

On the Puzzles of Precision of Sentencing Recommendations

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Keywords: Precision of Sentencing Recommendations; Subjective Knowledge; Puzzles; Misunderstandings

Abstract: The plea leniency system has made the sentencing recommendations of the prosecutorial authority indispensable. As a result, there has also been clamor for precise sentencing recommendations. However, the lively pursuit of precision of sentencing recommendations movements more or less ignore issues that require calm thinking. Although the idea of precision of sentencing recommendations sounds good, the normal differences in the sentences which due to subjective knowledge, evaluation, and judgment have led the so-called precise sentencing being a luxury. At the same time, advocating for precision of sentencing recommendations has to confront two major puzzles: "difficult to define" and "difficult to operate". It is necessary and urgent to get rid of the misunderstanding of precision of sentencing recommendations and avoid blindness.

Introduction

Recently, in the context of plea leniency system were incorporated in 2018 Criminal Procedure Law and comprehensively rolled out, the call for precision of sentencing recommendations has become increasingly high. The Supreme People's Procuratorate has strongly advocated the precision of sentencing recommendations. And this is supported by most law scholars and practitioners. At the same time, there is also a tendency: to make definite sentence as the direction of precision of the sentencing recommendations. Now, the idea of precision of sentencing recommendations (even definite sentencing recommendations) seems to have swept the prosecutorial authority and became the "housekeeping skill" that prosecutors should cultivate. On October 11, 2019, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of Justice and the Ministry of State Security jointly formulated Guiding Opinions on the Use of the Plea Leniency System, which provides that: the people's procuratorate handling plea cases shall usually submit a definite sentencing recommendation. In new types of cases, cases of rarely seen crimes, or cases of major crimes where the sentencing circumstances are complex, they may also submit a sentencing recommendations with a range of penalties. The reasons and basis shall be explained when submitting sentencing recommendations. Since then, it is not difficult to find that the definite sentence has become an important manifestation of the precision of sentencing recommendations. Although the idea to make sentencing recommendations precise has spread wildly, and the pursuit of definite sentencing recommendations is also certain, is the concept of precision of sentencing recommendations (or even the pursuit of fixed sentences) really feasible? And is it really necessary? Judging from many cases in practice, the formulation of precision of sentencing recommendations is not rigorous. Moreover, there are some difficulties in the process of pursuing the precision of sentencing recommendations. This essay will discuss the puzzles of precision of sentencing recommendations to clarify misconceptions.

The Puzzles of Precision of Sentencing Recommendations and Its Origins

At present, with the plea leniency system being carried out and the prosecutorial authority's function being adjusted, to advocate precision of sentencing recommendations becomes common. However, there are at least two puzzles to be confronted while trying to make sentencing recommendations precise.

Puzzles. Those who advocate the precision of sentencing recommendations mostly argue from the perspective of motivation. For the accused, if there is no clear expectation of sentencing, they do not have enough motivation to plead guilty and accept punishment, and there is not enough motivation to negotiate with the prosecutorial authority. In other words, the more specific and accurate the sentencing recommendations are, the greater motivation of the accused and his defense lawyer to negotiate with the prosecutorial authority, so the higher probability to reach an agreement. However, for a long time, more than 80 percent of defendants in criminal cases plead guilty in China's judicial practice[1]. There is not much confrontation between the accused and the criminal investigation authority, prosecutorial authority and courts. In contrast, the accused are mostly cooperating. In particular, without the effective assistance of defense lawyers, how can the accused who do not possess professional legal knowledge reach effective negotiation with the prosecution authority? In this context, as long as the prosecutors have given a sentencing "discount", the accused is usually willing to accept the sentencing recommendations. In other words, the relevance of the precision of sentencing recommendations and the willingness of accused to plead guilty and accept punishment may be exaggerated. What really affects the accused is whether they can get a sentencing "discount": if there is a sentencing "discount", the accused usually accepts it, even if it is not a definite sentence recommendations; if the sentencing "discount" does not meet the expectations of the accused, even if the sentence recommendations is definite, it will not help. The plea leniency system neither necessarily requires precision of sentencing recommendations, nor requires definite sentence recommendations. Therefore, it will not be a good argument for precision of sentencing recommendations. In fact, the precision of sentencing recommendations seem to be harmless if it is only used as a "vision", but to be fully implemented as an initiative, we must face two puzzles.

