

Nulla Poena Sine Lege in China: Rigidity or Flexibility?

Li Li¹

Nulla poena sine lege is a fundamental principle of criminal law. Its application is closely related to a basic understanding of criminal justice and separation of powers. The 1997 Chinese Criminal Law adopts a modified version of this principle. This modified version includes a negative and a positive dimension, and appears to be more rigid on the surface than the classic conception of the doctrine. However, in view of China's penal statutes, the rigidity of the Chinese *nulla poena* doctrine has been offset by broad sentence ranges, vague criteria for offense classes, unconstrained sentence mitigation and multi-functional sentencing circumstances.

I. CLASSICISM AND POSITIVISM

Nulla poena sine lege is classically stated by Feuerbach in three dimensions: *nulla poena sine lege*, *nulla poena sine crimine*, and *nullum crimen sine poena legali*.² It means that there is "no crime without law making it so and no punishment except in accordance with a statutory rule." Two schools of thought are relevant to this principle: classicism and positivism. The classicist school advocates strict compliance with the principle of *nulla poena* and minimizes the judicial function in the administration of criminal justice. The positivists disagree with classicism's rigid adherence and challenge the view of an extremely narrow judicial function. Both of these schools of thought can be found in the history of *nulla poena*'s development.

Traced back to Roman law, several aspects of *nulla poena* existed that were colored by strict adherence.³ The strict adherence proposition was supported by the classicists and went on to have profound influence on the development of criminal law in continental Europe. Cesare Beccaria, a representative of the classical school of criminal law, posited that a judge should only apply laws mechanically and has no discretion in creating, interpreting or amending laws. In *An Essay on Crimes and Punishments*, Beccaria outlined his view on the role of judges:

1. Li Li, Ph.D. candidate, University of Hong Kong Faculty of Law, 2010; LL.B. Sun Yat-sen University, Guangzhou, China, 2003.

2. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 170 (1937).

3. *Id.* at 166.

Judges, in criminal cases, have no right to interpret the penal laws, because they are not legislators When the code of laws is once fixed, it should be observed in the literal sense, and nothing more is left to the judge than to determine, whether an action be, or be not, conformable to the written law.⁴

Corresponding to his proposition on the extremely narrow judicial function, Beccaria placed a premium on existing law and argued for a rigid adherence to *nulla poena*:

[T]he authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact. No magistrate then . . . can, with justice, inflict on any other member of the same society, punishment that is not ordained by the laws [I]t follows, that no magistrate, even under a pretence of zeal, or the public good, should increase the punishment already determined by the laws

. . . .

In every criminal cause the judge should reason syllogistically. The major should be the general law; the minor the conformity of the action, or its opposition to the laws; the conclusion, liberty, or punishment.⁵

The strict adherence proposition tended to safeguard individual rights and limit the government's power. It was incorporated into French law after that nation's revolution. For example, the 1791 draft of the French Penal Code provided for absolutely determinate statutory punishments and left no discretion to judges.⁶

While the protection of individual rights persisted into the eighteenth century, criminal positivists in the nineteenth century began to consider the balance between individual freedom and social security. Compared with classicism, positivism appeared in a more enlightened period. Its theorists faced relatively liberal governments and easily lost sight of the importance of limits on government. Positivists believed that legislation is imperfect. Hence this school downplays the importance of legislation and challenges the classicist view of the extremely narrow judicial function.

Enrico Ferri, a representative of the positivist school, wrote in his book, *Criminal Sociology*, that “[j]ust as an imperfect code with good judges succeeds better than a ‘monumental’ code with foolish judges, so a prison system, however ingenious and symmetrical, is worthless without a staff to

4. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 24, 27 (1788) (1764).

5. *Id.* at 22, 25.

