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Exploration of Probation in Chinese Criminal Law



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Chinese criminal law has stipulated five main punishments, as well as four supplementary punishments that can be used together with the main punishments or imposed separately independently. The five main punishments include death penalty, life imprisonment, fixed-term imprisonment (six months to fifteen years for a single offense),¹ criminal detention (one to six months),² and public surveillance (three months to two years)—a punishment with a higher level of supervision than probation that is implemented by security organs in the community.³ Probation, in contrast to public surveillance, is a method of punishment that represents an alternative to a short period of incarceration—that is, either criminal detention or fixed-term imprisonment of up to three years. This article will explore the role of probation in China.

Fixed-term imprisonment is a sentence practice being used widely in Chinese criminal law and represents a large percent of the punishments imposed on criminals. Fixed-term imprisonment has some advantages in that it deprives offenders of criminal capability by incarcerating them for some fixed period—but it has been shown to have many adverse effects on both the criminal and society. Criminals not only learn crime techniques during short-term imprisonment but also are stigmatized by society once they are released. In order to prevent the adverse effects of criminal detention and short-term imprisonment on criminal offenders, many jurisdictions, China included, adopt probation as an alternative to implementing short-term punishment.

Chinese Criminal Code article 72 states that “probation may be granted to a criminal sentenced to criminal detention or to fixed-term imprisonment of not more than three years if, according to the circumstances of his crime and his demonstration of repentance, imposing probation will not result in further harm to society.”⁴ The prerequisite for probation, according to Chinese criminal law, is that an offender who should be sentenced to criminal detention or no more than three years of imprisonment shows remorse and, when released, would not harm society. In such cases, the judge suspends the deserved punishment in favor of probation.

The deserved punishment is implemented if offenders on probation commit further criminal acts. Similarly, the

probation is canceled if offenders have on record other crimes that were not adjudicated in previous court proceedings or have committed any of the acts prescribed by police warrant. Although the decision to implement probation is part of the judge’s process of punishment measurement, probation itself is a method of implementing punishment. So, as discussed subsequently, some criminal textbooks describe probation in the context of penalty measurement and some in the context of penalty implementation.⁵

Probation is applied only to less serious crimes. Chinese criminal law does not outline the scope of less serious crimes directly, but elaborates several factual and circumstantial conditions that increase the probability of probation. The final decision is at the discretion of the judge. How the judge evaluates facts and applies law and why he works in a particular way to make his decision is influenced not only by the factors enumerated in the law but also by the judge’s social, political, and personal inclination regarding the nature of the crime in question and the outcome objective. Chinese people’s view of justice also influences the application of probation, because most of the common citizens in China regard probation as releasing offenders into society without punishment, and thus disfavor it.

In this article, I elaborate on several issues, including when a judge will order probation, the basis of probation, and how probation operates in China. I first review judicial procedures related to ordering probation of criminals who are to be sentenced to criminal detention and up to three years of imprisonment. To that end, I analyze the objective of probation in China. I then explore the basis of judicial probation orders from several perspectives and, finally examine how probation is implemented by analyzing statutory regulations in the criminal code.

I. Judicial Overview on Probation

A. Statutory Eligibility

Probation is a sentencing option for misdemeanors, as well as for many felonies that can be sentenced using less serious punishment, including criminal detention and fixed-term imprisonment. Although some Chinese scholars have argued that ancient dynasties practiced probation

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to some degree, the majority view is that contemporary probation in China was imported from common law countries and adopted into the Criminal Law of the Qing Dynasty, a law first officially published in 1891. Articles 63 to 65 of this law elaborated conditions of applying and canceling probation, and regulated conditional release of an offender after conviction. The law further demanded that the convicted should have a fixed residence and a job, and should be in the custody of relatives. If the convicted lost his residence and his employment, the probation would be canceled.

