The Chinese Sentencing Guideline: A Primary Analysis

I. Background

Since the 1980s, three decades of reforms have led to remarkable transformations in China’s society and economy, and have also driven an extensive program of legal reform. To be fair, the progress in legal reform has been unprecedented in Chinese history. One of the most important aspects of this legal evolution is the reform of China’s criminal justice system. China has passed many criminal and procedural laws that have laid the foundations for a modern criminal justice system capable of protecting personal rights and interests.

Although China has made great progress in building a modern criminal justice system, the system still has some structural deficiencies. For example, judges and other legal professionals are facing a widespread and serious problem—irrational and inconsistent sentencing. In order to address these deficiencies in the current sentencing structure, a more systematic and transparent mechanism for providing sentencing guidance in the individual case is required. Thus, the Chinese government has already moved toward its aim by enforcing—or at least providing—a framework for consistent sentencing practices.

In October 2005, the Supreme People’s Court issued its Second Five-Year (2004–2008) Judicial Reform Plan. Among the primary goals of this reform, improving judicial procedure, ensuring judicial fairness and neutrality, and increasing judicial efficiency are regarded as the most important goals in China.1 In order to respect and protect human rights and insure justice and fairness, each criminal offender should be punished appropriately. Therefore, the adoption of a sentencing guideline became one of the major tasks of courts.

In June 2008, the Supreme People’s Court passed the “People’s courts sentencing guideline” and ordered some courts throughout China to experiment with new sentencing procedures.2 This guideline is an important effort to achieve uniformity of sentencing practice by reducing or eliminating disparity and inconsistency of approach to sentencing. This change is not merely a matter of fulfilling legitimate public expectation, but signifies the introduction of the principle of legality and rule-of-law values into sentencing in China.

II. Problems with the Current Sentencing Structure

A. Inadequate Judicial Guidance

The first problem with sentencing in China is the lack of meaningful guidance to judges. Indeed, under the present sentencing structure, the lack of a uniform set of standards to guide the courts has resulted in inconsistent sentencing.3 Moreover, current Chinese criminal law is quite indeterminate, providing little further guidance and thus failing to satisfy the needs of sentencing.

The current Chinese criminal code was adopted by the Second Session of the Fifth National People’s Congress on July 1, 1979, and substantially amended by the Fifth Session of the Eighth National People’s Congress on March 14, 1997. Like most civil law countries, China has a vast criminal code that includes all crimes and punishments. The code is divided into a general part and a specific part, the latter of which contains all the criminal offenses under Chinese law. Each article typically sets out the range of penalties for each type of crime and specifies maximum and minimum sentences—a situation that results in a very wide range of sentences.

With a broad panoply of sanctions available, judges are left with wide and unstructured discretion in determining the nature and duration of sentences. Such broad discretion not only is difficult to control but also allows greater scope for each individual judge’s prejudices to operate. Judges’ sentencing philosophies vary, often reflecting their political ideologies and demographic characteristics. These philosophies and characteristics lead to widely differing sentences in practice, and generate a sense of unfairness among offenders.

B. Lack of Transparency

Transparency is always desirable in sentencing because it makes sentencing outcomes more predictable to the parties in individual cases and more comprehensible to the general public. However, despite certain reforms and achievements, the current sentencing structure in China still lacks sufficient transparency for the promotion and protection of human rights. Generally speaking, the process of sentencing in the Chinese courts is relatively nontransparent when compared with that in Western countries.
Probably because of Chinese socialist legal tradition, judges can exercise their discretionary power in the absence of participation of other parties. As such, judges may take a relatively relaxed attitude toward sentencing decisions. Moreover, China does not have an independent procedure for sentencing; the court reaches a verdict and announces a sentence as part of the same trial proceeding. Judges rarely discuss ways to individuate punishment for a particular defendant, so sentencing usually takes place in a vacuum, without meaningful input from prosecutor, defendant, or defense lawyer.

This approach is not rational because the parties involved should certainly be able to make suggestions about an appropriate sentence during the sentencing process. Victims of crime also should have the opportunity to make an impact statement at sentencing. Although the current judge-controlled process may be an efficient way to dispose of criminal cases, it does not behoove the defendant: Defendants and even prosecutors are often at a loss to puzzle through the thought process behind a judge’s particular decision, further impairing confidence in the sentencing judge. Because of this state of affairs, some critics have charged that sentencing in China amounts to a black box.