6. This draft was killed before its promulgation due to judges' objection. After this, the 1810 Criminal Code vested judges with some sentencing discretion. Lü Anqing, *Zuixing fadng yu ziyou cailiangquan [The Principle of a Legally Prescribed Punishment for a Specific Crime and Discretionary Power]*, 26 HUANQIU FALÜ PINGLUN [GLOBAL L. REV.] 246, 248 (2004).

correspond.”⁷ Insisting on a physio-psychological approach, which was further empirically tested by political scientists and served as the basis for an attitudinal model for predicting judicial decisions,⁸ Ferri simultaneously challenged the strict compliance proposition of the *nulla poena* principle. He argued that:

In criminal law the application of the statute to the particular case is not, or should not be, a mere question of legal and abstract logic, as it is in civil law. It involves the adaptation of an abstract rule, in a psychological sense, to a living and breathing man; for the criminal judge cannot separate himself from the environment and social life, so as to become a more or less mechanical *lex loquens*.⁹

Influenced by this trend, Denmark introduced analogy, which empowers a judge to punish iniquitous acts that are not strictly prohibited by a criminal code in accordance with analogous code provisions, in the early twentieth century. Russia discarded the principle of *nulla poena* entirely in 1926 and Germany adopted many positivist views in the 1927 draft of the German Penal Code.¹⁰

II. THE APPLICATION OF NULLA POENA SINE LEGE IN CHINA: RIGIDITY

In Chinese criminal law, *nulla poena* is an imported product. Its incorporation into the Chinese Penal Code was not a one-step process. The principle of *nulla poena* first officially appeared in the New Criminal Law of the Qing Dynasty in 1911.¹¹ Later, the 1979 Criminal Law employed analogy instead of *nulla poena* due to both a lack of legislative experience and the influence of 1922 and 1926 Soviet-Russian criminal laws.¹² In recognition of judicial discretion, current Chinese criminal law employs a modified version of *nulla poena*, which states that where acts are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with law; otherwise, they shall not be convicted or punished. The modified *nulla poena* principle is explained by Chinese legal scholars as “relative *nulla poena*,”

7. ENRICO FERRI, *CRIMINAL SOCIOLOGY* 227 (D. Appleton & Co., 1897).

8. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* 240-63 (Macmillan 1948) (landmark study utilizing rates of agreement among justices to predict future judicial decisions).

9. FERRI, *supra* note 7, at 175.

10. See Hall, *supra* note 2, at 185-87. Political factors are also deemed to be forces that caused the development of *nulla poena* in Germany and Russia.

11. Peng Fenglian, *Zuixing fading yuanze yinru zhongguo lichengkao [Research About the Principle of “Legally Prescribed Punishment Fits the Crime” and its Process into China]*, 28 FAXUE ZAZHI [L. SCI. MAG.] 27, 27 (2007). This criminal law did not come into effect because of the collapse of the Qing dynasty.

12. Zhao Bingzhi & Xiao Zhonghua, *Zuixing fading yuanze de queli licheng [History of the Principle of Nulla Poena]*, HEBEI FAXUE [HEBEI L. REV.], June 1998 at 7, 7.

which follows the spirit of the original but is a self-perfection stage of the original version.¹³ This relative *nulla poena* is believed to be distinguishable from the proposition of positivism in that it entails the consideration of legal factors in the sentencing process rather than downplaying legal influences, and, on the other hand, it is not based on the strict *nulla poena* proposed by classicism in that it necessitates judicial discretion to some extent.¹⁴

Incorporating *nulla poena* into the criminal law marks a major breakthrough in China's criminal justice system because it represents the first time this principle expressly appeared in criminal law since the foundation of the new China. It is believed that this addition brings Chinese criminal law into closer conformity with the mainstream rule-of-law paradigm.¹⁵ However, somewhat different from the negative statement in the Latin maxim or other international covenants, Chinese *nulla poena* has both positive and negative dimensions. The positive dimension confirms that any offender who breaches criminal law shall be convicted and punished in accordance with the law, whereas the negative dimension emphasizes the converse. Compared with its Latin maxim, the extra, positive dimension does not allow a judge to acquit defendants whose conduct constitutes an offense but does not cause sufficient substantive harm to society. The positive dimension is criticized for depriving the judiciary of the discretion to acquit, while such discretion is an inherent element of *nulla poena*.¹⁶ This reduces the flexibility of legal rules and weakens the judicial check on legislative powers.¹⁷ Although the Chinese *nulla poena* is more textually rigid than its traditional counterparts, this rigidity is strikingly offset by the undetermined statutory sentencing guidelines provided by current criminal law.

