

AGGRAVATING AND MITIGATING FACTORS IN CONTEXT: CULTURE, SENTENCING, AND PLEA MITIGATION IN HONG KONG

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Despite the significant role that aggravating and mitigating factors play in sentencing outcomes, they have been neglected by both policy and research. The purpose of this study is to examine the influence of culture—which has been deemed to be an “elusive” influence—in the plea mitigation and sentencing process. An empirical study was conducted to examine the effects of both offense-specific and offender-specific factors that may serve to aggravate or mitigate the sentence in a magistrate’s court in Hong Kong. Data was collected through courtroom observations of sentencing hearings (n = 712). Statistical analyses reveal that Chinese cultural and social norms motivate judicial decisions, as defendants who did not conform to the cultural expectations of family, industry, enduring hardships, and maintaining good social order are likely to be sentenced more severely when they are convicted of a crime. A disciplinary model of sentencing is proposed to explain why certain factors are considered as aggravating in Hong Kong’s penal culture. These factors, however, are extraneous to the offense or the culpability of the offender. Implications and future directions are discussed.

Keywords: *aggravating and mitigating factors, plea mitigation, sentencing, culture, courts*

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INTRODUCTION

Aggravating and mitigating factors are essential elements of judicial decision making and sentencing. It is often stressed that, if justice is to be done, sentences should be based not only on the criminal offense but on the offender as well. Courts must take into account a wider range of factors that may aggravate (i.e., enhance) or mitigate (i.e., reduce) the severity of the sentence. These include factors that point to the seriousness of the offense, the harm done, the offender's culpability, as well as the offender's background, such as criminal history, age, employment record, and family obligations. Remarkably, despite their significance in the sentencing process, these factors have been neglected by policy makers and researchers (Jacobson & Hough, 2007) and are an "under-researched" area of criminal sentencing (Roberts, 2011, p. 1).

At the same time, there is no definitive guidance on what constitutes an aggravating or mitigating factor, which has led to much variability and ambiguity across legal jurisdictions around the world (Ashworth, 2010; Jacobson & Hough, 2007; Roberts, 2011; Tata, 1997). In certain legal jurisdictions, such as Australia and Hong Kong, aggravating or mitigating factors are numerous and widespread, whereas in other jurisdictions, only a minimal number of factors are able to aggravate or mitigate a sentence (Bagaric, 2014). Sentencing guidelines and the common law provide a wide range of factors that the courts should take into account when sentencing, but rarely give any instructions on how they are to be weighted and how they relate to broader sentencing principles (Roberts, 2011). Hence, such ambiguity creates a void that other influences can fill.

The purpose of this study is to examine the influence of culture, which has been deemed "elusive" (Manson, 2011, p. 42), in the sentencing process. Garland (1990, p. 195) provides a broad definition of culture that refers to "conceptions and values, categories and distinctions, frameworks of ideas and systems of belief, which human beings use to construe their world and render it orderly and meaningful." More specifically on the subject of aggravating and mitigating factors, culture informs about the values of a particular society and underscores those factors that render the sympathy and censure of the courts (Manson, 2011). Garland (1990, p. 195) acutely points out:

These cultural patterns structure the ways in which we think about criminals, providing the intellectual frameworks (whether scientific or religious or commonsensical), through which we see these individuals, understand

their motivations, and dispose of them as cases. Cultural patterns also structure the ways in which we feel about offenders . . . The intensity of punishments, the means which are used to inflict pain, and the forms of suffering which are allowed in penal institutions are determined not just by considerations of expediency but also by reference to current mores and sensibilities.