C. Lack of Consistency
A lack of transparency also gives rise to complaints about a lack of consistency. Consistency, and avoiding undue disparity, is a central tenet of any sentencing system. Also, consistency is a fundamental principle of the criminal law and the sentencing process, as well as a basic element of fairness and reasonableness in any system of criminal justice. Inconsistency in sentencing thus is regarded as a badge of unfairness and unequal treatment under the law. As Warren Young has stated:

Sentencing is an inherently imprecise undertaking that requires a significant number of variables to be weighed up and assessed. Some variation from judge to judge and from court to court is therefore to be expected. However, it is simply unjust that offenders appearing before one judge or court should receive systematically more severe or more lenient sentences than equivalent offenders appearing before another judge or court.5

Consistency in sentencing demands that similar crimes committed in similar circumstances by offenders whose circumstances are similar should be treated in a like, or consistent, manner. In other words, sentencing is consistent when offenders committing similar offenses are punished with similar penalties by different judges, whether those judges sit in the same court or different courts. Consistency in sentencing is thus important not only to the offender but also to those directly affected by the crime.

Inconsistency in sentencing has been a problem in many jurisdictions. Without exception, China has the same problem. Traditionally, criminal trials in China have focused on the issue of guilt, without much attention to the crafting of an appropriate sentence. Therefore, sentencing practice operates mainly on a case-by-case basis in the criminal courts, with reference to the judges’ own experience, or that of their peer judges, to determine a sentence.

Judges typically do not consult precedents to guide their sentencing. However, sentencing is a complex process. An increasing range of factors must be taken into account before the appropriate sentence can be made—including possible aggravating and mitigating factors, background information on the offender, the impact on the victim, and the growing array of disposals available to judges. The process is so complicated that it is very difficult for judges to follow and navigate. Therefore, some obviously disparate sentencing practices have given rise to inconsistency in sentencing. One of the most obvious consequences of inconsistent sentencing is a loss of equality and fairness. Another consequence of inconsistency is a loss of public faith in and support for the criminal justice system.

D. Lack of Sentencing Information Systems
A fourth problem with the sentencing structure in China derives from lack of sentencing information systems. Sentencing information systems provide judges with a readily accessible source of information on existing sentencing practice that can be used to inform sentencing decision making and increase consistency within and between judges. The purpose of such a system is to orient rather than to constrain, to help judges toward consistency rather than seeking to impose it on them. Thus, information systems are less restrictive than a sentencing guideline.

Usually, a sentencing judge needs at least three kinds of information: (1) statistical data about the penalties (the ranges of normal punishment); (2) information about the typical cases (descriptions of normal offenses); and (3) the criteria that should be taken into account when the case at hand is compared with the normal (typical) offense—in other words, what aggravating or mitigating features would justify a departure from the normal sentence?26

However, to date, China does not have a sentencing information system. This lack is one obvious barrier to the achievement of consistent sentencing practices, because individual judges may not be aware of other judges’ practices and cannot consult precedents to guide their sentencing. Consequently, it is not uncommon for similar crimes to be punished differently in China. With an up-to-date sentencing information system to reference, sentencing judges could easily get a clear, detailed idea of sentencing precedents and statistics. Furthermore, such a database should include sentencing information from a wide range of locations and be widely accessible, in order to help with national consistency.

III. Frameworks of the Sentencing Guideline in China
The guideline for categories of crimes and offenses has both narrative and numerical aspects, although the guideline on sentencing principles is in purely narrative form.
The guideline subdivides the offense into many categories, requires many detailed factual findings, and then identifies levels of seriousness that attach a range of sentencing dispositions to each. The guideline places emphasis not only on quantifiable factors, such as monetary loss and drug quantity, but also on other considerations, such as the defendant’s role in the criminal conduct. Generally, the guideline provides judges with clear instructions on how the elements are to be weighted or scored in terms of their gravity.