III. THE APPLICATION OF NULLA POENA SINE LEGE IN CHINA: FLEXIBILITY

Rules on sentencing have been set down by statutes and judicial interpretations in China in order to serve as legal bases for the Chinese *nulla poena*. However, these rules provide undetermined sentencing guidelines, which are characterized by broad sentencing bands, vague criteria for offense

13. Dong Yuting & Dong Jinyu, *Xingshi ziyou cailiangquan yu xingfa jiben yuanze guanxi yanjiu* [A Study of the Relationship Between Discretion and the Fundamental Principles of Criminal Law], 28 XIANDAI FAXUE [MOD. L. SCI.] 119, 121-22 (2006).

14. Fu Liqing, *Shandai zuixing fading: yi woguo xingfa disantiao zhi jiantao wei qierudian* [Research on the Nulla Poena Sine Lege from the Perspective of Chinese Criminal Law Article 3], 23 FAXUE PINGLUN [L. REV.] 41, 51 (2005).

15. Chen Xingliang, *Zuixing fading de sifa shiyong* [Application of the Nulla Poena Sine Lege], HUADONG ZHENGFA XUEYUAN XUEBAO [J. OF THE E. CHINA U. OF POL. SCI. & L.], Dec. 1998, at 27, 27.

16. Fu Liqing, *supra* note 14, at 46.

17. Shen Qi, *Xingshi fazhi shiye zhong de zuixing fading yuanze: dui woguo xingfa disantiao de fansi* [The Principle of a Legally Prescribed Punishment for a Specified Crime in Criminal Law], 20 SUPP. HEBEI FAXUE [HEBEI L. REV.] 114, 116 (2002); *see also* CHEN XINGLIANG, ZOUXIANG ZHIXUE DE XINGFAXUE [CRIMINAL LAW AND PHILOSOPHY] 207 (1999). Professor Chen argues that *nulla poena* guarantees human rights by putting limits on judicial and legislative powers, and that the limits on the latter are more important.

classes, unconstrained mitigated sentencing, and multi-functional sentencing circumstances. These characteristics alleviate the strictness of the Chinese *nulla poena*.

A. Statutory Sentencing

In most common law jurisdictions, the legislature is accustomed to setting the maximum penalties for offenses and broad discretion is left to the judiciary to set penalties below the statutory limits. In some cases, the legislature has gone a little further than that and made broad sentencing divisions. For example, in the case of burglary, a rough distinction in sentence is made between burglary and aggravated burglary.¹⁸ In spite of the acceptance of a general functional division between the legislature and the court, this plausible division was explicitly rejected by Justice Blackmun of the Supreme Court of the United States in *Mistretta v. United States*. Justice Blackmun reasoned that “the scope of judicial discretion with respect to a sentence is subject to congressional control.”¹⁹ With this clarification in mind, great efforts have been made across many common law jurisdictions to limit judicial discretion and promote consistency in sentencing.²⁰

Unlike their counterparts in common law jurisdictions, rules on sentencing have been set down by statutes and judicial interpretations in China in order to serve as the legal basis for the Chinese *nulla poena*. A menu of punishments is laid down in Chapter Three Part One of the 1997 Criminal Law. Punishments are divided into principal and supplementary punishments.²¹ Principal punishments include control (*guan zhi*), criminal detention (*ju yi*), fixed-term imprisonment (*you qi tuxing*), life imprisonment (*wu qi tuxing*) and the death penalty.²² The first three punishments are penalties on which a maximum and a minimum term are set down by legislation. For example, except as otherwise stated in Articles 50 and 69 of the 1997 Criminal Law, the term of fixed-term imprisonment may not be less than six months or more than fifteen years.²³ This limitation is a default constraint on fixed-term imprisonment for an individual offender.

Sentencing for a particular statutory offense usually follows the definition of that offense. An offense is usually divided into a broad range of one to four sentencing bands, each with a mandatory minimum or maximum punishment or

18. Theft Ordinance, (1997) Cap. 210, § 11(1), 12(1) (H.K.).

19. *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

20. Andrew J. Ashworth, *Sentencing Reform Structures*, 16 CRIME AND JUST. 181, 181 (1992).

21. Xing fa [Criminal Law] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 32, CHINALAWINFO translated in LAWINFOCHINA (last visited Mar. 25, 2009) (P.R.C.) [hereinafter 1997 Criminal Law].

