

PLEA BARGAINING IN JAPAN

PLEA BARGAINING NO JAPÃO

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Abstract: In Japan, the plea bargaining system was introduced with the amendment of the Code of Criminal Procedure in 2016. However, under this structure of Japanese criminal justice, even before the introduction of the plea bargaining system, informal plea bargaining has been practiced, but they were declared illegal by the new legislation. Further legal reforms are needed to ensure the fairness and transparency of the proceedings, and it is also important for the courts to play an independent role from the prosecution.

Keywords: Japanese Law - Criminal Justice - Plea Bargaining - Criminal Procedure.

Resumo: No Japão, o sistema do *plea bargaining* foi introduzido com a alteração do Código de Processo Penal em 2016. No entanto, sob a estrutura da justiça criminal japonesa, mesmo antes da inovação legislativa, a prática do *plea bargaining* já existia informalmente, muito embora ela tenha sido declarada ilegal pela nova legislação. São necessárias mais reformas jurídicas para garantir a justiça e a transparência dos procedimentos, e também é importante que os tribunais desempenhem um papel independente do Ministério Público.

Palavras-chave: Direito japonês - Justiça Criminal - *Plea Bargaining* - Processo Penal.

1. Plea bargaining system introduced in 2016

In Japan, the Code of Criminal Procedure was amended in 2016 to introduce several new systems, including a plea bargaining system, which took effect in 2019. The plea bargaining system, titled "Agreement on Cooperation with Collection of Evidence and Prosecution," allows public prosecutors to make an agreement with a suspect (a person who has not yet been indicted) or an accused (a person who has been indicted). Under this system, in exchange for the suspect/accused's cooperation with the public prosecutor on another person's criminal case for a specific crime, the public prosecutor grants the suspect/accused benefits such as non-prosecution. However, another type of plea bargaining, in which the public prosecutor reduces the sentence in exchange for the suspect/accused pleading guilty to his/her crime, was not introduced.

Crimes for which the plea bargaining system can be used include criminal offenses such as fraud and embezzlement, and violations of the Act on Punishment of Organized Crime, the Anti-Monopoly Act, the Financial Instruments and Exchange Act, the Stimulants Control Act and Firearms Control Act. The suspect/accused's cooperation may include making a statement during an interrogation by a public prosecutor or a police officer, testifying as a witness, and submitting evidence to a public prosecutor or a police officer. In return, the public prosecutor may grant the suspect/accused the benefits of not be indicted, a withdrawn indictment, indictment of a lesser offense, or request for a pre-agreed sentence at trial.

A plea bargain is negotiated between the public prosecutor, the suspect/accused and the defense counsel. The public prosecutor may conduct the negotiations solely with the defense counsel and is prohibited from negotiating with the suspect/accused in the absence of counsel. The police officer is not a direct party in the negotiations, but the public prosecutor is required to confer with the police officer in advance. Judges are not involved in these negotiations or agreements.

When an agreement has been reached, the public prosecutor, the suspect/accused, and the defense counsel shall produce a document stating the contents of the agreement. When the public prosecutor calls a suspect/accused who has entered into the plea agreement as a witness in another person's criminal trial, the public prosecutor is required to request the examination of this document as well. This way, the judge and the defense counsel of the other person will know that the witness is a person who has entered into a plea agreement with the public prosecutor.

2. Background of the introduction of the plea bargaining system

The background of the introduction of such a plea bargaining system is somewhat complicated and unique. This system was not introduced simply because there was a need to strengthen the methods of criminal investigation. Even before the introduction of this system, informal plea bargaining existed in Japan. However, the practice of such informal plea bargaining was unfair and unclear, reflecting the feature of the criminal justice system.

A distinguishing feature of criminal investigations in Japan is that police officers and public prosecutors interrogate suspects for long periods of time and on many occasions. The Japanese Constitution guarantees the right to remain silent and the right to counsel. However, in practice, both police officers and public prosecutors interrogate suspects without allowing defense counsel to be present. Even when suspects exercise their right to remain silent, police officers and public prosecutors continue to interrogate and demand statements from suspects. Moreover, the public prosecutor can arrest and detain the suspect. In principle, an arrest warrant issued by a judge is required to make an arrest, but in 2019, the number of cases in which judges rejected requests for arrest warrants was only 0.1% of the total number of requests. Once arrested, suspects are in custody for up to 72 hours. In addition, the public prosecutor may detain the suspect for 10 days. The judge's permission is required to detain a suspect, but in 2019, the percentage of cases where the judge did not give permission for detention was 5.2% (this percentage was below 1% until 2009). In addition, the public prosecutor may, with the judge's permission, extend the period of detention for up to another 10 days. In 2019, the percentage of cases in which the judge did not grant an extension was only 0.4 percent. The public prosecutor has the discretion whether to indict or not and can decide not to indict a suspect who has pleaded guilty to a crime. On the other hand, in 2019, only 0.2 percent of the cases indicted by the public prosecutor were ruled not guilty by the court. Once the public prosecutor has indicted a suspect, the suspect automatically remains in detention as an accused. The court can rescind the detention of the accused, but the percentage of accused whose detention was rescinded by the court was only 0.4 percent in 2019. The accused has the right to bail, but judges, in accordance with the opinion of the public prosecutor, tend not to grant bail when the accused pleads not guilty, judging that there is a high probability that the accused may conceal or destroy evidence. In 2019, around 90% of accused who

pleaded not guilty were not released on bail even after one month from the date of indictment, and the first trial was held without bail. Due to these tendencies of judges, pre-trial arrest and detention functions as means to coerce confessions and statements admitting the public prosecutor's story and discouraging pleas of not guilty. This practice of detention and bail is known as "hostage justice" and has recently become an internationally known feature of the Japanese criminal justice.

