

Comparison of Sentencing Systems in Criminal Laws between China and Germany

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Abstract

In my work, I first explain the terms “criminal law” and “sentencing”. Then I describe the process of sentencing and compare the various roles that play in sentencing. This enables me to analyze which reasons are responsible for the difference. With the results, I try to figure out the problems and give my suggestions. In the end, I can guess how the sentencing system might develop in the future.

Keywords

Sentencing; Based on Facts; Take the Law as the Criterion; Light Punishment.

1. Introduction

There is an opinion in the history of China: when a state is rebuilt, a tolerant criminal law is applied. If a state has existed for a long time and in peace, relatively stricter criminal law is applied. When the government of a state is always in disarray and civil wars occur, a strict criminal justice system must be implemented. [1]

It seems that criminal law is an effective means for the government to determine whether the social order is normal and the government can direct the policy of a state according to this state of affairs.

Criminal law also plays an important role in everyday life. Social morality dictates how to behave in different situations, for example at home, at work, in the market, etc. But when a crime occurs, social morality cannot protect the interests of the citizen. Then the criminal law comes into force. It guarantees the normal in society by punishing the illegal.

As a coherent part of criminal law, sentencing combines the after with the before. This means that the police should not only arrest the perpetrators, but also punish the perpetrators in a legal manner. The perpetrators should not be sent directly to prison without having their crimes judged.

Nowadays, still a few Chinese people think that criminal law is something negative or that it does not correspond to the reality of their lives. I want to show through my work that criminal law is fair and determinative for our lives. In the process of sentencing, everyone can feel the security, equality and tolerance.

Although China's sentencing system has improved a lot in the past thousand years, there are still numerous problems to be solved in modern times. With the comparison to the sentencing system in Germany, I would like to compare which inadequacies are hidden in these systems and which measures can be used to solve the problems.

2. Criminal Law

2.1. Concepts

In Germany, a criminal law is a law that orders a legal consequence from the area of criminal law. [2]

The criminal law in China is a law that defines crimes, criminal responsibilities and penalties. [3]

In order to ensure the political rule of the class and the economic interests of all classes, the ruling class has regulated what acts are criminal and should be held liable and what kind of criminal prosecution should be suspected. [4]

It seems that there are big differences between the criminal laws of Germany and China, as many criminal law rules were introduced in China earlier. And that also shows that despite different cultures, people can have same view on essential problems.

2.2. The Position of the Sentencing in the Criminal Law

According to Xi Jinping, criminal law has four parts, legislation, justice, enforcement and compliance. Sentencing is an important step between justice and enforcement. If the police arrest someone according to the criminal rules and accuse him of his crime, it should be clear to him whether he is committing a crime, what crime or what types of crime he is committing, whether he deserves a punishment, what punishment should be imposed on him, and how severe it is should be punishment. Sentencing works to answer and resolve these types of questions. With the result of the sentencing one is punished or released without guilt. The process of sentencing is clear, orderly and open and can convince everyone.

Sentencing is also a transition from theory to practice that links the criminal rules with the punishments.

Without sentencing, the penalty rules would be just useless letters on a sheet of paper. Without the sentencing, the enforcement would have no theoretical basis. In summary, one can say that the sentencing should not be disregarded.

3. The Explanation of the Sentencing

3.1. Concepts

In China, sentencing is a process in which the judge judges whether the offender should be given a sentence and what kind of sentence the offender deserves.

The sentencing in Germany serves as a guilt-appropriate punishment. The court weighs up the circumstances that speak for and against the perpetrator against each other in order to fill in the scope of punishment and to determine a certain punishment, the sentence. [5]

3.2. The Changes in Sentencing in the History of China

3.2.1. The Trend

Over the past 4,000 years, sentencing rules have evolved a lot. Today's sentencing system is more detailed, more detailed, clearer and more complete, and the process is at the same time more public, fairer and stricter.

In Marx's view, the law is produced when the land arises. China's criminal law originated in the first dynasty in the history of China, the Xia dynasty. At that time, the penal rules mostly played an important role as orders from the ruler and superstition in the determination of sentences. [6]

After that, the penalty addition system made two advances: in the spring and autumn period, the law was first published. Since then, sentencing has been based on certain rules and therefore the law is not an abused tool by the ruling class. From the end of the Qing Dynasty, the last dynasty, the traditional Chinese legal system gradually declined due to the wars. Many modern legal rules were introduced and had a colossal influence on the sentencing of China at that time.

2100 years BC In the Xia and Shang dynasties, sentencing was combined with religious belief. One opinion was "Only the one, who committed a crime, will be punished, and only the

emperor's words should be followed as the law.”[7] It means that, only the ruler has the right to judge and punish a crime according to God's instruction.

Compared to the sentencing system in the Xia and Shang Dynasties, the system in the Western Zhou Dynasty is on a new level. Zhou Gong made the ritual law for the first time, and so importantly called it a criminal law. Many modern sentencing rules have been revised. For example, “Although the elderly and children have committed crimes, they will not be punished” [8],” Sici are in charge of three interrogations, three forgiveness, and three pardons to assist Dasikou in hearing the lawsuit...There are three kinds of people who should be forgiven, one is the person who kills others by mistake because he reads the wrong person, the second is the person who kills others by mistake because of his carelessness, and the third is the person who kills others by mistake because he forgets someone somewhere” [9],” If there is a pardon based on the suspected case of Wuxing, and if there is a pardon based on the suspected case of Wufa, a detailed investigation must be conducted”[10],” Eight kinds of criminal law are used to determine the mitigation, and then the penalty is attached: one is the law against the king's relatives, the other is the old law against the king, and the third is the law against honest officials, the fourth law is the law to discuss crimes for the righteous ones, the fifth is the law for those who have made great contributions, the sixth is the law for those who are distinguished, the seventh is the law for the industrious state affairs, and the eighth is for guests.”[11] These sentences show that the criminal law protects the young and the elderly from severe punishments, distinguishes guilt from intent, and gives more attention to the question of whether or not one is committing a crime. But the interests of the ruling class were safeguarded by the so-called Bapi system, because in this it is ordered that people with a special social position, for example the friends of a ruler, should be punished more easily.

After the Western Zhou Dynasty came the spring and autumn periods. It was during this period that the law was published for the first time. This activity of publishing and disseminating codified law was a theoretical basis for the first great unified dynasty, namely the Qin.

