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A review of the new provisions for sanctioning mentally disordered offenders in China, in a broader historical context[☆]



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ABSTRACT

Reforms of the criminal justice system in China in recent years have included the 2012 Code of Criminal Procedure (CCP), which resulted in new disposals for mentally disordered offenders. From a Western perspective, changes in Chinese criminal law are sometimes clichéd as toothless window dressing, but they may represent a genuine step forward in safeguarding human rights. Taking a historical perspective, this paper reveals that in the East, as much as in the West, there is a 'moral tradition' of not punishing mentally disordered offenders who are not considered responsible for their acts. There are clear differences in disposal for those acquitted having been found 'not guilty by reason of insanity'. Whereas Western jurisdictions have offered (criminal) courts the opportunity for commitment in (forensic) mental hospitals from the early 19th Century, in China, disposal has remained, until the recent changes, the responsibility of the administration (mainly the police) or the family of the offender. A few high profile cases brought to light the inadequacy of these arrangements and the general disregard of obvious mental health issues when sentencing offenders. There was lack of clarity regarding who would take responsibility for treatment and issues of future public protection arising from a mental disorder. The 2012 CCP introduces the power of mental health commitment by the judiciary for those found non-responsible for an offense because of a mental disorder. Similar to provisions in Western jurisdictions there remain human rights concerns regarding aspects of 2012 CCP and the role of 'preventive detention' for mentally disordered offenders on indeterminate secure mental health detention. Nevertheless, the shift to judicial decision making in such cases and the possibility of mental health commitment are welcome steps in improving the human rights of this vulnerable population.

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1. Introduction

The socio-political context in China is changing. And as criminal justice systems are usually to be understood within that context, it is no surprise that there have recently been major criminal law reforms. From an international human rights perspective, criminal justice reform is welcomed, but often also criticized for being too minor a step towards the liberal democracies' standard (Belkin, 2000). The new Chinese Code

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of Criminal Procedure from 2012 (2012 CCP) has been received with ambivalence – is it, '[I]legalizing the tools for repression or safeguarding human rights?' (Rosenzweig, Sapio, Jiang, Teng, & Pils, 2013).

Of the changes in the 2012 CCP, new provisions concerning mental health commitment for mentally disordered offenders have not yet attracted much attention internationally. As with the criminal justice system, Chinese psychiatry also has a questionable reputation concerning its abuse of detention for political dissidents (Bonnie, 2002; Shao & Xie, 2015). Only in 2013, was the first national Mental Health Law commenced, establishing a framework for civil commitment of mentally disordered individuals, and also for the execution of commitment for those found not guilty of a criminal act because of their mental disorder.

As offending behavior arising from a mental disorder is both an eternal and universal problem, this paper will take a historical comparative approach to comment on legislation that cannot yet be fully evaluated in practice due to both its recent enactment, as well as the difficulties in accessing empirical data concerning the practice of criminal law in China.

The existence of criminal responsibility doctrines or insanity defenses in Western jurisdictions is said to be the expression of a 'legal and moral tradition of the western world' (United States Court of Appeals for the District of Columbia Circuit in the case of *Durham v. U.S.* (214 F.2d 862), 1954). However, the subsequent detention of those who are 'not guilty by reason of insanity' is rooted in deliberations of public protection and criminal politics. Both the Chinese tradition concerning mentally disordered offenders and criminal accountability and its tradition in what subsequent measures may be taken will be addressed sequentially. The paper focuses on a mental disorder at the time of committing the offense and its consequences for sentencing, meaning that fitness or competency issues regarding other elements of the criminal process are not discussed. After explaining the more specific inducements for the recent legal changes, the legal provisions themselves will be outlined and evaluated from an international human rights perspective.

