中南财经政法大学
青|年|学|术|文|库

刑事诉讼契约研究

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总　序

一个没有思想活动和缺乏学术氛围的大学校园，哪怕它在物质上再美丽、再现代，在精神上也是荒凉和贫瘠的。欧洲历史上最早的大学就是源于学术。大学与学术的关联不仅体现在字面上，更重要的是，思想与学术，可谓大学的生命力与活力之源。

中南财经政法大学是一所学术气氛浓郁的财经政法高等学府。范文澜、嵇文甫、潘梓年、马哲民等一代学术宗师播撒的学术火种，五十多年来一代代薪火相传。在世纪之交，在合并组建新校而揭开学校发展新的历史篇章的时候，学校确立了“学术兴校，科研强校”的发展战略。这不仅是对学校五十多年学术文化与学术传统的历史性传承，而且是谱写新世纪学校发展新篇章的战略性手笔。

“学术兴校，科研强校”的“兴”与“强”，是奋斗目标，更是奋斗过程。我们是目的论与过程论的统一论者。我们将对宏伟目标的追求过程寓于脚踏实地的奋斗过程之中。由学校斥资资助出版《中南财经政法大学青年学术文库》，就是学校采取的具体举措之一。

本文库的指导思想或学术旨趣，首先在于推出学术精品。通过资助出版学术精品，形成精品学术成果的园地，培育精品意识和精品氛围，提高学术成果的质量和水平，为繁荣国家财经、政法、管理以及人文科学研究，解决党和国家面临的重大经济、社会问题，作出我校应有的贡献。其次，培养学术队伍，特别是通过对一批处在“成长期”的中青年学术骨干的成果予以资助推出，促进学术梯队的建设，提高学术队伍的实力与水平。再次，培育学术特色。通过资助在学术思想、学术方法以及学术见解等方面有独到和创新之处的成果，培育科研特色，力争通过努力，形成有我校特色的学术流派与学术思想体系。因此，本文库重点面向中青年，重

点面向精品，重点面向原创性学术专著。

春华秋实。让我们共同来精心耕种文库这块学术园地，让学术果实挂满枝头，让思想之花满园飘香。

2009 年 10 月

Preface

A university campus, if it holds no intellectual activities or possesses no academic atmosphere, no matter how physically beautiful or modern it is, it would be spiritually desolate and barren. In fact, the earliest historical European universities started from academic learning. The relationship between a university and the academic learning cannot just be interpreted literally, but more importantly, it should be set on the ideas and academic learning which are the so-called sources of the energy and vitality of all universities.

Zhongnan University of Economics and Law is a high education institution which enjoys rich academic atmosphere. Having the academic germs seeded by such great masters as Fanwenlan, Jiwenfu, Panzinian and Mazhemin, generations of scholars and students in this university have been sharing the favorable academic atmosphere and making their own contributions to it, especially during the past fifty-five years. As a result, at the beginning of the new century when a new historical new page is turned over with the combination of Zhongnan University of Finance and Economics and Zhongnan University of Politics and Law, the newly established university has set its developing strategy as "Making the University Prosperous with academic learning; Strengthening the University with scientific research", which is not only a historical inheritance of more than fifty years of academic culture and tradition, but also a strategic decision which is to lift our university onto a higher developing stage in the 21st century.

Our ultimate goal is to make the university prosperous and strong, even through our struggling process, in a greater sense. We tend to unify the destination and the process as to combine the pursuing process of our magnificent goal with the practical struggling process. The youth's Academic Library of Zhongnan University of Economics and Law, funded by the university, is one of our specif-

ic measures.