Puzzle 1: difficult to define. What does the precision of sentencing recommendations (precise sentencing) mean? At present, the prosecutorial authority's sentencing recommendations are mainly divided into sentence within sentencing range and definite sentence. Generally speaking, the precise sentencing require an objective standard, and if this standard is reached, it can be called precise sentencing. Such as in daily life, we use a ruler to measure the length, width and height of an object. Comparing with estimation, using a ruler to measure is obviously more accurate. However, when we talk about "precision of sentencing recommendations" or "precise sentencing", what exactly does it mean? Perhaps there is another way to judge the accuracy of sentencing recommendations by "adoption rate". But it may be difficult to generalize what the relationship between the precision of sentencing recommendations and the adoption rate is. In fact, before advocating the precision of sentencing recommendations, the adoption rate of sentencing recommendations in some places was already high. For example, the adoption rate of sentencing recommendations in the Songbei Procuratorate of Harbin, Hei Longjiang Province reached 98%[2]. Therefore, it is difficult to evaluate the precision of sentencing recommendations by adoption rate. Above all, what the precision of sentencing recommendations means, it is an inevitable question.

Puzzle 2: difficult to operate. How to make sentencing recommendations precise? The precision of sentencing recommendations is mainly aimed at accurate sentencing, increasing adoption rate, and achieving judicial equity. However, the goal does not guarantee the reasonableness of the means. In my opinion, the idea and original intention of the precision of sentencing recommendations is good, but its implementation path is difficult, even a "whimsy", and it is easy to make prosecutor do "useless work". Taking drunk driving cases that frequently occur in judicial practice as an example. It should be said that drunk driving cases are "misdemeanor cases" and are usually not complicated. In this type of cases, the prosecutor should offer definite sentencing recommendations. But even in this simple cases, there are differences in sentencing between the prosecutors and judges, not to mention the more complicated cases. Moreover, although prosecutors can use special sentencing software to make sentencing recommendations, but even so, it is difficult to ensure that the sentencing recommendations will be consistent with the judges. Some people assert that the "sentencing guidance mechanism", "sentencing consultation mechanism", "sentencing communication mechanism" and "sentencing adjustment mechanism" can ensure

prosecutors make precise sentencing recommendations, these mechanisms are the "path" to achieve precise sentencing recommendations[3]. Actually, neither the sentencing guidance mechanism, the consultation mechanism, nor the so-called sentencing communication and adjustment mechanism can guarantee the precision of sentencing recommendations. The reasons are that defining precision of sentencing recommendations is hard, and sentencing involves the use of subjective knowledge, subjective evaluation and judgment. This is the fundamental reason why sentencing recommendations cannot be precise. For example, from the perspective of comparative law, the Federal Sentencing Guidelines of the United States in the 1980s should be regarded as a "benchmark", but after many years of practice, due to the unavoidable mechanical, most federal judges dissatisfy it and the US Supreme Court change it from the "mandatory" rules into "reference" rules in the Booker[4]. Even the "exquisite" sentencing guidelines cannot replace the judge's subjective knowledge and initiative. Similarly, the same mistakes are made if we let prosecutors pursue precision of sentencing recommendations by sentencing guidelines.