In order to control the great land of China forever, the first emperor implemented a strict law in the Qin area. The previously used legal rules have been retained and some new rules have been added to the new law. For example, the new rules were” Five people robbed together, if the stolen goods were more than one Qian, the left foot should be cut off, sentenced to ink and punished with Chengdan. When less than five people robbed together, if the stolen goods were stolen more than six hundred and sixty Qian, they should be sentenced to ink, cut off the nose and be punished with Chengdan; if the amount of money stolen is less than six hundred and sixty Qian but more than two hundred and twenty Qian, they should be sentenced to ink and punished with Chengdan; if the amount of money is less than two hundred and twenty yuan and more than one Qian, they shall be exiled.”[12] With these rules, terms such as “common crime”, “repeat offense”, “devotion” appeared on the stage of history for the first time.

In the next Han dynasties, the Wei, Jin, and the North and South Dynasties, the penalty system changed little.

To make the sentencing process more stringent, a new trial system of the death penalty has been created. Its content was “The minister needs to ask the emperor three times before deciding whether to impose the death penalty on the prisoner.”[13] That is, if one has been sentenced to the death penalty, his crime should be reviewed three times.

In the Tang Dynasty, a new rule was made especially for foreigners as a result of the booming trade. A rule decreed that those who quarreled from different countries should be punished under the criminal law of China.

From the Song Dynasty to the Yuan to the Qing Dynasty, there has been less change in the area of sentencing. But the rules were explained more and more clearly and in more detail.

From the end of the Qing Dynasty to the founding of the new China (1840-1949), war raged in this country. Modern legal rules were introduced and, together with some of the remaining Chinese legal rules, formed a new law that the Chinese government still uses today.

The traditional Chinese legal system no longer exists; today's Chinese legal system is part of Civil Law System.

3.2.2. The Background

The political system always has a decisive influence on the legal system. The development of the Chinese legal system goes through four periods - the slavery period, the feudal period, a brief period of capitalism and the socialist period. In the slavery era, the legal system was relatively backward. The sentencing was so irrelevant that the researchers can hardly find any traces of it. And it has always been associated with strong religious undertones. In the feudal period it was clearer and no more word of mouth, but it was recorded in writing and published. In the short period of capitalism, it became more modern with the introduction of criminal law. Today it is perfect in the socialist period.

The will of the ruling class can sometimes determine the severity of the sentence. If the rulers of a country care about people's lives, look after people's interests, and emphasize social fairness, then the country's penal system must be moderate and powerful. On the other hand, if the ruling class only looks after its own interests and ignores the wants and demands of the popular masses, the country's penalty system must be chaotic and unreasonable.

Marx says, "Die Basis ist die ökonomische Struktur der Gesellschaft... Über der Basis jeder Gesellschaft erhebt sich der Überbau. Der Überbau ist auch das System der ideologischen Verhältnisse, das durch die Basis entscheidend bestimmt wird, diese widerspiegelt und auf sie zurückwirkt..."[14] As part of the so-called superstructure, the change in the criminal law system is determined by economic development. These are the objective laws of historical development.

Culture affects transformation, especially in ancient China. Confucianism dominated the Chinese idea for the past 2000 years, so sentencing was always combined with ritual. But in the Qin Dynasty Taoism played a dominant role and the criminal law was relatively more important. Because of the wars from 1840 to 1949, the Chinese criminal law system changed towards Civil Law System. It started to tend towards modernization.

3.3. Basic Rules of Today's Sentencing

The sentencing is one of the kernels of criminal negotiations and should be carried out according to certain principles. Article 61 of the criminal law lays down the general principle of sentencing: "Wenn das Gericht über die Strafe entscheidet, sollen sie nach den einschlägigen Bestimmungen des Gesetzes zu den relevanten Tatsachen, den Umständen und dem Grad des Schadens für die Gesellschaft in Übereinstimmung passen."[15]

3.3.1. The Evidence Must be based on Facts

Without a crime one would not be punished. In order to ensure the punishment of the criminals, the police should first investigate the crime. Then the court combines the offense with criminal law rules and assesses which offense or offenses criminals are committing. When considering the severity of the punishment, the court should take into account other factors, e.g. the offender's motives, the consequences of the act, etc. Finally, a decisive factor is the degree of harm to society.

3.3.2. The Law Must Serve as a Guideline

Chinese criminal law has established a statutory penalty for the nature of the crime, what specific penalty can be applied, and how the penalty should be applied. Therefore, the conviction should be based on the law and based on discretion.

4. Criminal Law Rules and Unwritten Factors that May be Considered

4.1. Legal Sanction

4.1.1. Rules in the General Provisions

In China, the crime-specific identities of the criminals, the circumstances of the offense and a penalty system are established.

These terms are not listed in the German criminal law, but only the subjective factors.

4.1.2. The Sub-rules in Criminal Law

In China, the crime-specific identities of the criminals, the circumstances of the offense and a penalty system have been established.

These terms are not listed in the German criminal law, but only the subjective factors.

4.2. Discretionary Sentencing

The discretionary sentencing is the situation with which the court can grasp the constitutive elements of crime, the social harmfulness of the crime and the subjective malevolence of the perpetrator.

4.2.1. Motives of the Perpetrator (Goals and Motives)

Criminal motives in China refer to the internal causes or ideological activities that encourage the criminal to commit a crime.[16]

The basic principles of sentencing are laid down in the German criminal law: "Bei der Zumessung wägt das Gericht die Umstände, die für und gegen den Täter sprechen, gegeneinander ab. Dabei kommen namentlich in Betracht: die Beweggründe und die Ziele des Täters, besonders auch rassistische, fremdenfeindliche oder sonstige menschenverachtende... "[17]

For example, if one kills the other on purpose, he should be sentenced to death, life imprisonment or at least ten years' limited imprisonment. But if you commit the same offense without intent, the sentence is lighter, usually three to seven years in prison.[18]

4.2.2. The Way of Inspection

This is also a decisive factor in sentencing and mentioned in the criminal law of China and Germany.

For example: Killing a person with particularly cruel means is more harmful than murder by general means and shows that the subjective malicious intensity of the perpetrator is deeper and one should be punished more severely.