After the establishment People's Republic of China, but before the promulgation of criminal code, probation existed in judicial practice and documents of the Chinese Supreme Court. The Central Government's 1950 notice, Interpretation of Justice Ministry about Parole, Probation and Deprivation of Citizenship, regulated that probation applied only to a fixed-term imprisoned offender whose prison term was short and who had not caused serious harm. In 1952, article 5 of the Regulation of People's Republic of China to Punish Corruption regulated that "if the offender accused with corruption has [the] following particulars [he] may be given a lighter or mitigated punishment, or probation, or exempt from punishment and given administrative punishment." The first criminal code, published in 1979, officially regulated probation, establishing it as a sentencing option.

The second amendment of the criminal code, published in 1997, further elaborated probation and removed the provision that probation is not applicable to anti-revolutionary criminals after crimes of endangering state security. Thus, the 1997 amendment allowed for the possibility of applying probation to crimes of endangering state security if the crime is not serious. The 1997 amendment also allowed for probation if the defendant was a soldier in wartime. Now, more than 80 percent of crimes in the Chinese criminal code are eligible for probation.

B. The Nature of Chinese Probation

The structure of probation may be perceived in two ways—either as the suspension of the declaration of a crime or as the suspension of the execution of incarceration as a punishment. With the former, called diversion in some jurisdictions, court proceedings are stopped and the offender is placed under a probation officer's supervision. The latter type refers to the suspension of punishment: An offender is first convicted and then placed under a probation officer's supervision for correction, with supplementary conditions, for a certain period of time. Chinese criminal law supports the latter type of probation, so Chinese probation occurs after the offender has been convicted. In general, Chinese courts impose probation in lieu of incarceration.

Thus, the point of debate in Chinese criminal law is whether probation deals with the measurement of punishment or the execution of punishment. Some argue that probation is a system of *measurement* of penalty,

because measurement of punishment includes such decisions as whether to impose criminal punishment on offenders, what form the punishment should take if imposed, and whether to implement the punishment immediately.⁶ Others argue that probation is a system of punishment *implementation*, because after deciding whether and what type of penalty to impose on offenders, implementing punishment is optional. Thus, the argument goes that probation is merely a penalty implementation method.⁷

Still other scholars argue that probation is both a system of penalty measurement *and* a system of penalty implementation. The basis for their argument is that the adjudication of probation resides in the process of penalty measurement, but that probation becomes part of the implementation process after it is imposed on offenders. This group, including Professor Kaiming Zhang,⁸ believes that probation should represent a mix of both systems.⁹ Some scholars even advocate considering the punishment of public surveillance as a form of probation and using it as one type of punishment.¹⁰ These arguments reflect the opinions of scholars about where probation fits into the sentencing process.

Article 72 of the Chinese criminal law makes no clear statement about whether probation begins at the phase of penalty measurement or at the phase of imposing criminal liability. The common practice in the Chinese judicial system concerning probation is that it is an option for criminal detention and fixed terms of imprisonment of no more than three years. In general, probation first appears in court proceedings when the judge decides the nature of crime and the possible penalty for the crime. If the judge believes the crime is less serious and the offender presents no danger to society, he may choose the possible lighter penalty for the crime.

The judge has broad discretion to order probation because, as noted previously, probation is applicable to 80 percent of crimes regulated under Chinese criminal law. The judge reviews the case and finds the applicable provision in criminal code, then convicts the offender for the crime he committed. At conviction, if the judge believes that the offender satisfies the conditions of applying probation, he will announce probation simultaneously. Thus, in Chinese courts, declaration of crime and punishment are concurrent with the suspension of punishment.

However, in recent years, some local courts have tried to be innovative by introducing probation before the beginning of court proceedings. In that case, the prosecutor suspends prosecution to less serious crimes and does not file it to the court. However that kind of probation has no legal basis in China and has not been replicated nationwide.

Finally, the Chinese criminal code also differentiates the probation for crimes in peacetime versus wartime. The probation in article 72 (dealing with peacetime) is conditional, with the court retaining the right of cancellation if the offender does not satisfy certain regulated standards

during a certain period of time. However, article 499 (dealing with wartime) provides that

any serviceman who, during war time, commits a crime and is sentenced to fixed-term imprisonment of not more than three years with a reprieve pronounced may, in consideration of the absence of actual danger from him, be allowed to atone for his crime by performing meritorious deeds, the original sentence may be rescinded, and shall not be punished as a criminal.

