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*Reform of Chinese sentencing: snapshots from the PRC*

Sentencing procedures have been the site of some of the most innovative reforms in Chinese criminal justice. All over China, courts from local levels to provincial levels, and now even the Supreme People's Court are busy drafting rules, running pilot projects, and devising new procedures to streamline and rationalize the practice of sentencing. Judges and other legal professionals are tackling a widespread and serious problem—irrational and inconsistent sentencing—in a highly technocratic and comparatively scientific manner. This is an exciting series of developments, and forms the basis of my presentation this morning.

But before I begin talking about these developments, let me say a few words to provide some context. In a civil law country with communist trappings, sentencing practice in China deviates quite markedly from what many of you in this room observe and participate in on a daily basis. So I begin with an explanation of how Chinese judges actually sentence criminal defendants. I then highlight some problems and tensions in the current state of Chinese sentencing. I'll conclude by talking about some of these reform efforts by local and provincial courts, and focus on two in particular that have captured national and even international attention.

## **1. Procedure**

As a civil law country, China deploys a “unified” sentencing procedure. Judges determine decide both whether to convict the defendant, and how much to punish him, in the same setting. I will elaborate on the process momentarily, but from the beginning we must realize that there is no separate sentencing hearing in China, as is the case in most civil law countries. Rather, the separate sentencing hearing is a reflection of our common law heritage, and a vestige of our muted faith in the jury system.

Typically, a Chinese criminal trial unfolds in an hour, and comprises two phases. In the first phase, factual investigation, the court hears evidence from the prosecutor about the circumstances of the crime. The defendant will occasionally chime in, but only to fill in the narrative, not to set it. In the second phase, oral argument, the prosecutor and defense attorney will talk about guilt, possible punishment, whether their D deserves a suspended sentence, and so on. In current practice, discussion of sentencing, if it happens at all, happens in this second phase. The collegiate panel then adjourns, and meets privately to discuss the conviction and the sentence, and usually mails the decision to the D within 30 days. They will occasionally reconvene to pronounce the decision orally, though this happens infrequently.

In other words, the sentence is fashioned without meaningful input from prosecutor, defendant, or defense attorney. The parties can certainly make suggestions about an

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appropriate sentence during the second phase, but the court has still not found defendant guilty. And as a result, defense attorneys are often reluctant to talk about sentencing. Prosecutors, on the other hand, do not much concern themselves with sentencing, as this has traditionally been viewed as judicial territory.<sup>1</sup>

Consequently, critics have charged that sentencing amount to a “black box” in China. Opaque to the outside world, the sentencing procedure takes place without meaningful input from the defendant, his lawyer, or even the prosecutor. While this may be an efficient manner in which to dispose of criminal cases for the judge, unified sentencing does not behoove the defendant. Judges rarely discuss ways to individuate punishment for a particular defendant, and impose sentences without regard to defendant’s dangerousness, culpability, likeliness to reoffend, background circumstances and other factors that should be reflected in a judgment.

## 2. Critique

Scholars and practitioners have detected a wide array of problems with Chinese sentencing practices. We have already seen one of them: that sentencing takes place in a vacuum, without meaningful input from the parties. Other frequently cited criticisms are directed at the judges: that they are uneducated and overly political; that they spend insufficient time and effort thinking about the sentence; or that they are too often influenced by extra-legal factors – whether in the form of bribery, or instructions from the communist party if official interests are at stake. In the interests of time, I will narrow my remarks here to two such criticisms: the vagueness of the criminal law, and the lack of guidance on sentencing.

### Vagueness of Criminal Law

Like most civil law countries, China couches its crimes and punishments in a vast Criminal Code, divided into general principles and specific provisions. The latter section contains all the criminal offenses under Chinese law. Each article typically contains both the name of the offense, and applicable penalty for convicted offenders. While this sounds simple and straightforward in theory, it is not in practice.

Let’s take the example of the relatively simple crime of assault, or as it is known in the Chinese Code, intentional infliction of injury.

Article 234. Whoever intentionally inflicts injury upon another person shall be sentenced to fixed-term **imprisonment** of *not more than three years*, **criminal detention**, or **public surveillance**.

Whoever commits the crime mentioned in the preceding paragraph, thus causing severe injury to another person, shall be sentenced to fixed-term **imprisonment** of *not less than three years, but not more than ten years*; if he causes death to the person or, by resorting to especially cruel means, causes severe injury to the person, reducing the person to utter disability,

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<sup>1</sup> Li Keqin & Hu Jinyou, *Liangxing Chengxude Sifahua Gaige* [Judicialized Reform of Sentencing Procedures], 79 ZHONGGUO JIANCHAGUAN [THE CHINESE PROCURATORS] 54, 54 (2009).

he shall be sentenced to fixed-term **imprisonment** of *not less than ten years*, **life imprisonment** or **death**.