The guideline or academic theme of this Library lies first at promoting the publishing of selected academic works. By funding them, an academic garden with high-quality fruits can come into being. We should also make great efforts to form the awareness and atmosphere of selected works and improve the quality and standard of our academic productions, so as to make our own contributions in developing such fields as finance, economics, politics, law and literate humanity, as well as in working out solutions for major economic and social problems facing our country and the Communist Party. Secondly, our aim is to form some academic teams, especially through funding the publishing of works of the middle-aged and young academic cadreman, to boost the construction of academic teams and enhance the strength and standard of our academic groups. Thirdly, we aim at making a specific academic field of our university. By funding those academic fruits which have some original or innovative points in their ideas, methods and views, we expect to engender our own characteristic in scientific research. Our final goal is to form an academic school and establish an academic idea system of our university through our efforts. Thus, this Library makes great emphases particularly on the middle-aged and young people, selected works, and original academic monographs.

Sowing seeds in the spring will lead to a prospective harvest in the autumn. Thus, Let us get together to cultivate this academic garden and make it be opulent with academic fruits and intellectual flowers.

Wu Handong

摘　要

随着人类社会现代化进程中经济关系的日益市场化，社会主体关系也呈现出多样化的特点。在主体独立意识增强和社会关系复杂化的时代背景下，利益多元所带来的也是价值取向的多元。在控制犯罪与保障人权之间，在诉讼公正与诉讼效率之间，现代刑事诉讼程序也开始有了更多的人性和现实性的选择与取舍，无罪推定、自由心证这些曾经被贴上政治标签的司法理念已逐渐深入人心，而有关诉讼契约和程序分流类的诉讼制度也日益受到关注。在程序价值得以弘扬的当下，将契约隐喻及其制度这一命题作为分析工具引入到刑事诉讼法学的研究领域和实践环节中，就是为了在规制国家司法权力运用、增强诉讼民主和加强人权保障的刑事程序法治进程中，寻找科学可行的理念切入和程序制度的建构路径。基于此，扩充甚至创设契约在刑事诉讼中的观念平台与制度运行空间，就成了中国刑事诉讼现代化进程中必须要面对的课题。

无论是在中国还是西方，契约作为一个古老的范畴，很早就存在于人类的交往活动中。从原初状态看，契约所对应的往往只是一种实在的协议或协议形式，而且这种可实证的协议或协议形式只囿于民商法律领域和相应的民商事活动中。在传统语境中，契约所表征的是当事人之间以发生、变更、担保和消灭法律关系为目的的协议，是引起一定法律效果的当事人之间的一种意思表示，具有主体适格、意思一致、旨在转让某些权利和承担某些义务以及法律性这四个方面的要素。契约起源于经济法律领域，传统的契约概念因此只具有专属于民商法学的意义，并不包括契约观念的张扬和契约方法论的运用，因而也就不具有现代契约隐喻或契约理念的意蕴。但从罗马法以后，契约这一概念工具通过漫长的演变，已日益与时代观念结合起来，在保留其固有的精神蕴涵的同时被赋予了一些新的含义，其不仅作为民商法律概念被人所理解，而且还出现在宗教神学、政治人类学、现代经济学等研究领域。时至今日，契约范畴及其分析范式不仅是一

种带有价值评价的知识形态，而且还以一种与价值无涉的方法论为人们所普遍接受。契约的现代演化及在社会领域的渗透，在很大程度上已使其隐去了传统的“实在协议”的外壳，所体现的往往是契约的精神家园，是契约理念与契约方法论的运用，这就是契约的文明隐喻，即主体的独立与平等、选择的自由与理性、交换的合意与诚信、合作的互惠与互利。