The present article reports on an empirical study that examined the influence of aggravating and mitigating factors on sentencing outcomes in a magistrate's court in Hong Kong. Quantitative data was collected through courtroom observations of the sentencing process of a sample of defendants. Statistical analyses reveal that culture plays a defining role in sentencing. Hong Kong provides a novel context in which to explore this, because aggravating and mitigating factors are drawn from parameters set out in its common law, much of which is derived from its British colonial legacy. But at the same time, Chinese cultural influences and social norms motivate judicial decision making (Cheng, 2015). A disciplinary model of sentencing will be proposed to provide meaning as to why certain factors are considered as aggravating in Hong Kong's penal culture. It will be argued that certain defendants possess characteristics that fall outside of the region's cultural expectations, and that they are therefore sentenced more harshly when they are convicted of a crime. This study adds to the limited literature on aggravating and mitigating factors, especially in jurisdictions outside the Western context, and sheds light on the scarcely examined influence of culture on sentencing outcomes.

I. AMBIGUITY OF AGGRAVATING AND MITIGATING FACTORS

It is often a matter of intuition as to whether a particular factor is deemed to be aggravating or mitigating. It appears that, in the daily operations of the criminal process, members of the legal profession have some preconceived ideas about which factors result in a more severe or a more lenient sentence, and base their sentencing judgments upon these (Roberts, 2011). Indeed, sentencing is seen as a craft (Tata, 2007). However, a closer examination reveals that aggravating and mitigating factors cannot be taken for granted. Despite the attempts by many jurisdictions to codify aggravating and

mitigating factors in sentencing guidelines—and despite the abundance of court cases that serve as precedents—ambiguities are commonplace.

Although it is beyond the scope of this article to examine the sentencing regimes of every legal jurisdiction, a brief survey of selected jurisdictions reveals the uncertainties that current guidelines on aggravating and mitigating factors pose for those who pass sentence. For instance, since 1998, the Sentencing Council for England and Wales (previously, the Sentencing Guidelines Council) has created definitive sentencing guidelines for most common offenses. Offenses are typically divided into three or four categories, based on their seriousness, with each category relating to a range of potential sentences. Aggravating factors can be used by the court to determine the level of seriousness of a particular offense; for example, in the guidelines on assault against the person, the court must consider the degree of harm and culpability by consulting a non-exhaustive list of aggravating and mitigating factors, such as the degree of injury, whether the victim was a member of a vulnerable group, and whether the offense was premeditated. In placing the offense in the appropriate category, the court must then take into account other factors, such as previous convictions (Sentencing Council, 2011).

The principal reference to aggravating and mitigating factors in England is found in the guideline publication titled *Overarching Principles: Seriousness*. In it, a non-exhaustive list of thirty-one factors is outlined to indicate a higher level of culpability and harm, which is generally applicable to all offenses. On the other hand, only four mitigating factors are listed to indicate a low level of culpability; these are (i) a greater degree of provocation than usual, (ii) mental illness or disability, (iii) youth or age, and (iv) the offender playing a minor role in the offense (Sentencing Guidelines Council, 2004, pp. 6–7). Although the guidelines provide lists of factors that the court must take into account, they do little to explicate the weight placed on each factor and how they are to affect the sentence (Ashworth, 2011). Also, these factors remain open-ended, as § 166(1) of the Criminal Justice Act, 2003, tells the court to take into consideration any matters that are, in their opinion, “relevant in mitigation of sentence.”

Similar problems can be found in other comparable jurisdictions. In New Zealand, the Sentencing Act, 2002, codifies for the first time a list of aggravating and mitigating factors in that jurisdiction. The Act lists twelve generic aggravating factors and seven mitigating factors; however, there is no prioritization or weighting of each factor, and there is no guidance on

how various factors apply to different offenses, or why a factor is justified in aggravating or mitigating a sentence. As a result, the weighing of these factors remains a matter of judicial discretion (Young & King, 2011). Section 181(2) of the Canadian Criminal Code specifies only five aggravating factors. It is noteworthy that no mitigating factors are listed under this statute; this is consistent with a general trend across jurisdictions to put more stress on aggravating factors than on mitigating considerations (Roberts, 2008).