Informal plea bargaining has been conducted within the unique structure of the Japanese criminal justice system as described above. Public prosecutors have demanded that suspects sign confession statements in exchange for the avoidance of prolonged detention in interrogation rooms without the presence of defense counsel. Public prosecutors have also demanded that suspects sign statements admitting the stories that would convict others in exchange for avoiding arrest or bail in interrogation rooms without the presence of defense counsel. When the written statement produced by the public prosecutor is evidence of guilt, courts have almost always admitted the written statement and convicted the accused, even if the same person testifies against the contents of the written statement at trial. Thus, there is a structure in Japanese criminal justice that allows public prosecutors to make informal plea bargains with suspects based on their overwhelmingly dominant bargaining position. Moreover, the fact that such informal plea bargaining took place was rarely made public. Therefore, for a long time, there was no great need for Japanese public prosecutors to institutionalize plea bargaining.

However, one high-profile acquittal case made reform of the criminal justice system inevitable. The accused in that case, Atsuko Muraki, a senior official in the Ministry of Health, Labor and Welfare, was arrested and indicted in 2009 for allegedly instructing her subordinates to produce false official document at the request of an organization with fraudulent purposes. In this case, in addition to Muraki, two other people related to the organization and one of her subordinates were arrested and indicted. All three signing statements admitting to the false story that Muraki was involved in the production of the false official document were released on bail shortly after the indictment. In contrast, Muraki, who had consistently maintained her innocence, was detained for 164 days before being released on bail. In this case, several MHLW employees were interrogated by the public prosecutor without being arrested, and about half of them signed statements admitting the public prosecutor's story. At the trial, however, it became clear that there was an inconsistency between the date and time when Muraki allegedly instructed her subordinates at the request of the organization and the date and time when the document was objectively created. Furthermore, the subordinate testified at the trial that he was forced to sign the statement prepared by the public prosecutor even though he had denied Muraki's involvement during the interrogation, and that he agreed to sign the statement in exchange for bail because he could not bear the pain of detention. In this way, Muraki was acquitted in 2010. However, the case did not end there. It was revealed that the lead public prosecutor in the investigation had falsified the data on a floppy disk, which was evidence in the case. Furthermore, it was revealed that several public prosecutors knew about this and concealed the fact. As a result, a total of three public prosecutors were arrested, indicted, and convicted.

The 2016 reform of the Code of Criminal Procedure was triggered by these prosecutorial scandals. The slogan of the reform was to move away from over-reliance on interrogations and written statements. The most important reform was the introduction of the system of videotaping interrogations. The plea bargaining system was to be introduced as one of the means of evidence collection other than interrogation. However, there were many criticisms of introducing a new weapon for public prosecutors in a reform that was triggered by the prosecutorial scandals. During the Diet

deliberations, amid criticisms from lawmakers, the Director of the Criminal Affairs Bureau of the Ministry of Justice expressed the opinion that once plea bargaining is institutionalized, informal plea bargaining will become illegal and evidence obtained through it may be denied admissibility.

3. Practice and issues of plea bargaining

The plea bargaining system became effective in 2019. In the two years since then, there have been only three known cases in which a public prosecutor and a suspect/accused entered into plea agreement. The fact that a plea bargain has been made will not be revealed unless the prosecutor requests the examination of the evidence obtained through the plea agreement. Therefore, it is possible that there are other cases besides these three that are not yet known to the public.

It is also not clear whether there is any informal plea bargaining going on that has been confirmed to be illegal by the institutionalization. Unlike the plea bargaining system, whose procedures are stipulated in the Code of Criminal Procedure, informal plea bargaining often proceeds through unclear procedures and agreements are made in ambiguous forms. Therefore, it is essential to examine, ex post facto, the conversations in the interrogation room to see whether there was any suggestion of benefit or inducement of statements by the public prosecutor. For this purpose, recording of interrogations is effective, but the percentage of cases for which videotaping is mandatory under the 2016 amended Code of Criminal Procedure is less than 3% of all criminal trials. Although public prosecutors may voluntarily record interrogations in other cases as well, they rarely record interrogations of suspects who have not been arrested. However, informal plea bargaining has often taken place with suspects who have not been arrested. In Muraki case, it was revealed that several suspects who had not been arrested signed statements admitting the public prosecutor's story for fear of being arrested themselves. In order to prevent illegal informal plea bargaining, the entire process, including the interrogation of suspects who have not been arrested, should be recorded.

Expanding the scope of recording interrogations is also necessary for the proper operation of the plea bargaining system. A suspect/accused who intends to cooperate in an investigation by entering into a plea agreement has the motive of gaining benefit for himself/herself and may make untrue statements to shift the blame to others. Therefore, in order not to convict an innocent accused based on a false statement, it is essential to carefully judge the credibility of statements made by witnesses who have entered into plea agreements. And to make this possible, it is necessary to examine, by means of objective recording, what kind of statement was initially made and how it was changed by the plea bargaining.

The 2016 amendment to the Code of Criminal Procedure is scheduled to be reviewed in 2022, three years after it took effect, to examine its status of enforcement. Japan Federation of Bar Associations, an organization that all practicing lawyers in Japan are members of, has proposed that the recording system of interrogation should cover the entire process of all cases.

Plea bargaining and similar systems have been introduced in many countries. In Japan, as in other countries, plea bargaining may be useful in investigating organized crime. The most important issue is to establish a mechanism to ensure fairness and transparency of the proceedings and to avoid wrongful convictions. As such a mechanism, the scope of recording interrogations should be expanded and the right of defense counsel to be present during interrogations should be established. Legislation is necessary for this purpose, but it is also important for the courts to play an independent role from the prosecution, as expected by the Constitution.

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