4.2.3. Post-criminal Performance

Punishment is not only a means of punishing the criminals and making the criminals bear the consequences of the crime, it is also a target and an opportunity for criminals to repent of their mistakes and improve.

In China, if you behave well after the crime before being noticed by the police, e.g. having a guilty conscience or taking corrective measures in good time, you will be sentenced to a lighter sentence in court. "For private prosecution criminal cases, it is necessary to convey as much as possible in order to promote reconciliation. If, after the work of the judiciary, the defendant pleads guilty and repented, compensates the victim for the loss, gets the victim's understanding and thus reaches a settlement agreement, the prosecutors can withdraw the suit or the defendant is given a lighter or impunity-free sentence . "[19]

The same rule also exists in the German criminal law. " Hat der Täter: 1. in dem Bemühen, einen Ausgleich mit dem Verletzten zu erreichen (Täter-Opfer-Ausgleich), seine Tat ganz oder zum überwiegenden Teil wiedergutmacht oder deren Wiedergutmachung ernsthaft erstrebt oder; 2. in einem Fall, in welchem die Schadenswiedergutmachung von ihm erhebliche persönliche

Leistungen oder persönlichen Verzicht erfordert hat, das Opfer ganz oder zum überwiegenden Teil entschädigt, so kann das Gericht die Strafe nach § 49 Abs. 1 mildern oder, wenn keine höhere Strafe als Freiheitsstrafe bis zu einem Jahr oder Geldstrafe bis zu dreihundertsechzig Tagessätzen verwirkt ist, von Strafe absehen." [20]

4.2.4. The Consequences of the Act

This term is easy to understand. The consequences are a key factor when the court judges the gravity of a crime, both in Germany and China's criminal law.

In the German criminal law, it is written, "Bei der Zumessung wägt das Gericht die Umstände, die für und gegen den Täter sprechen, gegeneinander ab. Dabei kommen namentlich in Betracht: ...die Art der Ausführung und die verschuldeten Auswirkungen der Tat..." [21]

In China, the punishment for an offense is sometimes divided into many levels. For example, is intentional homicide. Our criminal law stipulates, "If you willfully murder someone else, you will be sentenced to the death penalty, life imprisonment or imprisonment for more than 10 years, if the circumstances are relatively mild you will be sentenced to three to ten years imprisonment." [22]

4.2.5. The Past Life of the Perpetrator

The past life of the offender is not important in either the judgment or conviction, but in some situations the court may still take it into account.

If the perpetrator consistently adheres to the law and performs well, then it is a question of someone with no criminal record or an occasional offender, so the offense should be easier. Consistently bad behavior by the perpetrator and even having a criminal record suggests that the perpetrator's personal risk and recidivism are more likely, and consequently the perpetrator should generally be sentenced to harsher sentences.

In the criminal laws of China and Germany there are provisions on a high level of punishment for a criminal record, which also reflects the subjective malevolence of the perpetrator after repeated offenses.

4.2.6. The Victim's Identity

In Germany, this term is not considered a criterion, but for people who have special citizenship, there is special law, e.g. the rules in BGB, which protect the rights of minors, and MuSchG.

For the weak sections of the population, e.g. the elderly, young, pregnant women, the disabled, there are corresponding rules in China's criminal law. And the court takes into account the victim's citizenship when determining the criminal's punishment, especially if the victim belongs to the aforementioned weak social classes.

4.2.7. Crime Scene and Time of the Crime (China)

These two factors are seen to a lesser extent in China's criminal law. Sometimes, at a certain time or in a certain place, an offense could make a more intense social influence.

For example, if theft is committed during earthquake relief, the consequences of the crime are of course more serious than usual and the punishment becomes relatively harsher at the same time.

5. The Process of Sentencing

Professor Dr. Bernd-Dieter Meier divided the sentencing process into seven phases [23]: (The sentencing process in China also works like this, but such a clear and understandable process is not yet summarized in China.) In this part, the theories that were discussed in the last part were raised, brought into practice.

1. Bestimmung der Strafzwecke
2. Ermittlung des gesetzlichen Strafrahmens
3. Ermittlung der relevanten Strafzumessungstatsachen
4. Festlegung der Bewertungsrichtung der Strafzumessungstatsachen
5. Gewichtung und Abwägung der Strafzumessungstatsachen
6. „Umwertung“ des Abwägungsergebnisses durch Einordnung des Falls in den ermittelten Strafrahmen
7. Abschließende Gesamtbetrachtung

Figure 1. The seven stages of sentencing[24]

5.1. Determination of the Purposes of Punishment

“Zunächst müssen die Strafzwecke bestimmt werden, d.h. es muss festgelegt werden, welche Ziele mit der Strafe überhaupt erreicht werden sollen. Erst wenn man sich darüber im Klaren ist, warum gestraft werden soll, stehen die maßgeblichen Leitlinien zur Verfügung, auf die die Strafe hin ausgerichtet werden kann. In der Sache ist die Frage auf der Grundlage von § 46 Abs. 1 StGB im Sinne der präventiven Vereinigungstheorie zu beantworten.”[25]

It is already clear that the answer is the perpetrator's fault.[26] And it is also stipulated in the German criminal law, “Die Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, sind zu berücksichtigen.”[27]

Getting sent to prison usually means that the criminals will become estranged from society for a long time. In this rapidly developing society, everything can change dramatically in seconds, even a long time. It therefore seems difficult that the prisoners can still adapt to the new society. For example, some smartphones cannot be used. They also lack the knowledge they need when applying for a job, and worst of all, they are already unable to exist. Without income, they can only earn their livelihood, or become beggars, or intentionally commit an offense to go to prison because they still have enough food and a place to stay in prison. After several years in prison, some criminals no longer have full families or are too old to remarry. People in some places are very resistant or even unkind to people who commit crimes. One person arrested after he was released said, “I really didn't want to commit any more crime under the prison, but it appears that I have been locked in prison forever. Everyone looks at me differently. Nobody wants to accept me.”[28]

The government should pay more attention to the punishment. After all, the goal of punishment is to avoid crime and preserve the stability of society rather than to produce criminals.