In Australia, far more emphasis is placed on individualized sentencing than on consistent guidelines (Krasnostein & Freiberg, 2013). Bargaric (2014, p. 1162) even claims that “[w]ith only a hint of exaggeration, in Australia nearly every consideration potentially aggravates or mitigates.” This expansive approach to sentencing is justified on the basis of a need for judicial discretion to tailor sentences to the unique character of each case and the varying circumstances of each offense and offender (Krasnostein & Freiberg, 2013, p. 267).

At the other end of the spectrum, the United States may be considered as one of the most restrictive jurisdictions in terms of allowing for aggravating and mitigating factors to influence sentences. Across different states and at the federal level, there are formal sentencing guidelines; for example, under the federal guidelines, there is a two-dimensional grid founded on the seriousness of the offense and the criminal history of the offender. The grid comprises 256 cells that define six-month sentencing ranges (Berry III, 2011). Sentences are added up, based on aggravating factors and previous convictions. If the court wants to depart from the sentencing ranges, it must give reasons (Bargaric, 2014). But in the 2005 case of *United States v. Booker*, the U.S. Supreme Court ruled that the guidelines were unconstitutional. Instead of being mandatory, the guidelines are now deemed to be advisory. Sentencing judges can take into account a variety of factors—including extra-legal factors—when imposing punishment (Robinson, Jackowitz, & Bartels, 2012). Moreover, sentencing judges must consider all relevant mitigating factors and are permitted to ignore past contradictory policy statements (Baron-Evans & Coffin, 2010). In sum, Roberts (2008, p. 264) notes that “[g]uideline schemes around the world generally adopt a *laissez-faire* approach to the use of sentencing factors.”

The other source of aggravating and mitigating factors is appellate court cases. Appellate courts in various common law jurisdictions lay down precedents governing the factors that subsequent cases ought to consider;

however, there are many inconsistencies in case law, as Walker (1999, p. 230) observed in writing about the English courts: “[there are a] number of reasoned decisions by the Court of Appeal which are difficult, if not impossible, to reconcile with each other.” Also it is often the case that a particular factor has been considered by the courts to be both mitigating and aggravating. A prime example is intoxication, which has been interpreted as both: on the one hand, the courts have stated that drunkenness cannot be tolerated, especially if an offense was committed to support an alcoholic addiction; on the other, intoxication has been deemed to diminish the offender’s personal responsibility and has thus led to a reduced sentence (Padfield, 2011).

II. SIGNIFICANCE OF OFFENDER-RELATED FACTORS

To date, only a handful of empirical studies have examined the impact of aggravating and mitigating factors on sentencing. These studies demonstrate that offender-related factors are significant in affecting sentencing decisions, but the scope of what is taken by the courts to be aggravating or mitigating factors can be wide-ranging. An earlier study by Shapland (1981, p. 74), who analyzed 126 sentencing hearings in the English magistrates’ courts and Crown Court, notes that many accounts in sentencing hearings are comparable to everyday justifications and excuses; but there are disagreements between what clients want their legal representatives to put forth as mitigating factors and what lawyers believe that the court would accept as a realistic mitigating factor. Lawyers noted that they must be realistic and flexible when dealing with individual judges and magistrates, as they perceived differences of approach to sentencing between the two levels of court, trial and appellate, as well as between individual judges (Shapland, 1981, p. 81).

Jacobson and Hough’s (2007) English Crown Courts study is another that closely examined the role of aggravating and mitigating factors in the sentencing process. The authors observed the sentencing hearings of 162 sentencing decisions and conducted interviews with forty judges. The authors found that both offense-related and offender-related factors were frequently raised during sentencing hearings; but it was offender-related factors that usually played the most significant role in reducing the severity of a sentence. In the observed hearings, the judges repeatedly mentioned

offender-related factors as key in imposing a non-custodial sentence as opposed to a custodial one. This is consistent with previous findings where, in determining a custodial or non-custodial sentence for “cusp cases,” those that could be sentenced either way, the influence of offender characteristics or circumstances served to pull an offender away from a custodial sentence (Hough, Jacobson, & Miller, 2003, pp. 37–38).

