

Certainty, or Flexibility?

---the approaches to sentencing and sentencing reform in China

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I. Background

For a long time, sentencing disparity (imbalance) has been an outstanding problem in Chinese criminal justice.

In 1980s, researchers of a university law department had made a questionnaire survey about the sentencing standards. In the questionnaire, there are 150 criminal cases designed by the researchers. The respondents were required to put forward their own views on sentencing only according to the given facts and circumstances in each case. Nearly one thousand criminal justice personnel participated in the survey. The survey results show that for 70% of the judicial personnel, the positive and negative gap between the penalty they decided and the average penalty is generally not more than one year; but for 30% of the judicial personnel, the gap is large or too large, for example, in one case, the gap between the sentences decided by different “judges” appeared unexpectedly for up to 15 years!¹ Although the average penalty is not equal to the fair sentencing standard, it is really amazing that these criminal justice

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¹ See Su Huiyu etc., *Sentencing and the Computer*, Shanghai: Baijia Press, 1989, p.10.

personnel made such different decisions for the same case according to the same law, in the absence of any external interference or pressure.

Researchers and judiciaries have taken some positive efforts to explore the scientification of sentencing approaches since 1980s. Then some scholars carried out empirical research on sentencing balance problem in 1990s. Prof. Bai Jianjun made an empirical analysis on the relationships between 422 crimes and their punishments in criminal law and the relationships between the crimes and punishments of 1107 robbery cases in Lawyee Database since 2002, and probed into the causes of the imbalance and the countermeasures. According to his research, the proportion of sentencing imbalance (including too light, relatively light, relatively heavy, or too heavy) in total cases is 16.9%. Among them, the imbalance rate is higher in southwest area, up to 19.1%; the lower in the northeast area, 13.1%.² This study attracted more attention of the academic circles for the penalties of the specific crimes in criminal law and for the sentencing situation in judicial practice. The benchmark for sentencing, sentencing principles approaches to sentencing, sentencing procedures and other issues were heatedly discussed in the academic circles.

II. The Exploration of the Scientification of the Approaches to Sentencing in China

² Bai Jianjun, *An Empirical Study on the Balance between Crime and Punishment*, Beijing: Law Press, 2004, p.376.

Sentencing approach is an important issue. It is of great significance for achieving a balanced sentencing. For a long time in China, the approach to sentencing has been experience-based. The so-called experience-based sentencing approach, also known as the integrated sentencing approach, refers to when the judge hear the case, he(or she) roughly estimates the possible penalty for the offender within the range of the legal punishment, referring to the judicial experience; and then he(or she) considers various circumstances of sentences such as the heavier, the lighter, the mitigated circumstances, or exempt from punishment, and comprehensively assesses the final declaration of the penalty to the offender.³ As the most common sentencing approach, the experience-based sentencing approach has been used for a long time in China's judicial practice. And the evaluation of it shows two tendencies, positive and negative.

Objectively speaking, because of the complexity and diversity of the phenomenon of crimes in criminal cases, how to deal with specific cases can not be fully applied mechanically to a fixed pattern. The judges should make a detailed analysis of specific cases, according to the circumstances of the actual time and the local situation, and considering the circumstances of the cases; and then make a decision of the appropriate sentence. From theoretical aspect, the traditional experience-based sentencing approach appears to meet this need.

³ See Chen Xingliang, *The Ontology of Science of Criminal Law*, Beijing: Commercial Press, 2001, p.774.

Meanwhile, the provisions of China's criminal law on sentencing are general and vague, which also makes a comprehensive sentencing approach exist inevitably. For example, the stipulation of Article 61 of the existing Penal Code on the fundamental basis for sentencing is too broad, vague and difficult to grasp, and the judges have to play their initiative in order to achieve the proportionality of sentencing. Again, the standards of "heavier" and "lighter" in this article are vague, thus provide a space for the judges' individual wisdom.⁴ In addition, another important reason that the experience-based sentencing approach has been widely used is that it is simple in the procedure.

However, the defects of the experience-based sentencing approach revealed in years of judicial practice. The sentencing must be based on facts, the judge's discretion of the sentencing relied on the subjective estimation will inevitably be influenced by various factors such as their legal awareness, professional ability, experiences in life and work, personal likes and dislikes, etc. All of these may result in a subjective, arbitrary and contingent decision of sentencing. Meanwhile, the experience-based sentencing approach relies heavily on the judge's individual experience, lacking of a uniform standard for sentencing, and that results in sentencing imbalance. It happened that the offenders committing similar crimes in different regions were sentenced to totally

⁴ See Guo Lirong, *Research on Penal Policy*, Beijing: Chinese People's Public Security University Press, 2008, p.185.

different penalties. For example, for the cases of stealing about RMB 20,000, the offender can be sentenced to three years in prison in economically developed regions; however, in economically backward areas, the offender may be sentenced to 5-6 years in prison.⁵ Sometimes even in the same period and the same area, the natures of the crimes and the facts and circumstances of the crimes are basically the same, the results of the sentencing might differ significantly. In addition, experience-based sentencing approach is essentially "estimation" style (many people call it "patting-on-the-head" sentencing approach) and is not precise enough, therefore, sentencing imbalance is inevitable.