This kind of probation has no regulated particular conditions, and the original verdict can be canceled only if the offender performs meritorious deeds. The judge may order this type of probation at the beginning of court proceedings.

II. The Basis and Purpose of Probation

A. Objective Standards

In general, probation is ordered by judge on the objective and subjective bases regulated in article 72–77 of the Chinese Criminal Code. The judge proceeds by applying these objective and subjective conditions in detail. The objective standard of probation delineates the punishment type and sentence term.

Chinese criminal law stipulates the types of punishment and the period of sentence for which probation is applicable. Among the five basic punishment types, capital punishment, life imprisonment, and public surveillance are excluded from probation conditions. The reason is that probation is not adequate punishment for offenders sentenced to capital punishment or life imprisonment, because they have committed serious crimes that endanger society; such dangerous personalities cannot be dealt with effectively without adopting harsh punishment.

Public surveillance does not deprive offenders of their liberty, but rather imposes some restrictions. The procedure for public surveillance is similar to that for probation, except public surveillance further requires that offenders may not exercise the right to freedom of speech, of the press, of assembly, of association, of procession, and of demonstration without the approval of the organ executing public surveillance.¹¹ The purpose of public surveillance is to warn offenders that even less serious offenses are not tolerated by law if they threaten social stability. An offender who is sentenced to public surveillance shall be supervised by a public security organ and, while engaged in labor, receive equal pay for equal work.

Criminal detention, whose purpose is to punish offenders and change their behavior by depriving them of their freedom for short periods of time, is supervised by a public security organ in the vicinity. During the period of implementation, the criminal sentenced to criminal detention may go home for one to two days each month, and can receive appropriate remuneration if participating in labor. The term for criminal detention has been set at not less than one month and not more than six months.

Fixed-term imprisonment, which deprives offenders of freedom for not less than six months and not more than fifteen years, is applied to offenders who have committed serious social harm and present great personal danger to society. Offenders who are sentenced to fixed-term imprisonment serve their sentence in prison or in a similar facility and take part in labor if they are able to work. Due to the fact that criminal detention and short periods of fixed-term imprisonment are not always effective for correcting and rehabilitating offenders, probation has been adopted as an alternative to correct the shortcomings of these punishments.

Chinese judges have large discretionary power regarding fixed-term imprisonment because Chinese criminal law has regulated different degrees of fixed-term imprisonment for most crimes. For example, article 400 states that

any judicial functionary who releases without authorization a suspect for a crime, defendant or criminal in custody shall be sentenced to fixed-term imprisonment for not more than five years or criminal detention. If the circumstances are serious, the offender shall be sentenced to fixed-term imprisonment of not less than five years and not more than ten years. If especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than ten years.

Thus, the law has regulated three degrees of fixed-term imprisonment for the dereliction of duty of judicial functionary staff members. Only if the judge chooses a punishment of less than three years of imprisonment may he order probation at the same time.

In Chinese criminal law, punishments including fines, confiscation, and deprivation of political rights (all supplementary punishments) are either used together with basic criminal punishment, or applied independently. Regrettably, no statutory authority allows adopting probation for an offender who is sentenced to these supplementary punishments alone. Article 72(2) states that “if a supplementary punishment has been imposed on a criminal whose sentence has been suspended, the supplementary punishment must still be executed.” Thus, supplementary punishments cannot be commuted to probation.

Article 74 decrees that probation shall not be applied to recidivists.¹² Chinese criminal law defines a recidivist as an offender who has been sentenced to no less than fixed-term imprisonment and who, within five years after his punishment has been completely executed or he has received a pardon, commits another crime for which he should be sentenced to a punishment of no less than a fixed-term imprisonment. Because recidivists have a tendency toward chronic criminal behavior leading to numerous arrests and re-imprisonment, they receive heavier punishment and cannot receive probation. Suspension of punishment for this type of criminal only aggravates crime in society and the offender’s personality

cannot be improved with social correction in the community. Thus, the Chinese criminal code prevents recidivists from the receiving probation.