22. *Id.* at art. 33.

23. *Id.* at art. 45.

both. For example, there are four sentencing bands for theft.²⁴ An offender who commits theft shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or control, and shall also, or shall only, be fined.²⁵ If the amount of the theft is large, or there are other serious circumstances, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years and shall also be fined.²⁶ If the amount is especially large, or if there are other especially serious circumstances, the offender shall be sentenced to fixed-term imprisonment of not less than ten years or life imprisonment and shall also be fined or sentenced to confiscation of property.²⁷ Finally, whoever commits a crime falling within any of the following categories shall be sentenced to life imprisonment or death, and shall also suffer confiscation of property: (1) stealing from a financial institution where the amount involved is especially huge; or (2) stealing precious cultural relics and the circumstances of the crime are serious.²⁸ Sentences for theft are divided into four bands according to the amount of the proceeds and specific circumstances. The mandatory maximum fifteen-year term and the minimum six-month term automatically apply to fixed-term imprisonment of not less than ten years and not more than three years for theft.

In addition to setting sentences for particular offenses, some general guidelines on sentence calculation are laid down in Part One of the 1997 Criminal Law. One basic principle of the 1997 Criminal Law sets down the bases for sentencing. It states that the severity of punishment shall be commensurate with the crime committed by an offender and the criminal liability he bears.²⁹ Other general principles and rules on sentence calculation and implementation are provided mainly in Chapter Four, Part One, regarding the concrete application of punishments. The chapter on concrete application of punishments encompasses twenty-nine articles covering general principles of sentencing,³⁰ lighter or heavier sentences within an offense's sentencing band,³¹ mitigated sentences below an offense's sentencing band,³² combined punishments for several offenses,³³ suspension of sentence,³⁴ and sentencing circumstances (*liangxing qingjie*) such as recidivism, voluntary surrender and meritorious performances, which call for lighter, heavier, or mitigated

24. *Id.* at art. 264.

25. *See* 1997 Criminal Law, *supra* note 21, at art. 264 (defining the first sentencing band for theft).

26. *See id.* (defining the second sentencing band for theft).

27. *See id.* (defining the third sentencing band for theft).

28. *See id.* (defining the fourth sentencing band for theft).

29. 1997 Criminal Law, *supra* note 21, at art. 5.

30. *Id.* at art. 61.

31. *Id.* at art. 62.

32. *Id.* at art. 63.

33. 1997 Criminal Law, *supra* note 21, at art. 69-71.

34. *Id.* at art. 72-77.

sentences, or even exemption from criminal liability.³⁵ Although many rules on sentencing are spelled out by the statute, the strictness of the *nulla poena* is strikingly offset by broad sentence bands, vague criteria for offense classes, unconstrained mitigated sentences and multi-functional sentencing circumstances.

B. Sentence Bands

First, the rigidity of Chinese *nulla poena* is tempered by the broad sentence ranges. In current criminal law, most offense classes are linked to broad sentence ranges. Some sentence ranges include several types of punishments. For example, whoever incites to split the country and undermine national unification shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, control, or deprivation of political rights.³⁶ The combination of the four types of punishments can be found in nine offense classes.³⁷ Sexual offenses are another example. Anyone who rapes a woman or has sexual intercourse with a girl under the age of fourteen, in any of the given circumstances, shall be sentenced to fixed-term imprisonment of not less than ten years, life imprisonment, or death.³⁸ This combination of punishments applies to twenty-two offense classes.³⁹ In other cases, although sentence bands encompass only one type of punishment, this punishment covers a broad range. For example, it is provided that whoever incites to split the country or undermine national unification, the lead conspirator, or the one whose crime is grave, shall be sentenced to fixed-term imprisonment of not less than five years.⁴⁰ Supplemented with the mandatory fifteen-year maximum limit on fixed-term imprisonment, fixed-term imprisonment of not less than five years indicates that the sentencing judge could pass a fixed-term imprisonment sentence of between five and fifteen years, a ten-year span between the maximum and the minimum imprisonment for one offense class. Punishment for this offense class, fixed-term imprisonment of not less than five years and sometimes supplemental fines, can be found in thirty-seven offense classes.⁴¹ This range is far broader than that of the sentencing guidelines of the United States Sentencing Commission. The Sentencing Commission prescribes that “[w]here the guidelines call for imprisonment, the range must be narrow: the

35. *Id.* at art. 65-68.