In the interviews, however, judges were found to be reluctant to generalize about which factors influenced their sentencing decisions. They revealed that they had not contemplated the significance of aggravating or mitigating factors in terms of sentencing principles. They countered by answering that sentences ought to be dealt with on a case-by-case basis, and that “it depends” and “each case is different” (Jacobson & Hough, 2007, p. 14). Similar findings were highlighted by Flood-Page and Mackie’s (1998, p. 54) earlier study on sentencing in the magistrates’ courts and Crown Court in England. In this study it was revealed that, when deciding on a specific sentence, such as either a conditional discharge or a fine, judges considered the circumstances of an offense and the offender and made “intuitive” sentencing decisions.

The ambiguity of what constitutes an aggravating or mitigating factor and the weight that judges attach to them undermines traditional sentencing principles. In particular, factors that are not related to the offense are inconsistent with proportionality theory, as these factors may result in an actual sentence that is outside the sentencing range that is proportional to the seriousness of the offense committed (Ashworth, 2010).

III. SENTENCING LAW IN HONG KONG

In assessing aggravating and mitigating factors and sentencing decisions, the Hong Kong courts rely on guidance set out in case law. Unlike England and Wales, there are no sentencing councils and hence no definitive sentencing guidelines in Hong Kong. Cases are at times set out by the appellate court, known as tariff cases, to provide base sentences and guidance for subsequent courts to refer to, often in the form of a range of sentences for particular categories of offenses. Although Hong Kong’s sovereignty was restored to the People’s Republic of China in 1997, its pre-existing legal system remains intact under the “one country, two systems” framework. Article 8 of the Basic Law, Hong Kong’s mini-constitution, guarantees that

“[t]he laws previously in force in Hong Kong—that is the common law, rules of equity, ordinances, subordinate legislation and customary law—shall be maintained. . . .”

English law, including statutory law and case law, was quickly applied in the newly created colony of Hong Kong when it became a British colony in 1841. Through the enactment of the Supreme Court Ordinances in 1844 and 1873, English law applied to both expatriates and the local population of the colony. This was later reinforced in the Application of English Law Ordinance in 1966, which set out the English laws applicable to Hong Kong. Although the Hong Kong legislature could modify the English laws if they were not deemed applicable to the local circumstances, most legislation in Hong Kong was modelled after its English statute counterpart. As a result, as Lo and Chui (2012, p. 8) note, “Much of that English law transplanted to Hong Kong still applies today in Hong Kong or at least formed the origins of the present law in Hong Kong.”

In terms of the common law, as a British colony, decisions made by the Privy Council of the United Kingdom on Hong Kong appeal cases were binding on Hong Kong courts under the doctrine of precedent. Even for non-Hong Kong appeal cases, decisions made by the Privy Council and by the House of Lords were often regarded as strong persuasive authorities whom the Hong Kong courts would have invariably followed, unless there were compelling reasons that made them inapplicable to the local circumstances (Lo & Chui, 2012). This means that precedents set down prior to 1997 continue to apply. Even since 1997, although Hong Kong has been free to develop its own common law, the decisions of the Privy Council, the House of Lords, the newly created Supreme Court of the United Kingdom, and the English Court of Appeal are still viewed as persuasive authorities and, without good reason to diverge, they would probably be followed by the Hong Kong courts (Lo & Chui, 2012). In terms of sentencing, then, Hong Kong courts have referred to the English common law for assistance (Cross & Cheung, 2015). The structure of the court system after the hand-over remained largely the same as during its colonial era, with the magistrates’ courts as the lowest courts, followed by the District court (intermediate court) and the High Court. The main difference was the creation of the Court of Final Appeal in 1997.