Given the defects of the traditional experience-based sentencing approach, China's scholars and judicial personnel have conducted an in-depth research on the approaches to sentencing since late 1980s. Reflecting on the traditional experience-based sentencing approach, they tried to find better and scientific approach to sentencing. Among their research, the most prominent are mathematical sentencing approach and computer sentencing approach.

Mathematical sentencing approach is to use mathematical formulas or mathematical models in sentencing. As for the specific approaches, there are different ideas, including the followings: (1) Using a mathematical model in sentencing. This sentencing approach is to

⁵ The criminal law research center of China University of Political Science and Law & Cultural and Education Section British Embassy Ed., Comparative study on the problems of sentencing in China and UK, Beijing: University of Political Science and Law Press, 2001, p.338.

decompose the crimes and the punishments, and to establish a "crime scale", a "punishment scale" and a "crime and punishment conversion table". And then find the appropriate points in the "conversion table," according to the scores obtained in "crime scale" and in "punishment scale". Finally, convert the score of the appropriate points into the corresponding penalties.⁶ (2) Using analytic hierarchy process (AHP) in sentencing. AHP is the improvements made on the basis of mathematical models. The difference is that the designers use the multi-level weighted analysis to quantify the harms to the society by the criminals' offences, and then derive by certain mathematical formulas, in order to make the sentencing decisions based on reliable scientific logic and precision arithmetic.⁷ (3) Using the evaluation of weighted average method in sentencing. This method is to use the weighted average method and fuzzy mathematics comprehensive evaluation, divide the circumstances of the crimes into several levels according to the species of the sentencing circumstances. And then establish certain grades of punishment corresponding to the subdivision. Finally, decide the appropriate penalty according to the principle of suiting punishment to crime.⁸

Computer sentencing approach, in short, is to use computers in

⁶ See Yu Wei Ed., *The General Theory on Sentencing*, Wuhan: Wuhan University Press, 1993, pp.15-117.

⁷ See Zheng Changji, Zheng Chuguang, *Analysis of the Quantitative Decision of the Penalties*, *Journal of Zhongnan University of Political Science and Law*, 1989, No.1.

⁸ See Gao Dongzhu, *On the Quantitative Method of Sentencing*, *Collection of National Criminal Law Master's Thesis (1981—1988)*, Beijing: Chinese People's Public Security University Press, 1989, pp.503-507.

sentencing. According to the research of Prof. Su Huiyu, the computer sentencing system includes four parts as the followings: (1) Knowledge acquisition system. Knowledge relevant to sentencing is converted and processed into an internal computer representation. (2) Knowledge base. It includes three parts: laws and regulations database, experience database and precedent database. All laws, regulations, legislative and judicial interpretation of laws and regulations are stored in laws and regulations database. The contents of experience database are the experience summarized by the judge and the papers written by the experts on how to apply the laws correctly in conviction and sentencing. The precedent database is composed of the existing precedents which are selected by the Supreme People's Court as the typical cases. (3) The network of reasoning and decision making. In this system, all the facts of the crimes and sentencing, as well as the experiences of the judges and experts on sentencing are summarized as ten million of such form of "If this happens, then how to do" expressed rules. When the judge inputs the information of the facts of the case into the system, the network, under a certain control strategy, will search the relevant knowledge, make reasoning and reach the conclusion. (4) Human-computer dialogue system.⁹ Prof. Zhao Tingguang simplifies the computer sentencing system into two parts: the computer knowledge base and reasoning system. He proposes to

⁹ See Su Huiyu etc., *Sentencing and the Computer*, Shanghai: Baijia Press, 1989, pp.136-137.

determine the "middle line" of the legal punishment of as the boundary in every specific provision, the "lighter" circumstances and the "heavier" circumstances are placed into different spaces of sentencing range, and then the judge can decide the sentence by moving up and down from the starting point—the "middle line".¹⁰