The sentencing guideline may apply to all crimes that are punishable with certain time in prison, especially for some particular offenses, such as traffic accident crimes, intentional injury, robbery, theft, and drug crimes. Because the sentencing guideline attempts to define what should be treated as similar cases for sentencing purposes, it sets detailed criteria for crimes and assigns numerical weights to a series of sentencing factors. However, for crimes in which offenders may be sentenced to life in prison or the death penalty, judges retain full sentencing discretion. Sentences are subject to appellate review. Court decisions do not meet the appellate standards if the judgment in the first instance contains error in the determination of facts and the application of law, or if the punishment is inappropriately meted out.

The Chinese sentencing guideline has been devised, but has not been published. Presently, the guideline is still in an experimental stage and so has not yet been implemented nationwide. In June 2008, experiments on the adoption of the sentencing guideline began in Xiamen, Shenzhen, Beijing (Haidian district), Shanghai (Pudong district), Jiangyan (Jiangsu), NanChang, Xi’an (Pilin district), and in some other localities. In June 2009, experimenting courts extended to all provinces (an intermediate court and three basic courts of each province). In 2010, the guideline may be implemented by all courts formally.

The sentencing guideline first sets out the general principles of sentencing that judges must apply when determining appropriate penalties in each case, including the principle of legality, the principle of proportionality, and the principle of equality before the law. For example, one of the factors judges must consider when sentencing is proportionality: that is, ensuring that offenses of similar seriousness receive similar punishments and that offenses of different seriousness receive punishments correspondingly ranked in severity. In addition, the guideline requires that sentencing should be based on the current Chinese criminal policy of tempering justice with mercy. This policy is somewhat like the twin-track approach to sentencing used in Western countries—that is, reserving custody for people who commit serious crimes and punishing less serious offenders with community-based alternatives. Following this policy, some crimes (especially violent or sexual offenses) may be punished severely, whereas others are treated leniently.

The sentencing guideline also contains a model for structuring the sentencing decision. This model, usually referred to as the notion of normal punishments, seeks to reduce unwarranted disparity in sentencing by structuring the decision so that the courts can have a firm starting range for their decisions. Normal punishments (the starting range) are assessed based primarily on two factors: (1) the seriousness of harm and risk involved in the offense and (2) the culpability manifested in the offense.

The guideline requires judges to pay special attention to the uniformity of sentencing practice. Unless special reasons are at hand, the response to the offense should be a normal punishment—that is, the penal sanction imposed most frequently in similar cases. This sentencing model includes a step-by-step process: (1) the guideline calls on judges to evaluate all facts that may impinge on the sentence, (2) judges determine a normal punishment based on the basic facts of a crime, and (3) judges must consider all aggravating or mitigating factors to make a final decision. The guideline is not highly technical, so judges can follow it easily.

The guideline also has numerous adjustment factors and contains a list of specific aggravating and mitigating factors to consider when sentencing for specific offenses. Aggravating and mitigating factors are identified in a narrative form, which reflects the interpretative process that judges are expected to follow when passing sentence. Judges add or subtract levels of sentencing based on various factors, ranging from the use of a gun to an offender’s age and role in the crime. Aggravating factors, such as individual’s criminal history and recidivism, may result in a higher penalty. For example, a repeat offender may obtain a penalty increased by 10 percent to 40 percent. Mitigating factors, such as youth, diminished responsibility, being an accessory offender, attempt and discontinuance, confession, and offsetting guilt by merit are associated with more lenient sentencing (lower rates and length of prison sentencing). For example, an accessory offender may receive a sentence reduced by 30 percent to 70 percent.

In certain circumstances, judges may consider victims’ responsibility and interests before determining an appropriate sentence. If the offender was provoked by the victim, for example, or has shown remorse for the offense by making reparation for any injury, loss, or damage incurred, he may receive a reduced penalty. Usually, within-guideline sentences may receive greater deference than those that depart from the guideline. Of course, I do not mean to say that sentencing judges must completely follow the guideline. In practice, as adjustment factors, aggravating and mitigating factors appear to be manipulable parts of sentencing. However, judges are required to provide substantial and sufficient reasons for departure in order to improve transparency in sentencing.