As both developed and developing countries struggle with vast numbers of mentally disordered offenders in the criminal justice system, we hope that understanding the Chinese way of dealing with this population offers a platform for cross-cultural comparisons. To fully understand the subtleties of the Chinese provisions, a brief introduction of the Chinese legal and criminal justice system is needed. The People's Republic of China is a unitary state with centralized legislative, executive and judicial power. In its civil law tradition, written laws are binding. Both the courts and the public prosecution – respectively called 'people's court' and 'people's procuratorate' – are viewed as part of the judicial system. The courts can be divided into four levels: basic people's courts (BPCs), intermediate people's courts (IPC), higher people's courts (HPCs), and the supreme people's court (the SPC). In parallel, the public prosecution also consists of four levels: district people's procuratorates (DPPs), municipal people's procuratorates (MPPs), provincial people's procuratorates (PPP), and the supreme people's procuratorate (the SPP). The legislative power belongs to the National People's Congress (NPC), however the SPC and, typically also, the SPP can issue binding judicial interpretations. In criminal justice, it is principally the police – 'public security organs' (PSO) – who are in charge of investigating crimes and delivering judicial decisions. People's procuratorates are responsible for prosecution, approving arrest, and supervising the criminal justice administration. In practice, a criminal court generally consists three to seven members, depending on the court's level, the seriousness of the offense, and the complexity of the case. In most cases, this consists of a combination of professional judges and lay decision makers ('people's assessors'), both of which have equal status regarding conviction and sentencing (McConville, 2013). The defense representative is not necessarily legally qualified in China. According to Article 32 of the 2012 CCP, three types of persons can serve as 'defenders': (1) a lawyer; (2) a person recommended by a people's

organization or the employer of a defendant; or (3) a guardian, relative or friend of a defendant. It should be noted that the rights and obligations of a defense lawyer are different from the other two in many ways. For instance, only a defense lawyer can provide legal assistance to the suspect during investigation (Article 36 of the 2012 CPL).

2. The Chinese tradition concerning criminal responsibility for mentally disordered offenders

The Western moral tradition is usually traced back to the earliest recordings of Hebrew Law, as both texts from the Tanakh (e.g. Cosyns & Casselman, 2005) and the later Babylonian Talmud (around 500 AD) seem to regard offenders, who could not distinguish right from wrong, blameless 'in the eyes of God and man' (Simon & Ahn-Redding, 2006, p. 4). Later, it was also apparent in Greek philosophy (McGlen, Brown, Hughes, & Crichton, 2015) and Roman law that such an offender could not be punished, because he was already punished and 'excused by the misfortune of his fate'. (Justinian Digest 48, 9, 2, 2 (Modestinus), via Walker, 1968, p. 27).

The Chinese tradition can actually be traced back to around the same era. In the Xi Zhou Dynasty (1059–771 BC), 'three pardons' can be found in the Chapter of 'Sici' (office in charge of sanctions): for children under the age of seven, elderly over the age of eighty and 'mentally retarded', resulting in impunity (Guo, 2009). In Han Dynasty (202 BC–220 AD), lenient punishment was proposed for murderers who suffered from a mental disorder. However, this led to mitigation of punishment instead of exemption. In the Tang Dynasty (618–907 AD), with the enactment of the Laws of Tang, the moral tradition became more complex (Zhangsun, 1983). Mental disorder was differentiated into being mild or severe. Subsequently, offenders with a mild mental disorder could 'redeem' the punishment through paying a sum of money, popularly referred to as 'cash for clemency', if the maximum penalty was lower than exile. Offenders with a severe disorder, however, could make use of such redemption when harsher penalties were at stake, for example, for robbery or causing bodily harm (Fan, 1965). It did not matter whether the mental disorder was present at the time of the crime or during investigation. These rules remained in force over the ages under subsequent dynasties, even though research shows that in practice, mitigation of sanctions because of mental disorder was not common (Zhao, 2001a).

At the end of the Qing Dynasty (1636–1912 AD), China entered a period of domestic revolt and foreign invasion, which the last imperial government countered by reforming the legal system. Conspicuously, Shen Jiaben, the leading reformist during that period, already noted that the Han Dynasty rules on mentally disordered offenders were very similar to the Western tradition (Huan, 2013). He argued that such acts could not be considered as offenses (Shen, 1994). This opinion was later reflected in the Draft of the New Criminal Code of the Qing Dynasty. The Dynasty ended before the code was enacted, but the spirit of the Draft was adopted by the succeeding Kuomintang government during the Republic period from 1912 to 1949.

From 1949 to 1979, even though there was no unified criminal code, changes to the mentioned provisions were initiated. Article 12 of the 1950 Draft Outline of a Criminal Code, for instance, provided a criterion for exemption of punishment (which would then be imposed on one of the offender's guardians instead), which translates as 'unable to recognize and unable to control his own conduct' due to a mental disorder. A first correction to that was changing 'exemption of punishment' into 'exemption of responsibility' in the Draft of the Guiding Principles for a Criminal Code from 1954. A second amendment, of changing the word 'crime' to 'act causing damages', to underline that there is no crime without culpability, was made in the drafts of the new Criminal Code in 1957 and 1963. A third correction made by the SPCs in 1956 (in their Reply on Issues Concerning the Crimes Committed by Mentally-Disordered Offenders) replaced the word 'and' between

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