The research on mathematical sentencing approach or computer sentencing approach is undoubtedly of great significance for reducing sentencing imbalance. The scientification of sentencing approach is a goal of sentencing reform in China. But, no matter how advanced the sentencing approach is, the role of judicial personnel can not be denied. In fact, neither mathematical sentencing approach nor computer sentencing approach is separable from the judges' experiences. Even the quantification and assignment of the crimes and punishments is also built on the practical experiences of the judicial personnel. The main function of the scientific approach is to transform all these invisible experiences into a standardized operation. But we all know that the crimes are social activities committed by a variety of people, and it is impossible to accurately quantify these activities completely. Therefore, relying solely on experiences or solely on quantitative data is difficult to achieve the ideal and completely balanced sentencing. The sentencing standards can just be a relatively unified, minimizing the bias and closing to equilibrium

¹⁰ See Auxiliary Sentencing System Software developed by Prof. Zhao Tingguang.

as possible. This may be a "second best" but realistic option. ¹¹

III. Reform of Sentencing Approach in China: an Analysis on the Sentencing Guidelines¹²

China's sentencing reform is aimed at promoting a fair and scientific sentencing. The direct cause of China's sentencing standardization reform derives from the judicial practice. In some cases, the result of sentence appeared an imbalance of sentencing or sentencing injustice, which stirred up a controversy on whether the sentence was appropriate. In this context, some local courts took the lead in carrying out the sentencing standardization reform experiment. For example, in March 2003, the People's Court of Jiangyan City in Jiangsu Province issued a guideline for sentencing; in May 2004, the Higher People's Court of Jiangsu Province adopted a guideline on sentencing to guide the sentencing in Jiangsu Province. This reform experiment is affirmed by the Supreme People's Court. Thereafter, Zhejiang, Shandong, Jiangxi and other provinces have also carried out a standardized sentencing exploration.

In 2005, the Supreme People's Court of China established a research group on sentencing standardization, which was responsible for the investigation and research specialized on sentencing problem, and drafting the relevant normative documents based on the investigation and

¹¹ See Guo Lirong, *Research on Penal Policy*, Beijing: Chinese People's Public Security University Press, 2008, pp.192-193.

¹² In china, the standardization of sentencing includes two aspects, namely the substantial and the procedural. Due to space limitation, in this paper, I will mainly discuss the former.

research. Since June 1st, 2009, the Supreme People's Court has carried out the pilot work of sentencing normalization in more than 120 designated courts. In September 13th, 2010, the Supreme People's Court issued the "People's Court Sentencing Guidelines (for trial implementation)", and issued the "About Some Problems of Standardization of Sentencing Procedures (for trial implementation)" jointly with the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice. These two normative documents put into trial implementation in intermediate courts and lower courts across the country from October 1, 2010. After three years of trial, the overall effect is good. On September 23rd, 2013, the Supreme People's Court issued the "Sentencing Guidelines on Some Common Crimes", which put into implementation on January 1st, 2014.

Summing up the experiences in the judicial practice of sentencing reform, the "Sentencing Guidelines on Some Common Crimes" provides the principles of sentencing, the basic approaches to sentencing, the application of the common sentencing circumstances and sentencing of the common and frequently-happened offences.

"Sentencing Guidelines on Some Common Crimes" provides that sentencing should be carried out according to the following steps: Firstly, determine the starting point in the range of the corresponding statutory punishment, according to the basic constitution of the crime. Secondly,

based on the starting point, increase appropriate amount of the penalty to establish the benchmark punishment according to other criminal facts such as the amount of the crime, the frequency of the crime, the consequences of the crime, etc. Finally, adjust the benchmark punishment according to the circumstances of sentencing, considering the whole case, and determine the punishment for the offender according to the law.

In the "Sentencing Guidelines on Some Common Crimes", the common circumstances of sentencing are quantified and evaluated. Different sentence discounts or increase are set for different circumstances (see chart below).

Sentencing circumstances	Adjustment of the proportion of the benchmark punishment
14-16 years old offender	— 30-60%
16-18 years old offender	— 10-50%
Attempted offense	— 50%
Accessory criminal	— 20-50%; — more than 50% (for relatively minor crimes)
Surrender	— below 40%; — more than 40% or exempt from punishment (for relatively minor crimes)
General meritorious service	— 20%
Major meritorious service	— 20-50%
Confession	— below 20%
Plead guilty in court	— below 10%
Surrender ill-gotten gains or pay compensation	— below 30%
Victim forgiveness	— 20%
Recidivist	+ 10-40%
Having criminal record	+ below 10%
The victim is a minor, the elderly, the disabled, or a pregnant woman	+ below 20%

Committing the crime during a major disaster (such as looting in the earthquake stricken area)	+below 20%
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In addition, the "Sentencing Guidelines on Some Common Crimes" also provides sentencing guidelines for fifteen kinds of offences, such as the crime of causing traffic casualties, the crime of intentional injury, rape, unlawful detention, robbery, theft, fraud, etc.