36. *Id.* at art. 103(2).

37. 1997 Criminal Law, *supra* note 21, at art. 103, 105, 107, 109, 111, 290, 296, 298, 371.

38. *Id.* at art. 236.

39. *Id.* at art. 115, 119, 125, 127, 141, 170, 234, 236, 263, 328, 369, 370, 421, 422, 423, 424, 430, 431, 438, 439, 446. The combination of not less than ten-year imprisonment, life imprisonment and the death penalty is found in two offense classes in article 127.

40. *Id.* at art 103.

41. 1997 Criminal Law, *supra* note 21, at art. 103, 105, 107, 123, 146, 151, 163, 186, 187, 188, 189, 225, 237, 271, 286, 295, 317, 320, 351, 359, 360, 380, 383, 384, 404, 405, 411, 425, 426, 428, 430, 440, 443, 447. Not less than 5 years imprisonment is found in two offense classes in articles 151, 186 and 359 respectively.

maximum of the range cannot exceed the minimum by more than the greater of twenty-five percent or six months.⁴² Similarly, this range exceeds ranges in the State of Minnesota, where “the format is to indicate a single fixed sentence together with a durational range of around eight percent from the fixed sentence.”⁴³ These broad sentence bands strikingly temper the strictness of the *nulla poena* in Chinese criminal law.

C. Offense Classes

The strictness of *nulla poena* is further offset by the vague terms that divide offenses into several classes. Current Chinese criminal law usually distinguishes one offense class from another according to ambiguous terms such as “minor circumstances,” “gross circumstances,” and “extremely gross circumstances,” rather than by particular distinctions of offense behavior or offender record.

Murder is a good example of the “minor circumstance” category. The law provides that a person who is convicted of murder shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than ten years; if the circumstances are minor, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years.⁴⁴ Without particularizing the common sorts of circumstances for the “minor circumstances” condition, the ambiguity of this term creates wide latitude for a court to classify an offense into this category and then pass a lenient punishment on the offender.

Great efforts in concretizing these abstract circumstances have nevertheless been made in order to narrow this discretion in the sphere of sentencing. For example, one interpretation of the Supreme People’s Court (SPC) clarifies that the separate or accumulative smuggling of less than five conventional 60mm-caliber shells or smaller grenades or rifle grenades falls into the “minor circumstances” as mentioned in Paragraph One of weapon smuggling.⁴⁵ This interpretation also divides the “gross circumstances” as mentioned in Paragraph Two of Article 152 of the Criminal Law into four concrete circumstances with quantity and waste category constraints.⁴⁶ These efforts have reduced the uncertainty caused by ambiguous classification criteria to some extent.

D. Mitigated Sentence

Third, the legislature leaves wide discretion for a court to depart from the

42. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2008).

43. Ashworth, *supra* note 20, at 216.

44. 1997 Criminal Law, *supra* note 21, at art. 232.

45. Zuigao renmin fayuan guanyu shenli zousi xingshi anjian juti yingyong falü ruogan wenti de jieshi (II) [Interpretation of the Supreme People’s Court on the Concrete Application of Law in the Trial of Criminal Cases of Smuggling (II)] (promulgated by the Sup. People’s Ct., Nov. 14, 2006, effective Nov. 16, 2006), art. 1, CHINALAWINFO, translated in LAWINFOCHINA (last visited Mar. 30, 2009) (P.R.C.).