随着经济发展和国家治理方式的改变，公、私法的界限也变得日益模糊，契约理念及其规则进入公法领域已经不仅仅是理论上的探讨，而且成为实际存在的制度实践。尽管公法关系是与公益相关的关系，但公益并非是排斥契约的理由，违反与公益相关的所谓强行规定的契约固然不能有效成立，法律关系即使与公益相关，但只要契约不违反公益，公法中的法律关系也可以成为契约的对象。在国家权力色彩厚重的刑事诉讼领域，当事人处分权利的空间范围显然不及民事诉讼和行政诉讼领域那么大，但这并不意味着刑事诉讼领域就完全排斥自由合意，就完全没有契约理念与契约方法论的生存和适用空间。契约强调合意，刑事诉讼契约作为契约真身的外化表现自然也不例外，只不过是合意的目的有所特定而已。刑事诉讼契约，是指控辩双方就诉讼利益、与诉讼有关的程序及相关事项，以发生诉讼法效果为目的的合意，其具有公法行为和诉讼行为这两方面的属性。刑事诉讼契约的缔结与实现，应该强调刑事诉讼作为社会纠纷解决方式的特殊性和刑事诉讼程序设计所应追求的公法秩序，为此，契约中的合意只能在法律原则或明文规则允许的情况下才可为之，这是刑事诉讼行为有效的底限，也是刑事诉讼契约自由的限度所在。

现代刑事诉讼制度的设计不仅要追求惩罚犯罪与保障公民权利的二元目的，还应该以其自身的运行活动来形成或昭示某种价值观念。近年来，刑事诉讼理论也正在实现这种从注重目的性向注重功能性的转变，即更加强调程序自身所体现的公正与尊重个体人权的价值意义。在这些理论中，最能为契约隐喻及其制度在刑事诉讼中的引入提供生长土壤的莫过于程序主体性理论、刑事诉权理论、程序正义理论和诉讼效率理论。而从制度运行与结构的关系角度讲，刑事诉讼活动在实现社会公正，保障公民权利等方面所发挥的作用就是诉讼功能的体现，契约理念的弘扬对于发挥这样的功能来说，就是要强调通过契约主体的主动参与，防止国家权力与公民权利的错位关系。从发展趋势看，契约隐喻作为社会文明的一种体现，其对于刑事诉讼功能的呈现同样具有重要的意义，那就是体现着国家对公民权

利的立场，无论是犯罪惩罚、纠纷解决，还是人权保障、权力制约抑或是政策昭示，均概莫能外。

刑事诉讼结构或刑事诉讼模式变迁的历史不仅是国家权力配置方式演变的历史，更是司法权或审判权分离独立进而扩张与抑制的演进史。从国家权力运用的主动性与有所节制的角度讲，司法能动与司法克制同样是不容回避的问题。强调契约在刑事诉讼中的引入，就是要建构国家权力与公民权利间的平权关系，一方面应该在权力运用的层面上确立司法审查权和扩充公诉裁量权，另一方面，应该从主体性权利的角度赋予当事人刑事程序选择权，特别是在角色分化上的沉默权和针对裁判中立上的裁判主体选择权。而既然刑事诉讼是国家权力与公民权利在法律领域中的对话机制的一种表现形式，那么刑事诉讼契约生成强调的则是权力与权利在冲突中的互动与平衡，为了实现契约协商中的控辩平等，应该在追诉与防御间对双方的力量进行调节。但犯罪嫌疑人、被告人由于个人知识和能力的欠缺，且人身自由在很多时候会被限制的情况下，往往还会受到非理性、信息不对称等主客观因素的影响，要想通过自身的力量来主张和维护自己的权利，实现自己的正当利益并非是一件易事。因此，不能仅从选择与请求机会的角度关注被追诉者的权利，而应该从选择与请求能得以表现和落实的角度，关注协商合意的实现。随着司法应对多元社会的理念转换及现实负荷压力的增大，以主体权利尊重和自由合意为核心的契约化的制度模式，日益受到了世界各国刑事诉讼立法与实践的重视，这些制度形态主要包括以辩诉交易、刑事和解为代表的实体利益契约，以保释和简易程序为代表的程序利益契约，以及以证据开示和污点证人豁免为代表的证据运用契约。