To apply the guidelines correctly, the first and also the most important thing is to determine the "starting point" of sentencing. On how to determine the "starting point", the "Sentencing Guidelines on Some Common Crimes" provides that the starting point should be determined "in the range of the corresponding statutory punishment, according to the basic constitution of the crime." As for the fifteen kinds of common crimes, the Guidelines defined the starting point. Take the crime of intentional injury as example (see chart below).

the range of the statutory punishment (the Penal Code)	the circumstances (facts) of the crime (the Guidelines)	the starting point of sentencing (the Guidelines)
not more than 3 years of imprisonment, criminal detention, or control	Intentional injury causing one person slightly injured	not more than 2 years of imprisonment or criminal detention
3-10 years of imprisonment	Intentional injury causing one person serious injured	3-5 years of imprisonment
10-15 years of imprisonment, life imprisonment, or death	intentionally injure by particularly cruel means and cause one person seriously injured resulting in severely disabled (disability grade VI)	10-13 years of imprisonment (except the circumstances which the offender may be sentenced to life imprisonment or more severe punishment)

We can find that the starting point is determined within a certain

range of punishment (narrower than the range of statutory punishment). Obviously, on determining the benchmark punishment, the Guidelines hold the idea of a width, and not a point.¹³

IV. Discussion and Conclusion

From the view of the world, in the past few decades, more and more people devoted to the study of sentencing, and the standardization of sentencing is one of the main contents. The sentencing reform in China conforms to this worldwide trend. The standardization of sentencing in China includes two aspects, namely the substantial standardization and procedural standardization. In the process of the sentencing reform, American sentencing guidelines and the separation of conviction phase and sentencing phase becomes an object of imitation or referring to, naturally or half unconsciously.¹⁴ This is reflected in the two normative documents issued by the Supreme People's Court in 2010.

As for the approach to sentencing, certainty, or flexibility?--It is always confused for the criminal justice in every country. In most cases, the pendulum of sentencing always swings between certainty and flexibility because different values of the penalty influence the norms on sentencing. In China, the intention that the Supreme People's Court issued the "Sentencing Guidelines on Some Common Crimes" is trying to

¹³ See Xiong Qihong, Chinese Sentencing Reform: theory, the standard and experience, *The Jurist*, 2011, No.5.

¹⁴ See Xiong Qihong, Chinese Sentencing Reform: theory, the standard and experience, *The Jurist*, 2011, No.5.

find a reasonable balance between certainty and flexibility. Compared with the past, the Sentencing Guidelines provides a relatively clear and operational rule for sentencing. The "People's Court Annual Report (2010)" pointed out that more than 45,000 cases were heard in about 120 pilot courts in 2010, according to the statistics. For these cases, sentences are generally balanced; appeal and the rate of adjudge and remand declined; pleaded guilty in court, mediation and withdrawal, restitution of ill-gotten gains, and dropping of litigation increased significantly.¹⁵

As the actual effect on sentencing reform is concerned, the evaluation conclusions by the Supreme People's Court and by some scholars are not entirely consistent. Prof. Zuo Weimin argued that according to his empirical research, many judges of the pilot courts think the method of determining the benchmark punishment provided by the "People's Court Sentencing Guidelines (for trial implementation)" is not reasonable; however, it is easy to cause the repeated application of the circumstances of sentencing; the proportion of sentencing adjustment prescribed is not much reasonable, some are so large as to provide a new "legitimacy" for the abuse of judges' discretionary power.¹⁶

In addition, the Sentencing Guidelines also needs to be improved in many aspects. For example, how to determine the correct starting point of

¹⁵ See <http://www.court.gov.cn/qwfb/sfsj/201105/t20110525-100996.htm>, 5th July, 2011.

¹⁶ See Zuo Weimin, The Reform of Sentencing Procedure in China: misunderstanding and the right way- reflection based on comparison and empirical study, Chinese Journal of Law, 2010, No.4.

sentencing is still difficult for the judges in practice; besides the fifteen kinds of offences in the document, the starting points of sentencing other offences depend mainly on the discretion of the judges because there are no guidelines for them; even for the fifteen kinds of offences, the Sentencing Guidelines only provide the sentencing approach and rules for fixed-term imprisonment and criminal detention, while other types of penalties (such as the death penalty, life imprisonment, the supplementary punishments, etc.) are not involved; in corruption cases, sentencing imbalance is more prominent and more concerned by public, but the Sentencing Guideline adopted an evasive attitude.

The sentencing reform will continue to advance, and its practical effect need be assessed through extensive and in-depth empirical study. For example, a prominent feature of the "Sentencing Guidelines on Some Common Crimes" is digital and arithmetic. Whether it will be a problem that too much mechanical and lack of flexibility in practice; whether the numerical values of the Sentencing Guidelines are scientific and reasonable. All these issues are to be tested in judicial practice.