For this one crime, a judge could sentence someone to virtually any custodial punishment available in China. If the victim suffered a minor injury, or none at all, the defendant could get a couple months in prison, or even criminal detention, where he would split his time between a jail, and home. If the victim suffers fairly serious harm, the defendant could get 10 years in prison, a vastly more serious penalty than a term of criminal detention for essentially the same crime. Of course, this intermediate penalty would require significantly more damage to the victim, but it is not clear *how much*. What, exactly, is a serious injury? Finally, if the defendant disables the victim, and does so in a cruel manner, he will very likely face the death penalty.

With a broad panoply of sanctions available, judges must make a crucial decision with very little guidance about, for example, what “severe injury” is, or what constitutes “cruel means.” And even if a judge could differentiate severe injury or cruel means, he still faces a difficult choice. Does “more than ten years” mean eleven years, or forty-three? Does between three and ten years mean three or nine? The criminal code does not answer these difficult questions, and neither does subsequent legislation. Instead, judges have a pretty free hand both within the statutory ranges, and between the statutory ranges. In short, one of the most glaring problems of Chinese sentencing is the Criminal Law itself.

### **Insufficient Guidance**

The second problem, related to the first, is the lack of meaningful guidance to judges. Traditionally, Chinese criminal trials have focused on the issue of guilt, without much attention to the crafting of an appropriate sentence. Accordingly, judges have taken a relatively relaxed attitude toward this important part of the criminal process. As long as the sentence falls somewhere between the lower and upper limits of the applicable provision of the Criminal Law, trial courts judges can rest assured that their verdicts will not be upset on appeal. And Chinese trial court judges, even more than their American counterparts, dread reversal by the court of appeals, and face sanctions by their home court if the number of appeals exceeds a set number per year.

Though previous judgments would offer some guidance as to appropriate punishment, judges typically do not consult precedents to guide their sentencing. As a result, it is not uncommon for similar crimes to be punished differently. The ensuing disparity has, in some high profile cases, led to public outcry; the cumulative effect of such disparity is, of course, an erosion of public trust in the judiciary. Finally, and unlike judges in this country, Chinese judges do not typically explain the reasoning underlying the sentence. Defendants and prosecutors alike are often at a loss to puzzle through a judge’s thought process behind a particular decision, further sapping confidence in the sentencing judge.

The Supreme People’s Court is keenly aware of many of these problems, and has issued a number of what are called “judicial interpretations,” short statutory supplements to fill in

the tremendous gaps left in Chinese legislation. Consequently, judges can seek additional guidance in areas such as theft, environmental crimes, drug crimes, or other areas that the SPC has introduced additional guidance.

But for most crimes, judges rely simply on their own experience, or that of their peer judges, to determine an appropriate sentence. What is an appropriate punishment? A fine? Incarceration? A suspended sentence? If a fine, how much? If a prison term, for how long? If suspension, what conditions should be applied? Many Chinese judges answer these fundamental questions without thinking through the consequences of their

### **3. Reform**

At the local and provincial levels, courts throughout China are experimenting with a variety of techniques and procedures to enhance the rationality and fairness of sentencing. These experiments target many of the infirmities described above. Some have introduced presentence reports to increase the amount of information available to judges. Others have beefed up the oral argument phase of the trial, specifically calling for a sentencing debate, wherein the prosecutor and defense counsel have a chance to discuss punishment.

Two experiments in particular have garnered a significant amount of attention. Courts in Jiangsu province, just north of Shanghai, and Shandong province, just north of Jiangsu, have taken the lead in innovating sentencing reforms. Indeed, their efforts have even enticed the Supreme People's Court, which is now working with both courts to establish its own set of guidelines, which will likely be promulgated next year. I want to spend a couple of minutes describing the nature of those reforms.

But before doing so, I want to stress that these efforts are quite impressive. They involve years of research and experimentation, and are considered models for other courts in China to emulate. However much we hear about miscarriages of Chinese justice—and they are legion—that should not blind us to the impressive strides visible in certain areas. Chinese judges and scholars are keenly aware of the faults in the dispensation of criminal justice; a committed handful is committed to curing them systematically and rationally.