B. Subjective Standards

Except for the aforementioned objective eligibility standards, Chinese criminal law stipulates subjective standards for determining whether probation should be imposed. These standards include three factors: the circumstances of the crime, the offender's demonstration of repentance, and the risk of future harm to society. Some of the standards are detailed through the interpretations of the Supreme Court, whereas others fall under the discretion of the judge.

The circumstances of a crime point to concrete particulars related to criminal behavior and offenders who show a risk of danger through their actions and personality. The court shall consider all of these factors when convicting the offender and measuring the punishment. Because Chinese criminal code lacks specific descriptions regarding circumstances of crime, the Supreme Court and Supreme People's Procuratorate (which is similar to a prosecutor in the United States) have offered some interpretation of the circumstance of crime.

For example, "Interpretation of Supreme People's Court on Several Issues Regarding the Specific Application of Law in Adjudicating Juvenile Crimes" regulated conditions to adopt probation for juvenile crimes. The Interpretation encouraged using probation for juvenile offenders if the harm they inflicted was not serious. In 1999, Supreme People's Court announced its "Summary of Criminal Adjudication Forum of Courts in Maintaining the Stability of Rural Region," which stated the conditions under which to adopt probation to a peasant offender. The Summary elaborated that probation was to be adopted for peasant offenders who committed less serious crimes and regretted their actions.

Article 3 of the Decision of Supreme People's Court on Correct Adopting Probation to Crimes of Corruption, Bribery and Embezzlement states that probation is not applicable to offenders who used the money they stole to fund illegal business, smuggling, or gambling. In 2006, the Supreme People's Procuratorate released "Several Opinions to Implement Criminal Policy of Temper Justice with Mercy in Prosecution Process." Article 8 states that if a prosecutor needs to file public prosecution against a first-time offender, accessory, preparatory offender, discontinued offender, excessive self-defender, improper danger avoidance, juvenile crime, elder's crime, and cases stemming from disputes among friends, neighbors, and classmates, he may ask the court to proceed with mercy and adopt probation. Thus, these interpretations by the Supreme People's Court and Supreme People's Procuratorate clarified further the standard of probation.

The circumstances of a crime also include circumstances particular to the offender, such as the nature of his crime, his motive, his means, the environment and condition in which

the crime was perpetrated, the objective result, and the offender's subjective intention.¹³ All of these elements reflect both the degree of crime and the level of dangerousness of the offender's personality. The judge reviews these elements, either as a whole or as weighted factors, before deciding whether to order probation. In some cases, several factors may stand out as particularly pertinent, so the judge will weigh those elements more heavily in his decision. For example, consider a case in which the offender seriously harmed another person due to negligence. If the offender had no evil intention to harm the victim, and took active measures to avoid the result, the judge may weight those factors more heavily and put the offender on probation.

Repentance for crime is also a basis for ordering probation. Although demonstration of repentance is typically expressed in the process of committing crime by stopping crime and avoiding harmful results, the judge generally bases his conclusion on the offender's attitude after the crime. Attitude here includes whether the offender turned himself in to the police, performed meritorious treatment, gave a frank confession, and provided reparations by taking measures or compensating for the damage caused by the crime.

The less clear standard regarding probation is how judges adjudicate whether an offender is certain to cause no harm to society in the future. This decision is a subjective guess by the judge, who must assess and evaluate correctly that the offender will not commit any crime in the future. Because of the ambiguity of the standard, however, judges sometimes apply the standard arbitrarily. This standard is adopted most often for the crime of dereliction of duty, which almost always results in probation.¹⁴ In these cases, the judge views the offender's displacement as depriving him of crime opportunity and thus rendering the offender harmless to society. In recent years, some courts have introduced evaluation of the offender's personality as a standard to help judge his future likelihood of committing crime, but this practice remains uncommon in Chinese court practice.

With the advancement of study on probation, some scholars have questioned the reasonability of these objective and subjective standards and have advocated regulating a more specific standard, such as personality evaluation and a hearing procedure for probation. Although such a standard has not yet been introduced through the legislative process, some courts are already adopting it.