IV. Discussion and Conclusion

The sentencing guideline serves as a template for structuring judicial discretion and, to ensure that all aspects of a case have been considered, provides a matrix of issues for
judges to negotiate. The guideline formulates the general standards and principles of sentencing and provides clear and practical advice, but it is not binding on judges and does not mechanize the sentencing process; rather, the guideline is an additional factor that judges must consider in exercising their sentencing discretion. The sentencing guideline generally allows for sentencing within a narrow range, but judges still can exercise quite wide discretion in determining the appropriate level of penalty in each particular case, by moving up or down within a particular statutory provision.

Obviously, the sentencing guideline has the potential to achieve positive consequences and can improve criminal sentencing in China in a variety of ways. First, the guideline can promote and improve consistency by setting up sentencing ranges that would be appropriate in the majority of cases falling within particular categories of crimes and offenses. All specified, weighted aggravating and mitigating factors should be taken into account when a case comes before a judge. As such, the guideline offers a clear outline for sentencing courts’ outcomes in individual cases.

Second, the guideline creates sentencing structures that make possible meaningful appellate review. All determinations made by judges are subject to appellate review. Highly structured, detailed guidelines make decisions more transparent by requiring judges to provide clear, explicit reasons for increasing or decreasing sentences from what is considered normal punishment for a particular offense. Sentencing facts fall into identifiable, recurring categories that higher courts can use to test sentences against the goals of the guideline. Stricter review of sentencing judges ensures that they will more likely defer to the guideline and avoid injecting bias into their sentencing discretion.

Third, the sentencing guideline enhances transparency and provides accused individuals with greater predictability about sentencing decisions. Such predictability might encourage more realistic pleas by accused individuals because it provides them with benchmarks to take into account when deciding whether to appeal. Sentences that clearly express reasons are less likely to be appealed.

Fourth, the sentencing guideline also sends out messages to victims, providing greater predictability regarding sentencing and thus perhaps creating more realistic expectations among them. Victims are entitled to an understanding of what sentence is likely to be imposed on the person who has perpetrated an offense against them. Such information will assist them in understanding the sentencing and enhance their perception of fairness.

Although the guideline in China was designed to reduce sentencing disparity under the current unguided, discretionary sentencing scheme, pressure to reform the sentencing system still exists. Some judges have criticized that imposing the guideline is too restrictive of judicial behavior, especially in the context of formal social responses to a wide range of human misconduct. On the one hand, they agree with the proposition that consistency in sentencing is an important value; on the other hand, they commit to the ideology of individualization and insist on the need for flexibility because each offender’s personality and background are different, “no two cases are alike,” and “each case has to be decided on its own facts.”

Therefore, guideline opponents maintain, each sentencing decision is a completely unique decision that must be made on its own merits.

Despite these criticisms, the proposed sentencing guideline reflects China’s effort to achieve consistency by ensuring that sentences are within the range for similar offenses. Although the guideline cannot ensure absolute consistency in sentencing—absolute consistency is, in practice, unattainable—it would potentially reduce the number of inconsistent sentences. The sentencing guideline is merely as a tool that would enhance sentencing consistency while preserving judicial discretion—in other words, legality values can be protected without abolishing judicial flexibility, thus maintaining the balance between sentencing consistency and the free exercise of judicial discretion.

Perhaps more important, the sentencing guideline provides judges with an approach that can help them check potential abuses of power and ensure fairness of sentencing.

Clearly, the sentencing guideline can make sentencing more consistent, transparent, and predictable, as well as make judges more accountable for their decisions. As such, the guideline can substantially achieve its goal of steering courts toward certain sentences for certain types of offenses and offenders. The sentencing guideline has brought a fundamental new orientation toward governing sentencing in China—an orientation in which the ideologies of legality and proportionality are retained and mandatory guideline will become the major framework for Chinese sentencing practices. Though some disparities may remain, this change will certainly bring about some positive outcomes, such as the avoidance of discrimination in sentencing on demographic grounds and the furtherance of fairness in sentencing. Moreover, this guideline reflects China’s explicit desire not only to promote consistency in sentencing but also to improve the quality of sentencing and meet international standards of justice and fairness.

Notes

3 See http://www.dc.state.fl.us/pub/sg_annual/9596/i_introl.html.