The number of aggravating and mitigating factors is wide-ranging under the common law, and there is no definitive guidance on the weight each carries. *Sentencing in Hong Kong* (Cross & Cheung, 2015, p. 4)—widely

considered as the authoritative text on aggravation and mitigation in Hong Kong—stresses, “The factors which may aggravate the gravity of an offence are legion,” and “The impact of particular aggravating factors upon sentence is very much a matter within the discretion of the court.” It also stresses, “Sentencing is, ultimately, an art, and an assessment has to be made, not only of the offence, but also of the offender” (Cross & Cheung, 2015, p. 338).

It is evident that the sentencing regime in Hong Kong encourages judicial discretion. This study argues that, although it may be tempting to dismiss sentencing in Hong Kong as dependent on the facts of each individual case and offender, culture plays a definitive role in shaping which factors are salient. Garland (1990, p. 210) observes:

... the agents who do most to transform cultural conceptions into penal actions, are, of course, the “operatives” of the penal system—the personnel who staff the courts . . . these professionals always receive their education and carry their tasks within a broader cultural context . . .

Since the 1997 handover, there have been a greater number of Hong Kong Chinese magistrates and judges staffing the Hong Kong judiciary, and increasingly, there is a shift toward the use of Chinese—oral Cantonese—in court proceedings. In fact, most criminal case proceedings in the magistrates’ courts are conducted in Chinese (Department of Justice, 2011). The use of the local dialect has allowed for local values and norms to assert themselves in the courts where previously, given the dominance of English, court proceedings were deemed to be “textbook-like” (Ng, 2009, p. 94); indeed, with the use of Cantonese, magistrates are able to more openly express their own morality and even draw on traditional Chinese proverbs and teachings to chastise defendants (Cheng, 2015; Leung, 2012).

IV. CULTURE AND SENTENCING: THE DISCIPLINARY MODEL

The role of culture in the exercise of judicial discretion, especially in post-colonial societies, has attracted the interest of law and society scholars. There has been increasing interest in how the courts in post-colonial contexts draw on traditional values and norms, and apply them in daily operations, as well as how such values and norms intersect with the formal law of

the state and vice versa (e.g., Lazarus-Black & Hirsch, 1994; Santos, 2006; Shahar, 2012). In a study of the magistrate's court in the former British colony of Tonga, Philips (1994) notes how magistrates invoke the distinctive brother-sister relationship to chastise defendants in criminal cases. In Tonganese culture, brothers are expected to behave, including refraining from getting drunk, using foul language and violence, before their sisters, a norm that extends to cousins as well. In public settings it is difficult to know when a distant cousin is around; therefore it is often stressed that males must behave because they never know whether a sister is present. By referencing this cultural norm in court proceedings, Philips (1994) argues that the state can assume moral authority. In another ethnographic study of domestic violence cases in a family court in Hawaii, Merry (1994) observed that litigants who sought to justify their use of violence against their spouses are taught by the courts that regardless of the circumstances, domestic violence is unacceptable under the law. Through these court proceedings, judges can help to redefine cultural norms of acceptable and unacceptable behavior.

Like previous studies, this article argues that culture plays an essential role in court proceedings, but with an emphasis on sentencing outcomes in Hong Kong. A “disciplinary model” is proposed to illustrate this. The disciplinary model draws on the existing disciplinary welfare model that is used to explain the juvenile justice system in Hong Kong. Both models contend that sentencing is culturally informed; where they differ is in the absence of welfare-oriented sentencing in the adult criminal justice system. The Hong Kong Juvenile Justice System deals with criminal cases involving young people between the ages of 10 and 16. The disciplinary welfare model purported by Gray (1994; 1997, pp. 193–194) contends that the Hong Kong Juvenile Justice System is geared toward providing sentencing measures with the aim to “offer the exact dose of disciplinary regulation that they see as justified by the extent of deviation from, and potential return to, what is regarded as a ‘normal’ lifestyle.” The criteria for assessing which young people have deviated from a normal lifestyle are culturally informed.