46. *Id.* at art. 6.

mandatory minimum limits when mitigated sentences apply. Mitigated sentencing takes two forms: discretionary mitigated sentences and mandatory mitigated sentences.⁴⁷ Discretionary mitigated sentencing does not require the existence of a statutorily defined mitigating circumstance and applies only if it is approved by the SPC.⁴⁸ Discretionary mitigated sentences have transitioned from flexible application to strict application. The 1979 Criminal Law Draft 22 required the court to give reasons for the application of mitigated sentences.⁴⁹ Although “reason giving without detailed guidance may prove unhelpful,”⁵⁰ exposure of the judicial intent promotes publicity and transparency in sentencing. The requirement of giving reasons was replaced by a procedural requirement of a higher court review in Draft 33 of the 1979 Criminal Law. The strictness of the procedural review requirement was relaxed in the 1979 Criminal Law by authorizing a court to impose mitigated sentences upon the decisions of the adjudicative committee of the trial court.⁵¹ This is similar to the Criminal Law of Japan, which vests judges with the power to mitigate legally prescribed punishment without requiring any appellate court review.⁵² Lowering the approval authority from a higher court to the trial court created a friendlier environment for judicial discretion, resulting in abuses of mitigated sentencing and inviting corruption.⁵³

To curtail abuse of discretion in applying mitigation, the 1997 Criminal Law requires the SPC to give effect to discretionary mitigated sentences, and a detailed procedure for the approval of mitigated sentences is further specified by the SPC’s interpretation. According to that interpretation, in cases where the offender does not appeal and the prosecutor does not lodge a protest, the trial court that decides to impose a discretionary mitigated punishment shall report to the court at the next level for review.⁵⁴ If the higher-level court disagrees with the mitigated sentence, it shall remand the case for retrial or alter

47. 1997 Criminal Law, *supra* note 21, at art. 63.

48. *Id.*

49. Zhao Tingguang, *Lun liangxing yuanze yu liangxing gongzheng: guanyu xiugai wanshan woguo liangxing yuanze de lifa jianyi* [Discussion on Sentencing Principles and Sentencing Justice: Legislative Proposal on Amending and Perfecting Sentencing Principles in China], FAXUEJIA [JUR. REV.], Aug. 2007, at 43, 49.

50. Ashworth, *supra* note 20, at 225.

51. Xing fa [Criminal Law] (promulgated by the Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980), art.59, CHINALAWINFO, translated in LAWINFOCHINA (last visited Mar. 31, 2009) (P.R.C.) [hereinafter 1979 Criminal Law].

52. Zhang Mingkai, *Xu Ting’an jianqing chufa de sikao* [Thoughts of the Mitigation of Penalty in XU Ting Case], FALU SHIYONG [NAT’L JUDGES C. L.J.], Sept. 2008, at 4, 6.

53. Yue Longhai & Li Changlong, *Jianshu zhuoding jianqing qingjie de xingzhi he shiyong* [Discussion on the Nature and the Application of Discretionary Mitigating Circumstances], FAXUE TIANDI [LEGAL WORLD], Oct. 1997, at 9, 11.

54. Zuigao renmin fayuan guanyu zhixing zhonghua renmin gongheguo xingshi susong fa ruogan wenti de jieshi [Interpretation of the Supreme People’s Court on Several Issues Regarding the Implementation of the Criminal Procedure Law] (promulgated by the Sup. People’s Ct., Sept. 2, 1998, effective Sept. 8, 1998), art. 268, CHINALAWINFO (P.R.C.) [hereinafter Criminal Procedure Implementation].

the jurisdiction to another people's court; otherwise it shall refer the case, level by level, to the SPC for approval.⁵⁵ If the SPC approves the discretionary mitigated sentence, it shall issue a written approval order; otherwise, it shall rescind the original judgment or order, and remand the case to the court that originally tried it for retrial or instruct another court at a lower level to retry the case.⁵⁶ In crude terms, once a court attempts to impose a discretionary mitigated sentence, there is a chance that all relevant higher courts could become involved in the sentencing decision and a retrial might be ordered by a higher court even if no party requests an appeal. Thus, the question of whether the court is confident that its decision can survive the multiple levels of reviews is crucial. In practice, trial courts are usually reluctant to launch the review procedure and do not mitigate the prescribed sentence.⁵⁷ In some cases, a court would rather hand down an exemption from criminal liability sentence instead of a mitigated punishment because the former does not require any approval from a higher court.⁵⁸ In doing this, trial courts could serve defendants' best interests, realize the "individual case" ideology, and avoid the seemingly unnecessary trouble caused by the approval procedure. Thus, the use of the discretionary mitigated sentence has been curbed by the complicated approval procedure and the alternative treatment of exemption from liability.