5.2. Determination of the Legal Penalties

“Sodann muss der gesetzliche Strafrahmen ermittelt werden, der im zu entscheidenden Fall zur Verfügung steht. Der Strafrahmen legt die Eckpunkte fest, innerhalb derer die zu verhängende Strafe gefunden werden muss. Diese Phase der Strafzumessung kann im Einzelfall mit Schwierigkeiten verbunden sein, da der Gesetzgeber im Hinblick auf mögliche Besonderheiten des Delikts und des Täterhandelns eine Vielzahl von Ansatzpunkten für Strafrahmenverschiebungen, nach unten“ oder „oben“ zur Verfügung stellt. Eine praktisch besondere Bedeutung kommt in diesem Zusammenhang den Konkurrenzregeln (§§ 52 ff. StGB) zu.”[29]

A corresponding principle in China's criminal law is called "Legal principle of crime and punishment". This means that if the law expressly provides for a criminal offense, the criminal

will be judged and sentenced according to the law, if the law does not explicitly specify a criminal offense, the criminal may not be convicted.[30]

Another explanation is that crimes and punishments must be specifically provided for in advance by law, and judges must not be arbitrary. What kind of behavior is against criminal law and what the legal consequences of crimes are, substantive provisions must be made. Criminal law should be clear and precise and not vague or ambiguous.[31]

This principle comes from the “separation of powers” by the English philosopher John Locke and the French baron Montesquieu and “the theory of psychological coercion” by the German legal scholar Paul Johann Anselm Ritter von Feuerbach.

In his state-theoretical work *De l'esprit des lois/Vom Geist der Gesetze*, Montesquieu established the principle of the separation of powers between the legislature, judiciary and executive. Locke and Montesquieu did not come to their findings on the basis of theoretical considerations, but rather through an analysis of the existing British and British state organs and their relationship to one another. Montesquieu believes that in order to protect the freedom of citizens, the legislative, executive and judicial branches must be exercised by different state organs so that they can be mutually restricted and balanced. The law must clearly define crimes and punishments, thereby preventing judges from committing crimes.

Vertikale Gewaltenteilung	Bund	Bundestag Bundesrat	Bundesregierung (Bundeskanzler + Bundesminister) Bundesverwaltung (z. B. Bundeskriminalamt, BKA), Bundesamt für Verfassungsschutz, BfV	Bundesverfassungsgericht (BVerfG), Bundesverwaltungsgericht (BVerwG), Bundesfinanzhof (BFH), Bundessozialgericht (BSG), Bundesarbeitsgericht (BAG), Bundesgerichtshof (BGH), Bundespatentgericht (BPatG)
	Länder	Länderparlamente	Landesregierungen (Ministerpräsidenten + Landesminister) Verwaltungen der Länder (z. B. Landeskriminalämter, LKA), Landesverfassungsschutzbehörden	Landesverfassungsgerichte (LVerfG), Oberverwaltungsgerichte (OVG), Finanzgerichte (FinG), Landessozialgerichte (LSG), Landesarbeitsgerichte (LAG), Oberlandesgerichte (OLG), Verwaltungsgerichte (VG), Sozialgerichte (SG), Arbeitsgerichte (ArgG), Landgerichte (LG), Amtsgerichte (AG)
		Legislative	Exekutive	Judikative
Horizontale Gewaltenteilung				

Figure 2. Horizontal and vertical separation of powers[32]

All transgressions have a psychological origin in the sensuality, to what extent the desire is driven by the pleasure in the act to commit it. If the deed is to be omitted, this sensual impulse must be canceled by an opposing sensual impulse. Such an opposite sensual impulse is pain (evil) as a result of the deed committed. The will of the citizens is therefore determined by psychological compulsion to refrain from violating the law, if everyone knows that his deed will be followed by an evil which is greater than the displeasure which arises from the unsatisfied drive to act.[33]

Feuerbach believes that one behaves in order to make happiness and avoid suffering. So, if the law clearly states crimes and punishments, it is possible to inform people in advance that the pain that will be punished is greater than the pain that has not been punished. It is psychologically compelling not to commit crimes.

5.3. Determination of the Relevant Sentencing Facts

“Im dritten Schritt müssen die relevanten Strafzumessungstatsachen ermittelt werden. Der Kreis der insoweit in Betracht zu ziehenden Umstände geht über die im gesetzlichen Tatbestand genannten Merkmale weit hinaus. Für die Strafzumessung „relevant“ sind alle diejenigen Tatsachen, die im Hinblick auf die zuvor festgelegten Strafzwecke für die Bestimmung des Grades der Schuld und der Präventionsnotwendigkeit von Bedeutung sind, also etwa der Wert der gestohlenen Sache, die durch die Tat verursachten Folgen für das Opfer,

die Motive des Täters, sein Vorleben und sein Verhalten nach der Tat. Einen Anhaltspunkt für die in Betracht zu ziehenden Umstände liefert § 46 Abs. 2 Satz 2 StGB. Berücksichtigt werden muss in diesem Zusammenhang, dass diejenigen Tatsachen, die vom Gericht in der zweiten Phase bereits bei der Auswahl des anzuwendenden Strafrahmens berücksichtigt worden sind, in der dritten und den nachfolgenden Phasen nicht noch einmal in Ansatz gebracht werden dürfen (Doppelterwertungsverbot, § 46 Abs. 3 StGB)."[34]

The corresponding contents, which are quoted here from Meier's criminal law sanctions, are the factors that I have already mentioned in Part 3.2.

In China's criminal law, there are three basic characteristics of legal punishment, serious social harm, criminal illegality, and criminal liability.[35] It means the perpetrator does something against criminal law instead of morality and religious beliefs. And the severity of the social harmfulness reaches a much serious level. Determining the purposes of the punishment offers not only a reason for the police to arrest the perpetrators, but also a chance to sentence the perpetrators to the appropriate punishment in order to pacify the victims and their relatives and maintain social stabilization.