在西方人的眼里，一切社会关系都可以用契约予以说明。但在中国，虽然契约真身也能在现实中得以表现，但如果从理念与制度融合、观念与规则互动的角度讲，契约的广普化扩展还任重而道远，在小家经济的生产方式、缺少流动性的社会结构、家国一体的宗法社会形态，以及义务本位的法律文化观念等导致契约文明不发达的因素影响下，契约引入刑事诉讼也受到了来自传统体制和价值取向等方面的障碍，但这并不能阻挡刑事诉讼契约生成的时代潮流。从时代发展的眼光看，推进法治进程、契合行刑社会化、应对社会多元化为契约隐喻引入刑事诉讼提供了必要性论证，而注重和谐的文化传统、宽严相济的刑事政策，以及呼之欲出的制度实践则

为契约制度引入刑事诉讼提供了可行性的支撑。在现代化的进程中，中国传统刑事诉讼活动中的权力本位观念必将日益淡化。在契约生成的思路下，权力的目的在于以平等的态势与权利共处，为此，赋予行使权利的机会固然重要，而强调进行选择的能力则会更胜一筹。在刑事诉讼契约引入下的权力设置中，司法审查机制必不可少，而这一机制下的审前羁押制度的建构则更是重中之重；在公诉裁量权扩充趋势下的控辩协商制度建构中，除强调程序制约机制外，辩诉交易、和解不起诉、暂缓起诉、污点证人豁免等都应受到关注；在程序选择权方面，沉默权的制度化引入、陪审制度的调整、回避制度的完善以及简易程序的改革也是立法不应回避的；而在控辩协商能力平衡的保障上，辩护制度、法律援助制度和证据开示制度的落实与建构也不容忽视。

关键词：刑事诉讼；契约；契约隐喻；公诉裁量权；程序选择权；控辩协商

Abstract

With the modernization of society and the development of market economy, principal parts of society also show the characteristic of diversification. So, under the strength of the consciousness of independence and complexity of social relationship, diversification of profit results in the diversification of value. In pursuit of the target between controlling criminal and protection for human right, litigation justice and litigation efficiency, modern criminal procedure also pays more attention to humanism and realism. Those politics concepts such as free prove as well as presumption of innocence are also accepted by people. Under this condition, it will be valuable to regulate the national judicial power and strengthen litigation justice as well as protect human right by use of contract as analysis tool in the research and practice of criminal procedure. That is to say, establishing the room for contract related to system and function becomes inevitable for the modernization of Chinese criminal procedure.

No matter in china or in western, contract has existed in interaction of mankind for a long time. From the beginning, contract refers to one kind of agreement just happens in civil and economic activities. For this reason, in traditional meaning, contract means the agreement including the beginning, change, assure of law relationship. As a law concept, contract must conclude four factors as follows, suitability of the subject, consistence of will declaration, intention to conveyance of rights and obligations and legitimacy, but didn't include the spread of contract idea and application of contract method. Concept of contact came of realm of economy law, consequently, in traditional meaning, contract just belongs to civil law. After Roman Law, concept of contract experiences a long process of development, and have being combined with modernity as well as endowed with new meanings. It also appears in religion theology, politic anthro-

pology and modern economic. Nowadays, contract has become a kind of knowledge form accepted as a value – free methodology. What contract's modernization and execution embodies is not a real contract but the spirits, idea and methodology, which we call "contractual metaphor", which means the independence and equality of the subject, freedom and rationality of the choice, consensus and credibility of the exchange, reciprocity and mutual benefit of the cooperation.

With the development of the economic and the change of the way to govern the country, there is no definite line between public and private laws, and contract's idea and methodology entered the public law field and become active. Contracts incompatible with public interest cannot be valid, but public interest doesn't always repel contrast. Compared with the civil and administrative procedure, criminal procedure endows the party clients less rights to disposition. But that doesn't mean there isn't any chance. Contract's virtue lies in consensus, and the contract in criminal procedure, whose purpose is somewhat different, is no exception. Contract in criminal procedure refers the consensus of the accuser and the defendant agree in those things about litigation profit, correlation procedure as well as other items related to it , of which the purpose is to receive procedure effect, and it has both the public law behavior and procedure behavior nature. The signing and completion of the contract in criminal procedure should lay stress on the particularity of criminal procedure as a way of settling the dispute and the public law order pursued by criminal procedure design. Therefore, consensus in the contract can be achieved only under the permission of legal principle and legal rules, which is the fundamental issue of criminal procedure behavior and the bottom line of the discretion of contract in criminal procedure.