Why the precision of sentencing recommendation is just a dream? For sentencing, even if prosecutors and judges are both lawyer, since sentencing involves subjective evaluation and judgment, it is normal that they have different views. In other words, differences in sentencing are inevitable. For example, some prosecutors and judges would give higher positive evaluations on the same statutory sentencing—voluntary surrender, so the extent of lenient penalties is larger. At the same time, some prosecutors and judges would give lower positive evaluations, which results in smaller extent of lenient penalties. Whether it is between prosecutors, between judges, or between prosecutors and judges, there may be differences in sentencing due to different subjective evaluations and judgments while facing the same voluntary surrender. Even the same prosecutors and judges will have different subjective evaluations of voluntary surrender at different times. Guiding Opinions of the Supreme People's Court on Sentencing for Common Crimes(revised in 2017) requires: For the circumstances of voluntary surrender, the people's court shall fully consider the motive, time, and methods of surrender, seriousness of guilt, extent of truthful confession, and repentance of the offender, the penalty may be reduced by less than 40% of the benchmark penalty. Where the crime is minor, the penalty may be reduced by more than 40% of the benchmark penalty or even be exempted according to the law, except malicious evasion of legal sanctions by making use of surrender and other circumstances where it is insufficient to exempt the offender from a lenient penalty. Obviously, for voluntary surrender, prosecutors or judges reducing the benchmark penalty by less than 40% (for example, 20% or 30%), or reducing the benchmark penalty by more than 40% (for example, 50% or 60%), both meet the requirements of sentencing guidance. The specific reduction depends on the subjective evaluation and judgment of the prosecutors and judge[5].

Actually, sentencing involves moral and legal evaluation. However, moral and legal issues can not calculated objectively, and subjective knowledge is required. How the sentence is appropriately determined depends on the judge's subjective judgment and subjective knowledge is required[6]. Prosecutors and judges also belong to different groups, and it is normal for the evaluation of the same or similar situations to be different. For the same sentencing situation, prosecutors and judges have different subjective judgments. Such subjective knowledge and judgment is human nature. Like "preferences" in economics, preferences are subjective because it is tied to specific individuals. In addition, preferences can reveal a ranking of goals, but they can not be measured or quantified, and arithmetical operations can not be performed[7].

Avoid misunderstanding of precision of sentencing recommendations

In cases of guilty pleas and acceptance of punishment, the emphasis on the precision of sentencing recommendations is of value and significance in urging prosecutors to perform their duties diligently, and avoid being rejected by judges due to improper sentencing recommendations, which leads to complicated procedures and affects the efficiency of plead guilty and accept punishment cases. However, there are several obstacles.

First, for a long time, sentencing is judge's work. Whether in experience or "artificial reason", it

is a new challenge for prosecutors to offer accurate sentencing. Of course, perhaps we can assert that by advocating precise sentencing, prosecutors are required to improve the ability of sentencing, and practice makes perfect. It is undeniable that if prosecutors can devote more time and energy to making precise sentencing recommendations, it can more or less improve the quality and effectiveness of sentencing. However, common sense tells us that prosecutors have limited time and energy in handling cases, and we cannot help but consider the issue of costs. Especially in the procuratorates where caseload is enormous, when prosecutors are required to provide a definite sentence, it will inevitably increase the workload and bring antipathy. Moreover, when whether it is necessary to increase the workload and meaningful is still a question, forcibly advancing the precision of sentencing recommendations will be even more grievous. In addition, there is a bad phenomenon in judicial practice—to force prosecutors to make accurate sentencing by administrative instructions, such as clear metric. Maybe that is effective in China, because the administrative instructions can be powerful, but in essence, the negative effects also come. The biggest problem is that in the absence of a real incentive mechanism, even if the prosecutors have to make precise sentencing recommendations and definite sentence, it is likely that the original intention of the precision of sentencing recommendations could not be achieved due to perfunctory or inability.

Second, prosecutors may not be more suitable for sentencing than judges. An important reason to justify sentencing recommendations is that it can check judges' sentencing powers. However, this is very costly, and ex ante restrictions may not be more effective than ex post protests. And even if the prosecutors offer definite sentence recommendations, it may be rejected because it does not meet the judge's judgment. In this way, the original intention was to increase the probability of the judges' approval by increasing the precision of sentencing recommendations, but it can easily go astray. If the prosecutorial authority protest, it will increase the workload and make the desire to improve efficiency through plea leniency system and precise sentencing unsuccessful. In addition, from the perspective of comparative law, "In continental Europe, prosecutors seldom propose specific sentences. Prosecutors in common law countries other than the United States act as adversaries in relation to guilt, but generally not at the sentencing stage. In Australia, prosecutors are forbidden to make sentence recommendations. In Canada they now do, generally in joint submissions from the prosecutor and defense counsel, but as recently as the 1970s, they could not. In England, where until recently it was widely believed recommendations impinged on judicial authority, prosecutors may provide information but seldom argue for specific sentences. Irish prosecutors in recent years have resisted judicial pressures to propose recommended sentences for individual cases"[8].