5.4. Determination of the Direction of Assessment of the Sentencing Facts

"Nachdem die strafzumessungsrelevanten Tatsachen ermittelt worden sind, muss ihre Bewertungsrichtung festgelegt werden. Damit ist gemeint, dass entschieden werden muss, ob eine für relevant gehaltene Tatsache den Täter belasten oder entlasten soll, ob sie also strafscharfend oder strafmildernd in Ansatz gebracht werden soll. Die Entscheidung kann im Hinblick auf die verschiedenen Strafzwecke zu unterschiedlichen Ergebnissen führen; in der Literatur wird dieser Sachverhalt als, Ambivalenz der Strafzumessungstatsachen' gekennzeichnet." [36]

"Bewertungsrichtung der Tatsachen" means whether there are circumstances in the commissioning of the offense which have an effect on the offender or against the offender. For example, someone goes into a bakery and steals bread, or someone goes into a bakery, kills the cashier and steals bread, the reason is also decisive, he steals bread because he is hungry, or he steals bread Boredom. All of these facts or circumstances must be taken into account by the judge when making his judgment. Simply put, the subjective motives of the offender play a major role in the judge's judgment.

In the civil law system countries with legal methods, many countries have attached great importance to the criminal motives of their legislative or judicial practice. For example, Germany has clearly included its motives in its criminal law. Criminal law motives are not only the primary basis for the conviction in German criminal law, but also elements of certain crimes.[37] Article 46 of the German criminal law lays down the basic principles of the conviction: "Bei der Zumessung wägt das Gericht die Umstände, die für und gegen den Täter sprechen, gegeneinander ab. Dabei kommen namentlich in Betracht: die Beweggründe und die Ziele des Täters, besonders auch rassistische, fremdenfeindliche oder sonstige menschenverachtende..." [38] For example, Article 188 sees the motives relating to the status of the prisoner in public as an important factor in the provisions on sin and defamation of politicians and becomes an element of crime.

In China's criminal law, the criminal motive is not part of the crime, but a discretionary factor. Discretionary scope refers to facts that are not expressly provided for in criminal law and that are summarized and applied by judicial bodies in judicial practice, which affects the correct scope of discretion. The difference in criminal motives immediately shows that the perpetrator's sinfulness is different and is therefore an important factor to be considered in the conviction.

5.5. Weighting and Weighing of the Sentencing Facts

„An die – u.U. zu gegenläufigen Ergebnissen führende – Festlegung der Bewertungsrichtung schließen sich die Gewichtung und Abwägung der einzelnen Strafzumessungsfaktoren an. Mit „Gewichtung“ ist gemeint, dass festgelegt werden muss, welche Bedeutung einzelnen Strafzumessungstatsachen im Vergleich zu anderen Strafzumessungstatsachen beigemessen werden soll. Bei der Findung des Strafmaßes kommt nicht allen Umständen dasselbe Gewicht zu, vielmehr sind gewichtigere von weniger gewichtigen Umständen zu unterscheiden. „Abwägung“ bedeutet, dass die gewichteten Strafzumessungstatsachen zueinander in Beziehung gesetzt werden müssen. Belastende und entlastende Umstände müssen gegenübergestellt, im Hinblick auf die verfolgten Strafzwecke miteinander verglichen und in eine Rangfolge gebracht werden (§ 46 Abs. 2 Satz 1 StGB). Dabei ist es möglich, strafschärfende und strafmildernde Umstände gegeneinander aufzuwiegen, das Problem der ‚Ambivalenz der Strafzumessungstatsachen‘ also durch wechselseitige Kompensation zu lösen.“[39]

There is a principle called “principle of suiting punishment to crime” in the Chinese criminal law. The court should sentence you to severe penalties commensurate with the offense and criminal responsibility. When analyzing the crime and the size of the criminal responsibility, it is necessary to consider not only the objective social harm of the crime, but also to consider the subjective malignancy and personal danger of the perpetrator and to grasp the extent of the social harm reflected by various criminal factors . Therefore, the level of criminal liability is determined and the appropriate penalty is applied. It turns out that the severity of the punishment is compatible not only with the offenses committed by the criminals, but also with the criminal responsibility of the criminals, this means through the criminal liability between crime and punishment.[40]

This principle comes from the Enlightenment theory and natural law theory in the 18th century at the earliest. The Universal Declaration of Human Rights declared that freedom, property, security and the resistance to oppression are inalienable and it affirms freedom of speech, belief, writing and publication and clarification of the principles of separation of powers, equality before the law and sacred and inviolable private property. With the guarantee of legal protection, Article 8 of the Universal Declaration of Human Rights contains a cornerstone of the rule of law: Everyone has the right to access to and a fair trial before the domestic courts against all acts violating his or her rights.[41] And Article 15 states “(1) Jeder hat das Recht auf eine Staatsangehörigkeit. (2) Niemandem darf seine Staatsangehörigkeit willkürlich entzogen noch das Recht versagt werden, seine Staatsangehörigkeit zu wechseln.”[42]These two articles emphasize that the law should not only protect citizens from the harm of crime but also unduly serious punishment and serve the public and society.

The difference to the previous step is that this step is based on objective reality and not on subjective motivation. Sentencing facts are anything that has anything to do with the crime that affects the guilt of the perpetrator.

5.6. "Revaluation" of the Weighing Results by Classifying the Case in the Determined Penalty Framework

„Der sechste Schritt ist der bereits angesprochene schwierigste: die „Umwertung“ des Ergebnisses des Abwägungsprozesses durch Einordnung der Tat in den gesetzlichen Strafraumen. Anhaltspunkte dafür, wo die richtige „Einstiegsstelle“ innerhalb des Strafraumens zu suchen ist, ergeben sich aus dem Vergleich des Ergebnisses des Abwägungsprozesses mit den vom Strafraumen angegebenen Eckpunkten. Versteht man den Strafraumen mit der ganz h.M. als eine tatbestandlich vertippte Strafzumessungsvorgabe des Gesetzgebers an die Gerichte, dann bestimmt der Strafraumen nicht nur die Eckpunkte des rechtlich Zulässigen, sondern enthält zugleich eine wertende Vorgabe für die Einordnung des zu entscheidenden Falls: Die Mindeststrafe gibt an, wie die denkbar leichtesten, die Höchststrafe, wie die denkbar

schwersten Erscheinungsformen der in Rede stehenden Deliktsform bestraft werden sollen. Problematisch ist die Einordnung der zwischen diesen beiden Eckpunkten liegenden Fälle. In der Literatur wird darüber diskutiert, ob es möglich bzw. zulässig ist, die Einordnung der dazwischen liegenden Fälle an den Konstruktionen des gedanklichen Durchschnittsfalls (sog. normativer Normalfall) oder des statistisch am häufigsten vorkommenden Regelfalls zu orientieren. Die überlegene Lösung dürfte hier im zweiten Weg, der Bezugnahme auf den statistischen Regelfall, zu sehen sein. In den Blick gerät damit die Entscheidungspraxis der Justiz in ähnlich gelagerten Fällen, wobei freilich die Prüfung der „Ähnlichkeit“ wiederum mit ganz eigenen Schwierigkeiten verbunden ist. Bei der Festlegung des Strafmaßes müssen zudem die Wirkungen, die von der Strafe für das künftige Leben des Täters zu erwarten sind, sowohl unter dem Gesichtspunkt der Schuldangemessenheit der Strafe als auch unter dem Gesichtspunkt ihrer präventiven Notwendigkeit berücksichtigt werden (§ 46 Abs. 1 Satz 2 StGB).“[43]

