absence of regulations in terms of whether the accused are granted the right to appeal for a lenient sentence term after the verdict in the first instance in current laws, prosecuting authorities are trapped in a conundrum where prosecutorial counter-appealing is hard to decide on. As Montesquieu put it, every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Whether the practice of filing a prosecutorial counter-appeal in the name of legal supervision should be deemed as abuse of power depends on if it is exercised by the principle of rule of law. Under the current circumstance, prosecuting authorities are apparently given vaster discretion than reasonable levels in the decision of a counter-appeal. In fact, public prosecutors are inclined to place a counter-appeal as their first choice.

2.2.4 Insufficient Negotiation of Sentence Terms and Inadequate Protection for the Free Will Of Defendants

According to Article 173 of the Criminal Procedure Law of the People's Republic of China, sentencing recommendation should come from the negotiation of both parties based on the defendants' voluntary plea of guilt. It is a shame that despite the insights into litigation efficiency China has gained in terms of its establishment and application of the system of plea bargaining from the common law, regulations of the rights of the accused need further improvement. A particular example is that with "trade" replaced by "negotiation" between both parties, the rights of prosecution still outweigh those of the accused in China's plea bargaining. In this case, negotiations with the aid of defense lawyers or duty lawyers remain hard to identify. As it is put in the pilot program report, a certain number of pilot areas saw criminal suspects be told by prosecuting authorities to either agree with the sentencing recommendation or witness the application of plea bargaining eliminated from the cases, who are, to some degree, forced to accept the sentencing recommendation. This is one of the reasons why defendants disagree with it or appeal for a lesser sentence (Hu, 2018, 280).

3. IMPROVEMENT OF THE RIGHTS OF PROSECUTORIAL COUNTER-APPEAL IN THE CONTEXT OF PLEA BARGAINING

3.1 Identify the Purposes of the Right of Appeal

3.1.1 Fully Understand and Respect the Right of Appeal of the Defendant

According to Paragraph 3 of Article 227 of the Criminal

Procedure Law, a defendant shall not be deprived of the right to appeal under any pretext. In the context of plea bargaining, both the judicial and legislation authorities should come to a consensus about the protection of the legal rights of the defendant. Namely, the right of appeal of the defendant should not be restricted under any circumstances. Rather, the court should establish a mechanism to distinguish genuine and fraudulent grounds of appeal and step up efforts in the interpretation of laws for the defendant after the verdict in the first instance. Specifically, cases involving an appeal for a conducted sentence can be responded with questioning in court or a custodial interrogation to identify whether the accused is practicing a technical appeal. If so, further communication with the detention center should be conducted to dispel such notions.

3.1.2 Establish a System of Appeal to Reason

Cases applying expedited procedures at trials in the context of plea bargaining are normally minor criminal cases settled through the negotiation between the parties, where the accused have already enjoyed a sentence discount following his or her plea of guilt in the first instance. This requires the court to review and screen the grounds of appeal and respond accordingly. An appeal should be allowed when there are mistakes in substantive issues such as conviction and sentencing, serious violations in procedures, or involuntary confession of guilt and acceptance of punishment under duress. As for those who appeal without solid grounds and attempt to access sentence serving in detention centers, the court of the second instance should reject the appeal directly before any chance for the second instance proceedings is found (Han, 2020, pp.52-59).

3.2 Follow the Principle of Parsimony

Maintain the minimum use of the right of prosecutorial counter-appeal. In cases involving plea bargaining, prosecuting authorities can borrow the legal language pattern of "generally shall adopt" used by courts regarding sentencing recommendation, and are stipulated to adopt the principle of "generally shall not counter-appeal". Thus, in plea bargaining, prosecuting authorities feature a complementing pair of the rigidity of "generally shall adopt" in sentencing recommendation and the flexibility of "generally shall not counter-appeal" after the defendant's appeal. To be specific, if the defendant appeals without performing his or her obligations of apology, refund, compensation for losses, payment of fines etc. in the written statement of plea of guilt after the court adopts the sentencing recommendation from prosecuting authorities and gives a lenient sentence to the defendant in accordance with the law, prosecuting authorities can respond with a counter-appeal; If the defendant appeals against the accused criminal facts or sentencing or without solid grounds, the court of second instance shall try the case according to law.

3.3 Reinforce Protection of the Legal Rights of the Accused

3.3.1 Protect the Free Will of the Defendant

The free will of criminal suspects and defendants should be protected in the event of conviction of innocent people. That means, criminal suspects should be fully informed their rights and obligation in litigation and possible consequences brought by plea of guilt and acceptance of sentencing and be comprehensively heard by investigation and prosecuting authorities in different phases from investigation, arrest to prosecution. Among them, the most important information is that an appeal is only allowed when it is filed against problems in facts, evidence or procedures rather than the term of sentence after the courts apply plea bargaining in the case and adopt the sentence term recommended by prosecuting authorities.

3.3.2 Engage Criminal Defense Lawyers in the Proceedings

As they are streamlined, expedite procedures at trials require a higher level of involvement of criminal defense lawyers to prevent the legal rights of defendants from infringing (Hao and Yao, 2018, pp. 49-59). A successful defense strategy is the premise for the reduction of the practice of appealing against involuntary guilty plea of the defendant. In response, the pilot program of criminal defense lawyers' involvement has been developed to cover an expansive scope of applicable situations, which means legal aid will be provided in the trial proceedings in the first instance and, more importantly, defense services in the second instance and retrial procedures. Far less legally knowledgeable than investigators and prosecutors, criminal suspects and defendants are put at a disadvantage. This might explain the small proportion of defense lawyers' involvement in criminal cases. To balance out the disadvantage, lawyers should play an active role in the cases involving plea bargaining, especially in the phase of prosecution, to ensure the legal rights of criminal suspects and defendants.

CONCLUSION

Plea bargaining per se is an explorative, inclusive system that combines substantive rules and procedural

rules in criminal lawsuits. It can be further developed to regulate appeals, prosecutorial counter-appeals and trial proceedings in the second instance and thread justice and efficiency at the core of the system through criminal lawsuits. From a macro perspective, the implementation of plea bargaining represents a major advancement in the values of criminal litigation, which becomes more tolerant and grants the accused a higher level of autonomy. As a result, it adds diversity to the models of criminal litigation, with a new kind of cooperation and mutual benefits on top of the original confrontation between the government and the accused. Therefore, the legal interpretations of practice of appeals by the accused and counter-appeals by prosecuting authorities will give impetus to the development of the system of plea bargaining and play as the touchstone of relevant legal procedures.

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