Unlike discretionary sentence mitigation, mandatory sentence mitigation applies where a statutorily identified mitigating circumstance exists.⁵⁹ Mandatory and discretionary sentence mitigation share a common problem of how to mitigate the statutory punishment. There is a theoretical debate as to whether a sentence could be mitigated to another type of penalty or even to exemption from liability. In practice, unstructured and wide discretion in sentence mitigation is left in the hands of the court.

The legislature has once attempted to gain a stronger grip on judicial discretion by setting sentence minimums for mitigated punishments. In the 1979 Criminal Law Draft 22, the legislature set down seven minimum guidelines for mitigated punishments according to different statutory minimum sentences.⁶⁰ For example, seven years imprisonment was set as the bottom-line of mitigated punishment for an offense with a usual minimum punishment of ten years of imprisonment, and five years was the minimum for an offense with an original minimum punishment of seven years imprisonment.⁶¹ This guideline was later negated by the legislature in the 1979 Criminal Law Draft

55. *Id.*

56. *Id.* at art. 270.

57. Zhang Yonghong & Sun Tao, *Zhuoding jianqing chufa chuyi [On Mitigating a Punishment at Judicial Discretion]*, FAWANG WANG [LEGAL WEB], Mar. 25, 2009, <http://www.fawang.net/Article/xfx/200804/2565.html>.

58. *Id.*

59. 1997 Criminal Law, *supra* note 21, at art. 63.

60. Zhao Tingguang, *supra* note 49, at 49.

61. *Id.*

33 because the legislators thought the guidelines were too strict and that it was better to leave the court with freedom to decide based on the facts of each case.⁶² Since then, no statutory guidelines have been established for mitigated sentencing.

Compared with foreign practice, the guideline vacuum in mitigated sentencing has opened an unduly large zone for judicial discretion that has eroded the stability of the Chinese legal system. Articles 68 and 71 of the Criminal Law of Japan provide that mitigated sentences for the death penalty shall demand life imprisonment or imprisonment of not less than ten years; mitigated sentences for life imprisonment shall not be less than seven years; and mitigated sentences for fixed-term imprisonment shall be not less than half of the prescribed minimum sentence and not more than half of the prescribed maximum sentence.⁶³ With a wider sentence range for mitigated punishment, similar provisions were adopted by Austria and Germany.⁶⁴ Moreover, it seems more disturbing when considering there are eighteen offense classes with a minimum punishment of fifteen years or life imprisonment and 106 offense classes with a minimum punishment of ten years in the current criminal law. Scholars and practitioners have made proposals to rein in such broad discretion. Zhang Mingkai suggests six tentative penalty bands for mitigated sentences.⁶⁵ Liu Zhaofa and others suggest introducing the concept of the sentencing grid into Chinese criminal law and confining mitigated sentences within the grid immediately below the prescribed punishment⁶⁶ or within several rows below the prescribed punishment.⁶⁷ There is hope that judicial latitude in doling out mitigated sentences will be more structured in the foreseeable future.

E. Multi-functional Sentencing Circumstances

Lastly, multi-functional sentencing circumstances further weaken the absoluteness of *nulla poena* in China. According to the 1997 Criminal Law, some prescribed circumstances shall or may be taken into account by a court when it metes out a sentence on an actual offender. Some of these circumstances have multiple functions and give a court several ways to calculate sentencing, such as lightening, mitigating or remitting punishment. For example, the 1997 Criminal Law provides that offenders who voluntarily surrender may be given a lighter punishment within an offense sentence range

62. *Id.*

63. Zhang Mingkai, *supra* note 52, at 8.

64. *Id.*

65. *Id.*

66. Liu Zhaofa & Liu Mian, *Qianyi fadixing [Discussion on Statutory Sentence]*, SHANDONG SHENPAN [SHANDONG JUST.], May 1998, at 22, 23; Huang Min, *Dui xingfa zhong 'fadixing yixia jianqing xingfa' de jiedu yu pingjia [Understanding and Assessment of Mitigated Sentencing in Criminal Law]*, JIANCHA SHIJIAN [PROCURATORIAL PRACT.], Issue No. 3, 2005, at 87-88.

