

Plea bargaining: recent developments in Spain

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I. Problems in practice

a) Hidden plea bargains

As the Spanish Criminal Procedure Code only envisages plea bargaining when every co-defendant admits the facts and pleads guilty, it's not possible to avoid an oral hearing and get a guilty plea if any one co-defendant rejects it. Hence there exists an abusive practice which involves hidden plea bargaining between the defence lawyers and the Public Prosecutor. In this case the defendants who accept the deal, admit the facts and plead guilty "pretending" to go through the motions of a trial because they make statements, while the defendants who reject it just fight to be found not guilty. The Prosecutor keeps his word and at the end of the trial modifies the charges reducing the sentences he was seeking before for the co-defendants who cooperated with him, but not for the ones who didn't. This is the best way which the Prosecutor has to convict all the defendants even when cases are flimsy.

The situation thus described would not be a problem were it not for the fact that, in many cases, prosecutors demand that those who have cooperated should incriminate those who did not want to negotiate, so in the oral hearings the co-defendants not only admit their own guilt, but also point out and implicate the ones who try to be acquitted, whose odds of a fair trial are very reduced. It is still paradoxical that a defence Lawyer who offers a witness 1 € to exonerate his client commits bribery or obstruction of Justice, but a Prosecutor who threatens the same witness with prison if he does not incriminate someone is just doing his job.

The situation would not be so serious if Spanish Judges demanded corroborative evidence to support co-defendants allegations, in line with the rulings of the Spanish Constitutional Court. However, in practice, they don't follow the precedents and take advantage of a legal loophole, because with the Law in your hand Judges have absolute freedom to judge the worth of a co-defendant statement. To a large extent, this has been the fight against political corruption in Spain in the last years.

b) The right to not tell the truth vs. the right to lie

Actually, the underlying problem is that there is a confusion in Spain regarding the defendant's right to not tell the truth and a presumed right to lie. It's true that as the defendant has the right to not tell the truth he can not commit perjury. But this doesn't mean (as almost everyone believes) that the defendant has the right to lie without limits. Such limits are very clear: he can not implicate third parties in the commission of a crime if it's not true. Otherwise, the defendant could commit defamation (Sections 205 and 208 of the Spanish Criminal Code) and/or false accusation (Section 456 of the Spanish Criminal Code). However, there is not any precedent in this line.

II. Possible solutions

It's convenient to reform the law. How?

- a) Demanding corroborative evidence to find someone guilty beyond any reasonable doubt in the event of incrimination by co-defendants. It's not a matter of quantity, but of quality, so it doesn't matter how many co-defendants implicate another.
- b) Punishing the defendant who lies in the line I suggested before. Actually, in February 2018, the new Spanish Attorney General warned the so-called repentants in corruption cases that false accusations without evidence involve defamation and it must not be "for free", so he called for legal reform (which in my opinion is not necessary) to punish this behaviour.

III. Conclusion

Plea bargains are there to serve Justice, not to subvert it, so they must be subject to clear constraints.