III. Implementation of Probation

Article 76 of Chinese criminal law provides the primary rules concerning the implementation of probation. According to article 76, the public security organ is responsible for observing the offender during the period of suspension of punishment. The organ the offender worked for or the grassroots organization where he lived cooperate with the security organ to implement his probation. In 1998, the Ministry of Public Security announced

the Procedural Regulation of Security Organs to Deal with Criminal Cases, emphasizing that grassroots security organs are responsible for observing probationers and local organizations must cooperate with security staff to implement probation.

Article 75 outlines rules that offenders should follow during probation. According to article 75, probationers are required to (a) observe the laws and administrative regulations of the supervision organ, (b) report their own activities according to the observing organ's stipulation, (c) follow the observing organ's stipulations on meeting with guests, and (d) report and obtain approval from the observing organ for any departure from the city or country where they live, including a change in residence. The failure to fulfill any of these requirements during the period of suspension of punishment justifies the revocation of probation, as well as implementation of the original verdict that was announced at his trial.

The problem with this system, as many legal scholars have pointed out, is that no special branch of public security organs exists to implement probation, and they are overloaded with other cases. Furthermore, the aforementioned requirements for probationers are too vague to impose any real restrictions on them. The cooperation of grassroots security organs and how it is to be implemented is also vague, and is nearly impossible if the probationer is a migrant worker or loses his job after ordered probation.

Probation in Chinese criminal law is the suspension of punishment, with courts having sustained, conditional revocation power. Probation periods are never shortened; rather, courts may revoke probation during the serving period and increase punishment for offenders guilty of culpable offenses. The court reserves the right to revoke probation and implement further punishment at any time during probation if the probationer is found to have seriously violated article 75, committed another crime before the probation period for which he was not sentenced, or committed further crimes during probation. Chinese criminal law does not regulate consequences for minor violations of article 75. For serious violations of article 75, the court revokes probation and enforces the original verdict; for pre-probation and newly committed crimes, the court not only revokes probation but also implements further punishment according to article 69, a provision of combined punishment for several crimes.

According to article 69, if after his judgment is pronounced an offender is found to have committed crimes not sentenced to punishment, or if he has committed other, new crimes during the probation period, the sentence for newly discovered or newly perpetrated crimes is added to the offender's current sentence. However, the fixed-term imprisonment after adding several punishments may not exceed twenty years. Combined punishment for several crimes is applied also if the offender committed the same crime before and after the probation judgment was announced.

The calculation of the deserved punishment term for an offender with combined crimes was difficult before the Supreme People's Court disseminated its "Notice of Supreme People's Court on Considering the Custody Period when the Probation Is Revoked" in 2002. The Notice confirmed that the custody term is considered when the court revokes probation for new crimes or newly found crimes. Scholars advocate that the court should add the deserved punishment term first and then deduct the custody period from the deserved punishment term.¹⁵

Compared with Western countries, probation still is not a very popular option in China, and its adoption in court proceedings remains very low. One of the reasons, in my view, is that China has not yet developed efficient correction mechanisms that fit into the regional character of various places.

For example, in some areas of China, ordering probation is equal to releasing the offender. Many local courts have no probation centers and they release offenders on the condition of obeying article 75 in general. In order to resolve the implementation of probation and other sentences that have been executed elsewhere, some Chinese cities have introduced a system of community corrections by establishing special community correction centers. These centers provide legal and educational training for probationers and organize them to do volunteer work.

Historically, community corrections have been applied to offenders ordered to public surveillance, offenders temporarily ordered to probation, offenders commuted to parole, and offenders deprived of political rights and ordered to do community service. Security organs are technically responsible for supervising these offenders, but because most of the security organs are overloaded with cases, offenders are not fully under the control of security organs. The establishment of community correction centers, along with the cooperation between security organs and justice organs, makes community corrections a stronger option for dealing with offenders in the community.

In 2003, the People's Supreme Court, Supreme People's Procuratorate, Ministry of Security, and Ministry of Justice announced the establishment of experimental sites for community corrections, and regulated that security organs and justice organs would take responsibility for enforcing community corrections for offenders who served their term outside. The notice announced that Beijing, Tianjin, Shanghai, Jiangsu, Zhejiang, and Shandong might become the experimental sites for community corrections.