The third aspect is feasibility. The precision of sentencing recommendations today is the same as that some courts tried many years ago: the basic idea is exactly the same—longing for objective accuracy. This is like a copy of "computer sentencing" more than a decade ago. Professor Ji Weidong once pointed out: "Of course, computer sentencing can rule out subjective arbitrariness in the exercise of discretion to a large extent, but at the same time it will also rule out speculative elements such as natural law, human rights protection, 'shamefulness', and prevention-oriented; it also tends to exclude policy adjustment mechanisms that weigh and balance various interests. However, the nature of justice determines that such speculative and integrated operations can not only be ruled out, but also have to be necessarily increased in society which become more complexity, dynamics and have more increasingly diversified values. [9]" In legal history, it is not difficult to find that the pursuit of precise sentencing has always been a human dream. However, such an idea is a dream, even a fantasy. Even in the era of big data and artificial intelligence, it is difficult to make sentencing as accurate as mathematics. Because as long as there is human subjective knowledge and judgment, it cannot be accurately quantified. In other words, trying to quantify what is not quantifiable is ridiculous. Therefore, it is best to understand the precision of sentencing suggestions only as a kind of expectation, a guide to prosecutors, and should not be used as a hard indicator, otherwise it will have counteractive. American scholar Professor Jerry Z. Muller said: "Professionals tend to resent the impositions of goals that may conflict with their vocational ethos and judgment, and thus morale is lowered.[10]"

The existence of these obstacles makes our pursuit of precision in sentencing recommendations a misunderstanding. In addition, it is also a misunderstanding to understand the precision of sentencing recommendations as definite sentence recommendations (and deliberately pursuing it) and exaggerate the necessity and role of precision of sentencing recommendations. French economist Bascia once said: "Between a good and a bad economist this constitutes the whole difference—the one takes account of the visible effect; the other takes account both of the effects which are seen and also of those which it is necessary to foresee. Now this difference is enormous, for it almost always happens that when the immediate consequence is favorable, the ultimate consequences are fatal, and the converse. [11]" For economic policy, we should not only pay attention to the visible results, but also consider the invisible results. In fact, no matter whether it is economic policy or other policies, when making decisions, we should not only focus on the visible results, but also consider those invisible results. However, since some results are not easy to see, and those visible results look good (or even "seductive"), it is more difficult to pay attention to the invisible results. Although the precision of sentencing recommendations is intended to urge prosecutors to take sentencing seriously, increase the application rate of guilty pleas and acceptance of punishment, and to a certain extent check the discretion of judges [12]. On one hand, The realization of these goals has yet to be reviewed; on the other hand, the concept of precision of sentencing recommendations is ambiguous and difficult to operate, and will bring unnecessary conflicts between prosecutors and judges, increase the workload of prosecutors, and waste judicial resources (for example, investing a lot of manpower and financial resources to study how to realize the precision of sentencing recommendations) ... In order to avoid "useless work", we must consider both visible and invisible results, and avoid the misunderstanding of sentencing recommendations.