In China there is a proper concept, so-called crime predictions. Crime prediction refers to the judgment that can occur in a certain time and place, with the use of scientific methods based on existing data and data of crime, as well as the analysis of various relevant factors that include crime, research, status, structure and Can influence the development tendency of criminal phenomena.[44]

It shows the dynamic regularity of criminal phenomena under the aspects of quality and quantity and provides the scientific basis for the social development of strategic measures for crime prevention.[45] The goals are so that researchers can ensure that the crime prevention system is working effectively. For example, they can more accurately predict which types of crime will most likely be committed in the next two to three years and take appropriate prior action. You could also deduce from the data in which areas a crime could happen most and whether new types of crime could emerge as society develops.

5.7. Final Overall View

“Ist der Fall in den Strafrahmen eingeordnet und als Reaktion auf die Tat ein individuelles Strafmaß gefunden, so müssen die ggf. erforderlichen Folgeentscheidungen über die Strafart (z.B. die Aussetzung der Vollstreckung zur Bewährung einschließlich die in diesem Zusammenhang erforderlichen Nebenentscheidungen), die Nebenfolgen (z.B. Verfall und Einziehung) und die sonstigen gegen den Täter zu verhängenden Maßnahmen (z.B. Maßregeln der Besserung und Sicherung) getroffen werden. Die Beurteilung der Schuld- angemessenheit des gefundenen Strafmaßes und seiner präventiven Notwendigkeit kann sich durch diese weiteren Entscheidungen noch einmal verändern. Erforderlich ist deshalb im letzten Schritt eine abschließende Gesamtbetrachtung, bei der das Strafmaß im Kontext der übrigen Sanktionen und sonstigen Rechtsfolgen der Tat auf seine Angemessenheit und Notwendigkeit hin überprüft wird. Im Ergebnis kann dies dazu führen, dass das im sechsten Schritt gefundene Strafmaß abschließend noch einmal korrigiert werden muss.”[46]

The so-called " Aussetzung der Vollstreckung zur Bewährung " is raised in paragraph 2 of Article 56 of the German criminal law. “Das Gericht kann unter den Voraussetzungen des Absatzes 1 auch die Vollstreckung einer höheren Freiheitsstrafe, die zwei Jahre nicht übersteigt, zur Bewährung aussetzen, wenn nach der Gesamtwürdigung von Tat und Persönlichkeit des Verurteilten besondere Umstände vorliegen. Bei der Entscheidung ist namentlich auch das Bemühen des Verurteilten, den durch die Tat verursachten Schaden wiedergutzumachen, zu berücksichtigen.”[47] This is a special case in the enforcement of probation. After the judgment, more factors come into consideration, for example letting a new offense be committed, finding an old offense new, or the offense contributes a lot to society. The court can then immediately suspend the execution of the probation and decide again whether the sentence should be changed or what measures should be taken in the next cut.

"Dabei sind namentlich die Persönlichkeit des Verurteilten, sein Vorleben, die Umstände seiner Tat, sein Verhalten nach der Tat, seine Lebensverhältnisse und die Wirkungen zu berücksichtigen, die von der Aussetzung für ihn zu erwarten sind." [48]

But all of these measures are subject to the criminal law. This shows that the process of sentencing is always "included in the penalty framework".

The same situations can also be seen in China. Here they are not repeated unnecessarily.

6. The Penalty Discretionary System

This system consists of five situations in which the criminal's penalties are lessened or reinforced. The form of the rules in this system is similar to that in the sub-rules because they are written in the criminal law, but the content is different because the rules in the sub-rules specify the penalties corresponding to the crime, while the rules in this system give the judge give decision-making authority to a fixed extent. This competence is also the crossroads between the rules in this system and those in criminal penalties. A small difference is due to whether the rules are already laid down in the criminal law.

6.1. Recidivism

Article 65 of the Chinese criminal law provides that offenders who are sentenced to the lightest limited term imprisonment again in the following five years after the execution of a lightest limited term imprisonment should be severely punished. Special recidivism refers to a person who has been sentenced to and re-commits a criminal offense for committing crimes against national security, engaging in terrorist activities, or the Mafia. [49]

That is the definition of the word "Rückfall". But the so-called "Rückfall" is different from the recidivism that is usually meant. In this situation, the perpetrator must be an adult for every crime, namely he counts the same or over 18 years. The offenses have to be judged as easily as possible in terms of limited imprisonment. The interval between two crimes is also limited, or within five years. The final requirement is that the offender commit the offense on purpose rather than negligence.

This rule aims to warn people and prevent them from committing a crime on purpose. According to the survey, in the first four years from 1997 to 2004, recidivism accounted for 4.2% of total crimes, negligence accounted for 6.3%, recidivism in the last four years 1.4% of total crimes and negligence 19, 3%. [50] It seems that this measure is effective to some extent.

