

# Exploration on Sentencing Deprisonization in China from the Perspective of Sentencing Justice

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**Abstract:** The sentencing deprisonization is one of contents to realize the deprisonization in China. The judge imposes a non-custodial method of criminal sanction on the offender in order to avoid excessive detainment, save judicial resources and ensure the human rights effectively. The sentencing justice is the eternal pursuit of the sentencing deprisonization. In the judicial practice, lenient sentencing is an important barrier to the sentencing deprisonization. The principle of proportionality is the key to realizing the sentencing deprisonization.

## 1. Introduction

The connotation of deprisonization is very broad. It refers to a development tendency of the criminal law to avoid taking criminal measures which shall deprive criminal suspects, defendants or offenders of their personal liberties during the criminal justice and law enforcement. The deprisonization includes the pretrial deprisonization before the criminal judgment, the sentencing deprisonization during the judge's judgment and the penalty execution deprisonization during the execution of punishment. The non-prison measures taken against criminal suspects, defendants or offenders can avoid the excessive detainment, save legal resources and ensure the human rights effectively. Therefore, the deprisonization is of great significance for the whole process of the rule of law.

The sentencing refers to a trial activity that the people's court on the premise of ascertaining the fact of a crime and determining the charge inflicts punishment against the defendant in accordance with the relevant provisions of the criminal law and all kinds of legal circumstances as well as discretionary circumstances such as defendants' ages, circumstances of crime, whether the defendants confess their crimes or render meritorious service, and their attitudes toward admission of guilt. The sentencing deprisonization refers to a way in which the judge applies the criminal sanction method of non-custodial sentences to offenders who should assume the criminal liability, and avoids depriving them of applying the punishment against liberty, especially the short-term penalty of depriving freedom.

The sentencing process in fact is a process to indicate the judge's wisdom. It includes many aspects such as the judge's cognitive level, logical thinking ability, moral level and character. Although the *Guidelines* indicates the scientific accuracy and objectivity through the complicated quantity computation, the judicial discretion is limited to a large extent and the judge's discretion is limited, which has a effect on the judge to give his or her subjective initiative into full play. As the picture drawn by the philosopher Leibniz to solve the disputes about the philosophical problems shows, the disputes emerged at the moment will not be like the disputes between two philosophers but like the disputes between two accountants. It is because that as long as they have pens at hand, they will sit down and talk to each other "Let's calculate.". It is enough.

The sentencing is an important content to realize the goal of criminal proceedings. The sentencing justice is the basic requirement for a law-based country. Article 5 of the criminal law in China has stipulated the principle of compatibility of crime, responsibility and punishment, which means the severity of punishment should be compatible with the crime committed by the criminal offenders and the criminal liability assumed by the criminal offenders. Article 61 of the criminal law in China has stipulated that when criminal offenders are inflicted punishment, the relevant provisions of this law should be complied with in accordance with the fact, the nature, the

circumstance and the degree of harm to the society of a crime. The sentencing should be made by strictly abiding by the legal procedures, which should present the fairness and justice.

## **2. Main Barrier to Sentencing deinstitutionalization — Lenient Sentencing**

The sentencing deinstitutionalization is a way of implementing the criminal policy for misdemeanors. Based on all kinds of factors such as the circumstances of a crime and penitence performance of the defendant of misdemeanor, the non-custodial penalty shall be given to such defendant in order to achieve the sentencing justice. In the judicial practice of China, the sentencing activity which goes against the justice concept of the sentencing can be seen commonly. It is mainly indicated in the lenient sentencing.

The lenient sentencing refers to a method that the penalty is based on the period for which the defendant is detained actually when a court is giving the sentencing. In case of the circumstance that the defendant shall be judged a term of penalty legally shorter than the actual term of penalty for which the defendant is detained actually, the people's court is willing to be lenient. The penalty that the applicable term of penalty is close to the term of penalty for which the defendant is detained should be adapted to circumstance so that the actual term of penalty for which the defendant is detained can be converted. During the sentencing, the judge doesn't determine the penalty of a defendant based on the subjective and objective factors such as the circumstances of a crime which may influence the sentencing, but based on the term of coercive measures of imprisonment.

In the judicial practice, if the term of detention of coercive measures is longer than the term of penalty judged by the court, it easily causes the defendant to appeal to the higher authorities for help or doubt the justice of criminal proceedings after the end of the lawsuit. In order to avoid such a negative consequence, the judge usually compromises when giving the sentencing. Based on the above worry, although the judge thinks the defendant should not have given a penalty or should have given a shorter term of penalty than the detention term, the judge still gives the same or similar judgment as or to the detention term. The crime which should have given a non-custodial penalty is sanctioned by applying the custodial penalty instead. The lenient sentencing goes against the judge's neutral and just spirit of law granted by the law and impairs the defendant's lawsuit right.

In accordance with the provisions of Article 7 of the criminal law in China, the people's court, people's procuratorate and public security organs should take respective responsibilities, cooperate with each other and restrict each other in case of a criminal proceedings in order to ensure that the law is enforced accurately and effectively. However, in the judicial practice, the people's court, people's procuratorate and public security organs neglect the mutual restriction but highlight the cooperation. The lenient sentencing is an act done by the court to accommodate and compromise the unreasonable investigation and detention term and indulge the competent authority to abuse the detention.