From 2003 through 2006, 101 cities among 24 provincial, municipal regions in China developed experimental sites for community corrections. They accepted 89,610 people, among them 37,547 probationers.¹⁶ However, this program is still at an experimental stage; the probation system in China is not as well developed as it is in common law countries and other civil law countries. The community corrections program is administered by the office of justice, although security staffs are charged with enforcing corrections according to Chinese criminal law.

One major problem with the program is that justice offices and security organs have no professional officers who are educated in community corrections. Furthermore, the restrictions on offenders are relatively random and not very well enforced. Scholars of criminal law have recommended that the objective of probation be clarified and that the conditions to be imposed on offenders be specified in more detail.

IV. Conclusion

Probation is a viable alternative to short-term imprisonment that will continue to develop, especially as China introduces community corrections for probationers. Probation aims to overcome the problems inherent in short-term imprisonment and give offenders more opportunities to repent for their crimes and integrate into society. Chinese courts have adopted probation for juvenile delinquencies, dereliction of duty, and crimes of negligence that caused little harm to society and the victim. Justice offices in large cities have played a very important role in enforcing probation orders, especially in community service programs.

Compared with other jurisdictions, however, Chinese courts are less inclined to order probation, so the percentage of probation sentences in China remains very low. The future development of probation in China requires not only training court staff regarding probation but also consolidating the community correction centers that provide legal, educational, and other services to offenders. If the China Ministry of Justice dedicates itself to the consolidation of community corrections, the Chinese probation system will progress in a useful way.

Notes

- ¹ Fixed-term imprisonment shall not be less than six months and not more than fifteen years. In combined punishment for several crimes, the fixed-term imprisonment may not exceed twenty years.
- ² A term of criminal detention shall not be less than one month and not more than six months.

- ³ Public surveillance is implemented outside the imprisonment institutions and executed by public security organs. Its term shall not be less than three months and not more than two years. Public surveillance is somewhat similar to probation in implementation because both of them occur outside prison. However, public surveillance is a type of punishment, whereas probation is a method of implementing short-term incarceration.
- ⁴ In the English version of Chinese criminal law, "probation" in article 72 is translated as "suspension of punishment."
- ⁵ For example, Mingxuan Gao and Kechang Ma explore probation in the system of punishment measurement. See CRIMINAL LAW 523 (China Legal Publishing House 2004). Some argue for implementing probation in the system of punishment. See KECHANG MA, PUNISHMENT 578 (China Wuhan University Press 2006).
- ⁶ MINGXUAN GAO, PRINCIPLES OF CRIMINAL LAW, VOLUME 3, 199-200 (1st ed., China Renmin University Press 1994).
- ⁷ KECHANG MA, PUNISHMENT 578 (China Wuhan University Press, 2006).
- ⁸ KAIMING ZHANG, CRIMINAL LAW (1st vol.) 468 (1st ed., Law Press 1997).
- ⁹ ZUOFU WANG, APPLICATION OF CHINESE CRIMINAL LAW 251 (China People's Public University Press 1987).
- ¹⁰ Duan Hui & Weijun Zhou, *Exploration on Austerity of Punishment of Probation*, 7 CONTEMP. LAW J. 37 (2001).
- ¹¹ Criminal Code of People's Republic of China, art. 39(2).
- ¹² Chinese criminal law defines two types of recidivism, general and special. Special recidivism applies to an individual who committed a crime of endangering state security again at any time after serving his sentence or after receiving a pardon for the crime of endangering state security. Art. 65(2).
- ¹³ These elements are not statutory, but scholars have concluded that they can be used to prove the seriousness of the circumstances of a crime.
- ¹⁴ According to statistics, the rate of probation applied to the crime of dereliction of duty was 51.38 percent in 2001; in 2005, it reached 66.48 percent. See <http://news.sohu.com/20100216/n270260936.shtml> (last visited May 10, 2010).
- ¹⁵ Liu Weibo, *About How to Calculate Deduction of Custody Period if the Probationer Commit New Crime During Probation Period*, PEOPLE'S COURT DAILY, Jan. 20, 2010, at 6.
- ¹⁶ See Qi Xingfa, *Analysis on Chinese Community Correction System*, http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=42264 (Last visited May 10, 2010).



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