Conclusion

With the aggravation of the contradictions between staff and cases, and the establishment of plea leniency system, the prosecutors have become a "judge before the judge." [13] In addition, unlike the sentencing negotiation procedures in other countries and regions under the rule of law, our country's plea leniency system applies to all criminal cases and is not limited to misdemeanor cases. Previously, the status of prosecutors' sentencing recommendations was less important. Nowadays, in the context of plea leniency system, prosecutors' sentencing recommendations are pretty important. In the examination process for prosecution, the sentencing negotiation between the prosecutorial authority and the criminal suspect is very important. After all, only when the two parties reach an agreement can the criminal suspect sign a recognizance to admit guilt and accept punishment, and then can the cases be submitted to the courts. However, because the courts are in charge of sentencing, the prosecutors' sentencing recommendations need to be finally approved by judges. Such a system is designed to balance the power of the prosecutorial authority's sentencing recommendations and the court's sentencing power to try to avoid contradictions and conflicts between them. However, it is fundamentally unrealistic to expect to reduce conflicts and achieve balance through the precision of sentencing recommendations. As long as subjective values and judgments exist, it is normal for judges and prosecutors to have discrepancies in sentencing, which is not unbelievable. On the contrary, to pursue the so-called consistent and objective precision of sentencing is not reasonable. Perhaps the intention of precision of sentencing recommendations sounds good, but it is impossible to achieve. Therefore, it is necessary to rethink whether we should invest a large amount of time and money to advance the precision of sentencing recommendations. In my opinion, the precision of sentencing recommendations is not so important, what matters most is to make sure the prosecutors (and judges) can judge by professional ethics and conscience.

References

- [1] B.S. Li, The Pareto 80/20 Rule in Law: A Quantitative Analysis Based on Trials of Cases Where the Accused Pleads Guilty (In Chinese), Social Sciences in China, (2013) No.3, p.88.

- [2] Y.J. Liu, 98% of Sentencing Recommendations were Accepted(In Chinese), Procuratorate Daily, June 13, 2012, p.1
- [3] Y. Li, Principles and Paths of “Precision” of Sentencing Recommendations(In Chinese), Procuratorate Daily, September 17, 2019, p.3
- [4] Y.W. Wang, *Research on Sentencing Procedure*(In Chinese)(Peking University Press, China 2016), p.19-21.
- [5] As professor William T. Pizzi said “During the same period, studies were published showing that judges given the exact same sentencing files arrived at disparate, sometimes wildly different, sentencing decisions.” See W.T. Pizzi, A Perfect Storm: Prosecutorial Discretion in the United States. Erik Luna and Marianne Wade(Eds.), *The Prosecutor in Transnational Perspective*(Oxford University Press, U.K. 2012), p.193.
- [6] About subjective knowledge and judgment, see F.A. Hayek, *Individualism and Economic Order*, (“The University of Chicago Press, America, 1948).
- [7] R.P. Murphy, *Lessons for the Young Economist*(Ludwig von Mises Institute, America, 2010), p.36-43.
- [8] M. Tonry, Differences in National Sentencing Systems and the Differences They Make, *Crime and Justice: A Review of Research*, 45(2016), p3-4.
- [9] W.D. Ji, Dialectical Analysis of Criminal Punishment Imposition Through Software(in Chinese), *Tribune of Political Science and Law*, Vol. 25 (2007) No.1, p.126.
- [10] J.Z. Muller, *The Tyranny of Metrics*(Princeton University Press, America, 2018), p.31.
- [11] F. Bastiat, *The Bastiat Collection*(2nd ed.)(Ludwig von Mises Institute, America, 2007),
- [12] “The sentencing recommendation of the public procuratorate has a marked influence upon the court’s sentencing judgment. ” See X.F. Lin, Y. Ma, Sentencing Recommendations, Anchoring Effect and Fairness in Criminal Justice—An Empirical Study Based on a Sample of 520 Sentences in K City, *Social Sciences in China*, Vol. 39 (2018) No. 3, p.149-170.
- [13] As professor Thomas Weigend asserted that the prosecutor has become a “judge before the judge,” that is, an official who in many cases actually determines whether a sanction will be imposed and how severe or lenient that sanction will be. See T. Weigend, A Judge by Another name? Comparative Perspectives on the Role of the Public Prosecutor. Erik Luna and Marianne Wade(Eds.), *The Prosecutor in Transnational Perspective*(Oxford University Press, U.K. 2012), p378.