#### **Shandong**

The Zibo Intermediate People's Court has researched sentencing procedures back since 2003. At that time, the court launched one of China's first systematic studies of sentencing, analyzing nearly 7,000 criminal dispositions handed down in the city's 7 district courts between 2000 and 2002. The Court conducted field visits to the various courts in the city; and sent questionnaires to 47 judges in the city of Zibo.<sup>2</sup>

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<sup>2</sup> The questionnaires included a hypothetical fact pattern on which each judge was asked to impose a sentence. Most judges sentenced the hypothetical offender to one-year imprisonment, but a wide variety of other sentences also emerged: 3 years, 2 years, 1.5 years, half a year, and even criminal detention. A minority of judges suspended the offender's sentence, while the majority said they were unable to under Chinese criminal law. In other words, there was a pretty wide range of dispositions stemming from one fact pattern

Based on these results, the ZIPC has devised a number of legal documents to guide sentencing in lower courts, including factors for the 100-most common crimes, a new procedures, and negotiations between prosecutor and defendant. They also deployed computers in one of these regulations, which created a huge uproar. People mistakenly believed that computers, and not judges, were in charge of the delicate task of sentencing. In fact, the computer program merely assigned numerical weights to a series of sentencing factors. Judges still had to discern the mitigating and aggravating factors at stake in the case, and then input them into the program. The program itself would take a baseline crime, and add and subtract according to the factors selected and inputted by the judges. At the end, judges then had the opportunity to further increase or decrease the sentence by 6-months if they felt it was too lenient or too severe.

Unfortunately for scholars, these guidelines are not available for viewing. Relevant scholarship suggests that the procedures followed are similar in large part to the Jiangsu sentencing guidelines, to which I will turn right now.

## **Jiangsu**

Jiangsu Province became the first provincial level court to adopt sentencing guidelines back in May 2004. They are short, only 33 articles, and elaborate a procedure that is relatively easy to use. First, the guidelines call on judges to evaluate all facts that may impinge on the sentence – whether or not they specifically relate to the determination of guilt. Having ascertained all relevant information, judges can then proceed to sentencing.

First, judges are to determine a **sentencing baseline**, a touchstone to begin the process. If the provision calls for a range of punishments, say three to ten years, the baseline would be the median point, or 6.5 years. If the provision calls for different categories of punishment, the baseline would be the middle category. And if the provision calls for a fixed-term sentence of less than three years, the baseline will be one year.

Judges are then to determine relevant **sentencing factors**, that is, those aggravating or mitigating factors that differentiate it from others. These include things like physical characteristics of the defendant (juvenile, mental retardation, blind, deaf, etc.), his past criminal record, as well as specific attributes of the crime (self-defense, avoiding danger, amount of damage, number of victims and so on).

Finally, judges then subdivide a particular provision into **sentencing units**. As we have seen, provisions in the Criminal Law can be quite vast: less than 5 years, 3 to 10 years, and so on. The Jiangsu Guidelines subdivide these broad swathes into smaller sentencing units. For instance, when a provision calls for punishment of less than 5 years, the sentencing unit is one year. When a provision calls for punishment of less than 3 years, the corresponding unit is six months. Judges assign each mitigating or aggravating factor one unit, and alter the sentencing baseline accordingly.

The Jiangsu guidelines are remarkable for a number of reasons. They are not highly technical, as some other guidelines have been, and still let judges do their job. They

allow for judges to exercise discretion by moving up or down within a particular statutory provision, and do not mechanize the sentencing process. Judges still have to determine the applicable factors, and tweak the baseline sentence accordingly. And they do so rationally and within the confines of the Criminal Law.

Perhaps more important, they spell out a procedure by which judges may think through the case before them. What elements of the crime require punishment? What has defendant done to ameliorate, or alternatively *exacerbate*, the crime? A structure provides judges with a list of important ingredients needed to craft an appropriate sentence. Rather than rely on past cases, or less accurately go with their gut (as judges do everywhere), they now have a series of signposts to follow.

#### **4. Conclusion**

China is undergoing one of the broadest reform efforts in recent memory. In June, 2009, the Supreme People's Court announced that it would produce its own guidelines in the near future, and ordered 120 local courts throughout China to experiment with new its sentencing procedures. Though the procedures are not publicly available, they will likely include several of the developments discussed above: a step-by-step process, assigning numerical weights to various sentencing factors, and perhaps even dedicating some portion of the oral argument to sentencing. This raises the problem of imposing a sentence *before* conviction. But that is a contradiction the Chinese are willing to handle.