According to Wikipedia's explanation, relapse in criminology, as opposed to legal probation, means re-offending after serving a sentence. It is measured using the relapse rate. In the broader sense used by the crime statistics, a relapse is the perpetration of a criminal act by someone who has already been convicted of such a criminal offense. In the narrower and proper sense, however, there is only a relapse in the case of so-called "relevant" previous convictions, i.e. only if exactly the same or at least one criminal offense directed against the same legal interest is fulfilled in the new offense. [51]

If someone is responsible for a crime that fulfills the requirements according to paragraph 1 sentence 1 number 1 letter a or b or because of a criminal offense according to Section 89a paragraphs 1 to 3, Section 89c paragraphs 1 to 3, Section 129a paragraph 5 sentence 1 first alternative, also in conjunction with § 129b paragraph 1, §§ 174 to 174c, 176, 177 paragraph 2 number 1, paragraph 3 and 6, §§ 180, 182, 224, 225 paragraph 1 or 2 or because of an intentional criminal offense according to § 323a, if the offense committed while intoxicated is one of the aforementioned unlawful offenses, is sentenced to imprisonment of at least two years, the court may order preventive detention in addition to the sentence if the offender is due to one or more such offenses that he committed before the new offense, has already been sentenced to imprisonment of at least three years and the conditions specified in paragraph 1

sentence 1 numbers 3 and 4 are met. If someone has committed two offenses of the type specified in sentence 1, through which he has forfeited a prison sentence of at least two years in each case, and if he is sentenced to a prison sentence of at least three years for one or more of these offenses, the court may under the sentence in paragraph 1 1 number 4, in addition to the punishment, order preventive detention even without a previous conviction or deprivation of liberty (paragraph 1 sentence 1 numbers 2 and 3).[52]

The "Rückfall" in Germany's criminal law is similar to that in China's criminal law. The difference between the two terms lies in the requirements. Not only is the type of punishment and the corresponding time limit specified, but also a number of offenses listed, one or some of which the perpetrator has committed. The subjective factor cannot be seen here.

6.2. Voluntarily Surrender to Justice

Under the provisions of Article 67 of the Chinese criminal law, this behavior refers to automatically and voluntarily surrendering after a crime has been committed and the crime is truthfully reported to the police, judicial authorities, or other relevant organs. The penalties of the volunteer criminals can be lighter or less severe. If the crime is not too bad, the penalty can be bestowed. Criminal suspects, defendants, and offenders who use coercive measures are also considered surrender if they truthfully admit their other crimes that the judicial authorities have not yet mastered. Although the suspect does not have the first two paragraphs but can truthfully confess his crimes, he may receive a lighter sentence. If he truthfully confesses his crime and avoids particularly severe consequences, the sentence can be reduced.[53]

A corresponding term cannot be found in the German criminal law. With the help of the dude, this is the behavior of a certain man who is wanted, who has committed a crime. No more restrictions are imposed.

Facing up is mutually beneficial behavior. On the one hand, this behavior allows criminals to demonstrate that repentance torments them, which reduces their sentence. On the other hand, the victims and their loved ones will be spiritually comforted, and the government will also reduce the social harm of crime by educating the majority.

6.3. Meritorious Service Offset

According to Article 68 (1) of the criminal law, the following acts are considered meritorious services if they are true after confirmation: After the case, offenders report the crimes of other persons, including criminals in joint criminal proceedings, who uncover crimes other than the joint criminal offense. The offenders provide critical clues to detect other cases and they are verified. The offenders prevent others from engaging in criminal activities. The offenders assist the judiciary in arresting other offenders (including accomplices). The offenders have other outstanding achievements that benefit the country and society.[54]

If the perpetrator of a criminal offense, which is threatened with a minimally increased prison sentence or with life imprisonment, has made a significant contribution by voluntarily disclosing his knowledge to the fact that an act according to § 100a para. 2 of the criminal litigation law, which is related to his act, could be uncovered, or voluntarily reveals his knowledge to an agency in good time so that an act according to § 100a para. 2 of the criminal litigation law, which is related to his act and of which he is planning, can still be prevented.[55]

Meritorious service should not only be pure behavior, but must also lead to practical effects. The performance of the meritorious statesman of exposing the criminal activities of other persons must be determined by verification.[56]

From the point of view of utilitarianism,[57] the earnings system is a mutual benefit system for the state and criminals. For criminals, their meritorious service has been recognized by the judiciary and their sentences have been softened. For the country, the deserving system has

increased the efforts of the judiciary to fight crime, reduce the costs of the judiciary and stabilize the state.

6.4. Number of Crimes Concurrence

The combination of several offenses refers to the punishment of a prisoner who commits more than two offenses and who provides for the execution of the offenses according to certain principles.[58] The time limits for offenses set in national criminal law are different: some laws provide that multiple offenses are compiled before the sentence is announced, and some provisions before the sentence is determined, and some provisions before the sentence is enforced is carried out.[59]

There is an order in the Chinese criminal law that if the criminal commits many offenses before the sentence is pronounced, this principle applies to him. After the verdict, the principle still applies if the criminal commits a new crime before the sentence is carried out and he should be punished under the provisions of several crimes.[60]

The formation of a total penalty is the procedure laid down in German and Swiss criminal law if several offenses that are in proportion to one another are to be punished. A prerequisite for a total sentence formation is according to § 53 in the criminal law.[61]

If someone has committed several crimes that are sentenced at the same time, and as a result has earned several imprisonment sentences or several fines, a total sentence is recognized.[62]

6.5. Probation

Probation refers to a punishment that is deserved but not immediately carried out by the offender who has violated the criminal law and has been confirmed as a criminal through a legal process and should be punished with a penalty. Probation is a system in which a specific investigative body investigates a criminal within a specific testing period and decides whether a specific penalty applies based on the perpetrator's performance during the testing period.[63]

In Germany's criminal law, probation is defined as follows: In the legal context, probation is the time in which compliance with the probation requirements of a suspended prison sentence is monitored before a sentence is released.[64]

The requirements for the execution of the probation are almost the same in China and Germany. "Bei der Entscheidung ist namentlich auch das Bemühen des Verurteilten, den durch die Tat verursachten Schaden wiedergutzumachen, zu berücksichtigen." [65] That is, the execution of the probation depends on the fact that after the criminal conspiracy and the penance the criminal is of the opinion that the criminal on probation would not harm society. This is also a primary basis in China on which the court judges whether a criminal is on parole.

7. Problems in the Practice of Sentencing with Examples and Solutions

7.1. Problems

The process of sentencing is the process of mixing objective facts and subjective judgments. The process is influenced by many factors, for example politics, culture, economy, the rules of society, etc.

7.1.1. The Conflict between Morality and Criminal Law

Most of the time the law is referred to as the legally limited morality. That means, however, not that all legal rules can be found in morality. A conflict can often be seen everywhere in everyday life.

