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PLEA BARGAINING ACROSS BORDERS

Jenia I. Turner

LAW ACROSS BORDERS

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Plea Bargaining Across Borders

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Plea Bargaining Across Borders

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Introduction

Over the last three decades, a quiet revolution has occurred in criminal justice systems around the world. Plea bargaining has been introduced in systems that had long opposed the practice. The term "plea bargaining," as I use it in this book, means the process of negotiation and explicit agreement between the defendant, on one hand, and the prosecution, the court, or both, on the other, whereby the defendant confesses, pleads guilty, or provides other assistance to the government in exchange for more lenient treatment. Plea bargaining has now reached nations as diverse as Germany, Russia, India, Taiwan, South Africa, Australia, and Argentina, and is being considered by others, including China and Indonesia.

Despite the recent advance of plea bargaining globally, the practice remains controversial in the country where it originated and where it is most entrenched—the United States. American scholars have long expressed concerns about the fairness of plea negotiations. Some have even compared the coercive aspects of plea bargaining to the procedures of medieval inquisitions.[1] Plea bargaining has been criticized for its potential to undermine the search for truth in criminal prosecutions, and it is blamed for interfering with victims' rights.[2] Moreover, the lack of transparency in plea negotiations is said to reduce the public legitimacy of the criminal justice system.[3]

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[1] *See* John Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3 (1978).

[2] Michael M. O'Hear, *Victims and Plea Bargaining: From Consultation to Guidelines*, 91 Marq. L. Rev. 323 (2007); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 Wash. U. L.Q. 301, 304 (1987).

[3] Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911 (2006).

But even as its merits continue to be debated in the nation of its origin, the spread of plea bargaining to new territories suggests that the practice will play a significant role in criminal justice around the world for the foreseeable future. This is an ideal moment to study the forms that plea bargaining is taking as it is being transposed into new systems. What can countries learn from one another as they observe these developments? Are plea bargaining practices in different countries converging, or are they being heavily modified to conform to the existing features of each new justice system?[4] And what do the responses to plea bargaining reveal about the underlying principles of various criminal justice systems?

To assess the directions that plea bargaining might take as it spreads across the globe, this book focuses on five approaches to the subject.

Chapter 1, Traditions of Plea Bargaining, presents the United States as an example of a system in which plea bargaining is well developed and extensively regulated. This chapter focuses on the federal system, with some attention to the systems of individual states as necessary. The different approaches to plea bargaining in American federal and state jurisdictions and the long history of plea bargaining in the United States provide a wealth of experience and valuable insights. In addition, American plea bargaining has served as an example for a number of other countries considering adoption of the practice. Therefore, any discussion of the global rise of plea bargaining must necessarily examine the American model.

In Chapter 2, Informal Plea Bargaining, I turn to Germany as a paradigmatic example of this type of plea bargaining. By "informal," I mean plea bargaining introduced without legislative authorization by practitioners responding pragmatically to an overburdened court system. Until recently, the German Criminal Procedure Code did not provide for plea bargaining or even for guilty pleas, even though forms of consensual disposition of cases had been commonly used since at least the early 1990s. The practice was first tacitly and then openly approved by the German higher courts, but it was not formally regulated by the legislature until May 2009. German courts sanctioned the practice despite its tensions with the traditional German principles of mandatory prosecution and independent judicial investigation. Plea bargaining managed to take hold despite these formal obstacles because of the practical needs of the Ger-

[4] Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L.J. 1 (2004).

man system—primarily the need to process a large number of increasingly complex cases more efficiently. Although there was no deliberate attempt to import plea bargaining from abroad, the familiarity of German lawyers with plea bargaining in other jurisdictions likely influenced its adoption and acceptance indirectly.

In Chapter 3, Introducing Plea Bargaining as Part of Comprehensive Legal Reform, I describe the open embrace of plea bargaining by Eastern European jurisdictions such as Russia and Bulgaria. The deliberate adoption of plea bargaining in Eastern European countries was part of broader criminal procedure reforms, which were driven both by changing domestic needs and by international demands. As economic interaction between East and West increased after the collapse of the Iron Curtain, the European Union and the United States pressed for criminal procedure reform in Eastern Europe, and adoption of plea bargaining was one of the results. The Russian and Bulgarian plea bargaining regimes deliberately combine features from inquisitorial and adversarial regimes and can provide useful information about the feasibility of legal transplants in criminal procedure. The chapter analyzes the legitimacy and effectiveness of plea bargaining transplants in Eastern Europe and raises questions about the desirability of importing bargaining in countries with relatively weak judicial systems.

Chapter 4, Alternatives to Plea Bargaining, focuses on Japan and China. These two jurisdictions—and others in Asia—present a challenge to the thesis that systems around the world are converging toward explicit adoption of plea bargaining. The chapter focuses primarily on the Japanese system, which remains resistant to explicit recognition of plea bargaining, even in the face of an increasingly overburdened criminal justice system. Japan has responded to the need to process criminal cases more efficiently through alternative methods, such as introducing a simpler form of summary procedure for less serious cases; providing for a "pretrial arrangement procedure," in which the parties and the court attempt to limit the issues to be adjudicated at trial; and encouraging prosecutors to screen cases more thoroughly at the outset to ensure that each case is serious and warrants prosecutorial resources. But even in Japan, the system has arguably come to condone implicit forms of the plea bargaining. It is now common for a Japanese defendant to confess to a crime and cooperate with the authorities with the aim of receiving a sentencing discount, earlier release on bail, or suspended prosecution. Courts and prosecutors have acquiesced in these tacit exchanges and have even encouraged them at times. As Japanese criminal dockets face increasing caseloads, such exchanges are likely to become more

frequent and perhaps more explicit. A similar move from simplified trial procedures toward explicit plea bargaining may also occur in China. But as in Eastern Europe, the potential introduction of plea bargaining in a system whose regard for the rule of law and for defense rights remains the subject of international criticism raises serious concerns.

Chapter 5, Plea Bargaining in International Courts, reviews the rise of plea bargaining at international criminal courts such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). These courts were created to try three categories of crimes of special concern to the international community: genocide, war crimes, and crimes against humanity committed in Rwanda and the former Yugoslavia. The tribunals' statutes and their early rules of procedure did not provide for plea bargaining, and although the ICTY and ICTR received guilty pleas in each of their first cases, these pleas did not appear to rest on any promises of leniency by the prosecution or the court. But the considerable cost of the prosecutions and the length of the proceedings soon led to demands for greater efficiency, which in turn spurred the introduction of plea bargaining at these tribunals. The practice has been controversial. Some commentators view plea bargaining as an inappropriate tool for resolving crimes as heinous as those prosecuted in the ICTY and ICTR, and argue that it undermines the objective of creating an accurate historical record of the atrocities. Moreover, many victims are outraged that some defendants have received more lenient sentences as a result of "deals" with the prosecution. The experience of the international tribunals thus raises many of the same questions that plea bargaining confronts at the domestic level, but does so with even greater intensity. Significantly, it calls into question whether some classes of cases are so extreme or politically significant that plea bargaining, even if appropriate for the vast majority of offenses, is inappropriate for them.

Finally, the Conclusion reviews lessons from the experience with plea bargaining around the world, and offers tentative predictions for its future. In particular, it predicts that plea bargaining will continue to spread globally, as part of law-reform movements or in response to practical needs. As plea bargaining is introduced in new territories, it will also change form to adapt to local circumstances. The chapter advocates that policy makers should study these new forms of plea bargaining to identify practices that are most likely to be fair, legitimate, and effective. These practices can then be considered for adoption both by countries with long traditions of plea bargaining, such as the United States, and by