In China, the severe lenient sentencing is mainly resulted from the fact that the judge's discretion is too broad. The term of penalty stipulated by many terms in the criminal law of China is so flexible that it provides a legal environment for the lenient sentencing. Within the sentencing scope stipulated by the law, the process of exercising the discretion is the process of the judge's free evaluation of evidence. No unjust trace can be found in the lenient sentencing on the surface and the sentencing given by the judge is also within the limit stipulated by the law. However, in fact, the judge doesn't judge the defendant's penalty or the term of penalty by completely complying with the fairness and justice as required by the legal profession during his or her free evaluation of evidence.

The lenient sentencing is inconsistent with the criminal lawsuit purpose to protect the defendant's human rights. It makes the defendant, who should have given a lighter penalty, assume a heavier criminal responsibility. The judge is influenced by the long investigation and detention terms when exercising the discretion. The leniency and compromise go against the judge's just and independent legal responsibility, which results in the unfair sentencing.

### 3. Key of Sentencing deprivatization — Principle of Proportionality

During the sentencing, if the non-custodial penalty can be applicable, the custodial penalty shall not be applied in order to avoid infringing the human rights due to excessive application of the custodial penalty and causing the cross infection of the defendant during the detainment. Therefore, the principle of proportionality shall be abided by during the sentencing.

The principle of proportionality is an important principle of modern law-based countries. It is of great significance to prevent the public power from being abused and protect the human rights. The idea about the principle of proportionality originates in the United Kingdom. In 1215, the *Great Charter of Liberties* in UK stipulated that no one should be given a heavy punishment due to a light crime. After the victory of British bourgeois revolution, the principle of proportionality gradually becomes mature and becomes the basic principle of the constitutional law field. It plays an important role in guiding the allocation of the rights and the restriction of the powers. In the criminal proceedings, it is especially necessary to introduce the principle of proportionality as the guiding principle of the criminal proceedings in order to achieve the double purposes to punish the crime and protect the human rights by means of the criminal proceedings and keep the balance between the national public power and the citizens' private power. The principle of proportionality as a legal principle "doesn't come from the specific decision made by some legislative bodies or courts but comes from a kind of occupational and public legitimate awareness formed in a long time".

The principle of proportionality means that the state organs should take the public interests and the rights and interests of the counterpart when exercising the public power. When the rights and interests of the counterpart may be infringed in order to achieve the public interests, the state organs should choose the least injurious means to restrict and deprive citizens of their rights and interests as much as possible. The state organs should try to reduce the damage to the minimum extent on the premise of realizing the goal of public interests. Besides, the state organs are also required not to surpass the proportionality pursued by the state organs during the interference in citizens' private rights when exercising the public power.

The principle of proportionality together with the principle of a legally prescribed punishment for a specified crime, the principle of compatibility of crime, responsibility and punishment and the principle of equality before the criminal law stipulated in the criminal law of China all indicate the limitation to the public power. However, the principle of proportionality can't be the same as the basic principle of the criminal laws. If it is seen from the whole perspective of criminal law system, the principle of proportionality, as the basic principle of constitutional law fields, can not only supplement the weakness of basic principles of the criminal law resulted from the exercise of the criminal law, but also provide an effective remedy approach for the criminal legislation and criminal justice which violate the basic principles of the criminal law.

For example, after Xu Ting's case happened, in accordance with the provisions of Article 264 in the criminal law of China, "where there is a theft of public or private properties in a large amount or with other especially severe circumstances, the party involved shall be given a ten-year above fixed-time imprisonment or life imprisonment and fined or deprived of properties.", if Xu Ting's crime were determined and sentenced according to this article of law, it may lead to an extremely severe penalty. Therefore, in accordance with the provisions of Article 63 in the criminal law of China, "although the criminal offender doesn't fit the circumstance to mitigate the punishment as stipulated in this law, however, in accordance with the special circumstance of the case, the penalty under the statutory sentence may also be given with the approval of the Supreme People's Court.", Xu Ting was finally given 4-year fixed-term imprisonment because of the crime of theft.

The case of Xu Ting is representative. In accordance with the details of this case, it is improper to evaluate it by applying the basic principles of the criminal law. In fact, the reason why this case aroused huge disputes is that the allocation proportion of the relationship between the crime and the penalty stipulated in articles of the criminal law is unbalanced. A lighter penalty should have been applied to punish a criminal, but a heavier penalty is inevitably applied actually, which violates the principle of modesty of the criminal law. Therefore, it is feasible to adopt the principle of

proportionality in the constitutional sense to solve something improper during the criminal legislation and the judicial process. It is also the important reason why the *German Fundamental Law* not only stipulates the principle of a legally prescribed punishment for a specified crime, but also confirms the principle of proportionality.

The principle of proportionality must be abided by in order to achieve the sentencing justice during the sentencing deprivatization. The essence of the rule of law implied in the principle of proportionality can guide the enforcement of the law and avoid neglecting the restriction but highlighting the cooperation among the power organs, which may lead to the increasing emergence of infringing the human rights of the criminal suspects and the accused.

#### **4. Conclusion**

With the progress of the society, the purpose of the criminal law has experienced two stages in general. The first stage regards the punishment of the crime as the main purpose of the criminal proceedings. The second stage regards both the punishment of the crime and the protection of the human rights as the purpose of the criminal proceedings. During the criminal proceedings, China continues to improve the criminal suspects' and the defendants' basic rights such as personal liberties, property right and privacy right. Protecting the human rights is considered as the important lawsuit purpose when punishing the crime in order to avoid invading and harassing national public power against the private right. The conflict between the protection of public interest and the protection of the criminal suspects' and the defendants' basic rights always can be seen during the criminal proceedings when the criminal fact is investigated and the crime is punished. At this moment, it is essential to restrict the public power by applying the strict legal principle, which can effectively protect the human rights and avoid the wrongful convictions.

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