One case in Luzhou resulted in a dispute over an inheritance. Mr. Huang had no children since he married Ms. Jiang and later had to raise a son. Later, Mr. Huang met Ms. Zhang and began to live together as a husband and wife. Before Mr. Huang passed away, Mr. Huang made a will and gave and certified his property to Ms. Zhang. However, Ms. Jiang did not obey his will. Ms. Zhang

asked the local court to appoint the defendant, Jiang Lunfang, in accordance with the relevant provisions of the Inheritance Law and general principles of the civil law. Because Mr. Huang's behavior did not meet morality standards, the judge sentenced Ms. Zhang to lose the case based on public order and goodwill.[66]

The standpoint of law is that the power of a legacy is stronger than a statutory law of inheritance. According to this rule, Ms. Zhang should get Mr. Zhang's inheritance. And Ms. Zhang took very careful care of Mr. Zhang before he died. The moral point of view is that Mr. Zhang and Ms. Zhang's relationship was illegal and damaged the marriage bond between Mr. Zhang and Ms. Jiang.

Undoubtedly, as a judge, the first thing to examine is how the law is properly applied and interpreted, and moral or social opinion should not be the only basis for the judgment. In this sense, the applause received after the judgment does not prove that the judgment is correct. In connection with civil matters, in particular marriage, family and inheritance, however, social norms such as morals and habits cannot necessarily be included in the judicial process, but can, under certain conditions, become sources of civil law. On the other hand, the professional thinking of lawyers, to judge according to the requirements of the judicial democracy, is mostly in accordance with the general knowledge of the average citizen. A judgment that is recognized by the public therefore does not necessarily mean that it is against the law.

7.1.2. Conflict of Sentencing in Different Countries

On August 19, 2014, the Xiamen People's Court of Fujian Province passed a first instance judgment and sentenced a German to death for double homicide. The suspect was a 36-year-old German man from Upper Bavaria. In June 2010, he killed his former Venezuelan girlfriend and her new boyfriend in Xiamen and attempted suicide. This is the first case in which a German citizen has been sentenced to death in China.[67]

After the fall, the Foreign Ministry claimed that every effort would be made to protect the German suspect from the death penalty because the death penalty had long been abolished in Germany. The Chinese ministry also claimed that the Chinese court had the right to judge this case itself because this case happened in China.

This case shows the difference in the legal rules in China and Germany. Because of the rule followed by the two countries, according to which each country has the right to act on cases that occur in its territory, the case ended peacefully. If the defendant hadn't appealed, the death penalty would soon be carried out. If the death penalty were carried out, the defendant would be the first German to be executed in China.

7.1.3. Long-term Imprisonment Leads to Alienation From Society

For the criminals who are serving their sentences, the release means not only regaining the beauty of freedom, but also a lot of ignorance and incomprehension. To be in a closed environment for long periods of time, not knowing anything about what is happening outside of the world, and not being in touch with the rapidly evolving society means that they will have to pay more for their crimes than the prison sentence they will already receive accompany to the end of life.

7.1.4. The Change in the Proportion of the Different Types of Motifs

The current system of recidivism cannot fully develop the good social effects of punishment and defenses. There are sometimes difficulties in applying the law of recidivism in the judiciary. According to statistics, relapsing after his personal experience of crime and building self-protection after summarizing the lesson is usually no longer a return to the old business. To circumvent legal sanctions, they chose a new, easier way of committing crimes against society. Therefore, when prosecutors prosecute in accordance with the law, a recidivism is generally filed with a recidivist. In light of the facts and circumstances of the new offenses committed by

the defendant, the court must sometimes impose a lighter sentence on the defendant for criminal detention, scrutiny or additional penalty so that there is a legal conflict between the prosecutor and the verdict. The consequences of relapse cannot be severely punished, and the social impact of the judgment is not fully reflected.[68]

7.2. Solutions

7.2.1. Timeliness

In this rapidly developing society, the legal system should renew itself sustainably in order to correspond to the present society in a certain time and to solve the problems. As the last resort that protects the rights and property of citizens and ensures the stability of society, the judicial process should move with the times, thereby abolishing the outdated rules and raising the latest rules. The dissemination of the legal opinion, a clear explanation of the legal rules and the public enforcement of the law also make contributions.

7.2.2. Establishing the Institutions

To help criminals get used to society after they are released from a sentence and to ease the burden on prisons, the government could set up some institutions that are specially designed for prisoners, such as counseling.[69] The government could channel the negative emotions and psychology of the criminals, cultivate the healthy emotions and positive attitudes of the criminals, and let the criminals lead prison life with a calm and optimistic attitude. The government should guide them to properly assess society, accept reality, reduce the unreasonable demands on reality and create a practical and reasonable belief in life, and work to help the criminals develop their human relationships Strengthen treating ability and build healthy and harmonious relationships with others.

7.2.3. The Improvement of Domestic Law and the Referencing of International Law Come into Question at the Same Time

Nowadays globalization is the subject of the times. This term refers to many areas, for example politics, economy, culture, environment, foreign policy. While the Chinese government is doing a lot to improve the legal system, many international customs and international treaties should be taken into account. However, due to different historical contents such as politics, religion, culture, etc., countries cannot be modeled completely uniformly. However, the globalization of law and the globalization of the rule of law cannot be stopped, just as several types of cultures can coexist in one country. It is also possible to achieve the unity of law in the world without compromising the diversity of culture. In the development of this human history, China should not only seize this opportunity but also contribute to the rule of law in the world by promoting globalization as an opportunity to promote the rule of law in China. [70]

8. Conclusion

In the course of modernization, severe sentences will increase psychological barriers for social workers and hinder modernization. Especially in the area of economic development, the legislature should pay more attention to the extent of the punishment. Therefore, in the future, the easing of punishment will be a new standard to measure the development of modernization. The easing of the punishment also corresponds to the need for the development of time. With the development of politics and economy and the influence of the international situation, the application of the Chinese criminal law goes through a process that develops from strict to loose, and there is a tendency towards further light penalties. As the last line of defense for social security, sentencing plays a vital role in social stability and development. In the majority concept, the punishment seems to only serve to punish the perpetrator, the purpose of the punishment is rather to achieve the purpose of crime prevention. China's current sentencing in

the future will rely more on foreign experience and will reflect the trend towards facilitating punishment.

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