Modern criminal procedure system not only pursues the purpose of crime punishment and protection for human right, but also needs to show the values by itself activities. In recent years, criminal procedure concentrates its focuses from emphasis on function to emphasis on purpose, and gives more attention to individual human right. There are many theories, which are the support for importing contract concept in criminal procedure and procedure subject theory, criminal right of action theory, procedure justice theory as well as litigation efficiency theory are most significant among them.

From the relationship between function and structure, activities of criminal procedure are useful in realizing social justice and protection for human rights. To this purpose, spreading contract idea means stressing on participation of parties and preventing the wrong position relationship between national power and human right. From the tendency to development and the social civilization, introduction of the contract idea is beneficial to the development for the function of criminal procedure, which means crime punishment, dispute settlement, human right protection, power restriction and policies show and gives expression in the status of national attitude to citizen right.

Development history of the structure of criminal procedure or the model of criminal procedure not only is the evolution of national power scheme, but also is the history about separation of judicial power or jurisdiction. Emphasizing contract processing in criminal procedure need to seek for the balance between national power and citizen right. Therefore, we need to establish judicial review and discretionary power of prosecutorial organs. On the other hand, we also need to endow parties the right to selected criminal procedure. In order to realize the equality between accuser and the defendant, we should adjust the force of the two parties since criminal procedure lays heavy stress on the interaction and balance between powers and right in confliction. However, the accused are often hard to stand for themselves and realize justice profits because their free is usually restricted or they will influence by irrational attitude and limited information or knowledge. So we should not just focus on the opportunities to protect accused, but pay more attention to how to realize it. Meanwhile, with the change of the judicial idea and the pressure of realism, contract systems, which stress on subjective right and free agreement, is thought more and more highly in all the countries in the world. Those systems include substantiality profits contract, such as plea bargain, victim – offender mediation and procedural profit contract, such as bail, summary procedure and discovery of evidence and exempt of stained witness.

To western people, contract can explain all the social relationship. In China, although we can find contract ideas combined with systems in real situation, but in the perspective of spirit interconnected with regulations, popularizing con-

tract idea still have a long way to go. In traditional China, those elements such as family economy, non - mobility social structure, in which family combines with nation, and responsibility - oriented culture in law and so on leaded to the underdevelopment of the contract consciousness. Introduction of contract in criminal procedure is also affected by traditional value and other disadvantages. However, all of the factors can not block off the trend of the times to seek development. In order to keep pace with the progressive era, importing contract to the criminal procedure is necessary. In the modernism processing, power - oriented ideas in Chinese traditional criminal procedure activities will become weak. In perspective of contract, the power should get on well with the right. For this reason, it is very important to give the opportunities to the parties in procedure and it is of utmost importance to emphasize the ability at option of the defendant.

As a result, it is absolutely necessary for judicial review and establishing the system of pretrial detain is the core. In addition to stressing on restriction mechanism in procedure, plea bargain, victim - offender mediation, deferment prosecuting and exempt of stained witness also need to emphasis. As for the option in criminal procedure, importing the system of right to silence, adjusting jury system, improving challenge system and reforming summary system is also indispensable. Furthermore, in order to protect the right of negotiation between the accuser and the defendant, establishment or improvement of defense system, law aid system and evidence discovery system are also very important.

Key words: Criminal Procedure; Contract; Contractual Metaphor; Prosecutorial Discretion; The Option in Criminal Procedure; Plea Bargain

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