67. Zhang Yonghong & Sun Tao, *supra* note 57.

or otherwise mitigated punishment below the applicable offense sentence range.⁶⁸ Additionally, a deaf-mute or a blind person who commits a crime may be given a lighter punishment, have his sentence mitigated, or be exempted from punishment.⁶⁹ “Voluntarily surrender”, “a deaf-mute person” and “a blind person” are three examples of multi-functional sentencing circumstances. In total, there are twenty-one such types of sentencing circumstances in the 1997 Criminal Law and seven in judicial interpretations.⁷⁰ Each sentencing circumstance is accompanied by one combination of functions, the first two types of functions combine as seen in the above examples of voluntary surrender, a deaf-mute person or a blind person plus two others: 1) “a lighter punishment or mitigated punishment,” 2) “a lighter punishment, a mitigated punishment, or be exempted from punishment,” 3) “a mitigated punishment or be exempted from punishment,” and 4) “a lighter punishment or be exempted from punishment”. Within one type of function combination, a choice among alternatives leaves broad discretion to the court.

This uncertainty is exacerbated by a lack of legal guidance. One interpretation of the SPC tries to provide guidelines on how to choose among a lighter sentence, mitigated sentence and exemption from liability when the circumstance of voluntary surrender appears in a case. It provides that choices among the three types of sentencing calculations shall be made according to the severity of the offense and specific circumstances of the voluntary surrender.⁷¹ Offense severity can be understood from two perspectives, or in other words, measured with two variables: serious physical injury sustained by the victim and serious property loss.⁷² Offense severity, as one traditional and important legal factor, has consistently been a legal determinant in criminal case disposition.⁷³ Specific circumstances of voluntary surrender are closely associated with the attitude of the offender. Confession with remorse is usually viewed as a good attitude. In practice, an offender who confesses and shows remorse could receive leniency from the court, whereas offenders who refuse to confess or confess without remorse will receive harsher sentences.⁷⁴ Although offense severity and offender attitude have proven robust in their effects on sentencing in reality, they are only expressly provided for voluntary surrender and meritorious performance. There is not a general guideline for choosing

68. 1997 Criminal Law, *supra* note 21, at art. 67.

69. *Id.* at art. 19.

70. Zhao Tingguang, *supra* note 49, at 51.

71. Zuigao renmin fayuan guanyu chuli zishou he ligong juti yingyong falü ruogan wenti de jieshi [Interpretation of the Supreme People’s Court on Some Issues about the Specific Application of Laws in Voluntary Surrender and Meritorious Performance] (promulgated by the Sup. People’s Ct., Apr. 6, 1998, effective May 9, 1998), art. 3, CHINALAWINFO (P.R.C.).

72. Lu Hong & Elaine Gunnison, *Power, Corruption and the Legal Process in China*, 13 INT’L CRIM. JUST. REV. 28, 38 (2003).

73. Lu Hong & Bridget Kelly, *Courts and Sentencing Research on Contemporary China*, 50 CRIME L. AND SOC. CHANGE 229, 237 (2008).

74. Lu & Gunnison, *supra* note 72, at 39.

among sentencing calculation methods when a multi-functional sentencing circumstance emerges. In all other situations, a court is left with broad discretion in choosing how to sentence.

IV. CONCLUSION

The application of *nulla poena* is relevant to the basic understanding of criminal justice and separation of powers. Strict adherence advocates underline the significance of legal factors in the administration of criminal justice and maximize the importance of the legislature. The advocates of the opposing viewpoint prefer physio-psychological factors and promote the judicial function. Two dimensions of the Chinese *nulla poena* reduce the flexibility of legal rules, deprive the judiciary of acquittal discretion, and appear to be more rigid on the surface. Yet, in view of penal statutes, the rigidity of Chinese *nulla poena* has been offset by broad sentence ranges, vague criteria for offense classes, unconstrained mitigated sentencing, and multi-functional sentencing circumstances. One thing merits attention. Recently, some legal experiments have been carried out to standardize sentencing criteria. Effects of these efforts remain to be seen.