The panic regarding juvenile delinquency emerged in Hong Kong in the 1980s. There was prevalent public concern over “detached” young people who were engaging in theft and triad-related activities (Jones & Vagg, 2007, pp. 513–514). There was fear that rebellious youths would undermine the social order and economic prosperity of the colony. Such delinquency was seen to be caused by the weakening of social ties with family and

school, and the negative influence of criminal peers. Gray (1997) argues that the Chinese inhabitants of Hong Kong retained deep cultural ties to Confucian ethics that stressed obedience to parents and respect for authority. The response to delinquency was therefore accompanied by preventing young people's participation in undesirable activities and a reinforcement of their more socially desirable ties with family and school. These undesirable activities are not crimes but rather deviancy, and included behaviors like skipping school, staying out late at night, and hanging out in billiard parlors and arcades. The disciplinary welfare model is accepted as reality by both legal practitioners and young defendants in Hong Kong (Cheng, Chui, & Ong, 2015).

It is argued that for adult offenders, culture also significantly influences sentencing decisions, and those that deviate from socially accepted ways of living are punished more severely for their crimes. The cultural norms and expectations for adults differ from those for young people and are more varied. The welfare-oriented sentencing approach is traditionally applied only to juvenile justice systems (Muncie, 2009).

As a collectivist society, in Hong Kong a lot of emphasis is placed on conformity with tradition, acceptance of authority, behaving in a good and orderly manner, and placing the collective need above individual desires (Feldman & Rosenthal, 1991). Despite varying degrees of modernization and differences in terms of economic and political structures, core Chinese cultural values are seen as applicable to all Chinese people, regardless of whether they live in Hong Kong, mainland China, Taiwan, or overseas (Fan, 2000). For Hong Kong then, although it was under British colonial rule for over a century, certain cultural expectations underline the behavior of the general Chinese populace.

Several key cultural expectations will be examined. In Chinese culture, the family is regarded as the single most important social institution. A lot of stress is placed on the prominence of filial piety, the honoring of ancestors, showing respect for elders (Sung, 2001), and individuals getting married and forming their own families. This contrasts with the image of single women in western countries, where there is a much greater acceptance of being single as a normal lifestyle (Lewis & Moon, 1997). Confucianism, which still strongly influences Hong Kong society (Fan, 2000), advocates the patrilocal household. Traditionally in Chinese societies, the cultural expectation was for people to get married and have children and to be obedient to their parents (Wang & Abbott, 2013). Even in the urban and

industrialist setting of Hong Kong, Lau (1981) observes that family interests are placed above all other social interests.

Another cultural expectation is for members of society to be hard-working, “in the old-fashioned sense of diligence” (Harrell, 1985, p. 204). This cultural expectation is best summed up in the famous Chinese proverb, “If man works hard, the land will not be lazy” (Arkush, 1984, p. 467). Harrell (1985) argued that Chinese proverbs stress the importance of hard work, thrift, and diligence. The process of working hard is a virtue in itself, and manual labor is valued; therefore there is an expectation of hard work, regardless of remuneration and time (Harrell, 1985). Indeed, industry (i.e., working hard), persistence, and the ability to bear hardships are seen as core Chinese values and have been used by social scientists as constructs of scales measuring Chinese values (Fan, 2000; Chinese Culture Connection, 1987).

Moreover, there is a “black and white” view of crime and law-breaking in Hong Kong. When individuals commit crimes, they are labelled as criminals even if they commit relatively minor offenses (Cheng, 2015). Individuals with criminal records in Hong Kong are stigmatized, often feeling ashamed of being labelled as an offender, and feel discriminated against in looking for legitimate work, and by their colleagues even if they have found work (Chui & Cheng, 2013; 2014). Hong Kong society prides itself as a city of good social order, and has striven to maintain this image in the face of the changing social and political landscape following its return to the People’s Republic of China. As a result, there is more emphasis on punishing those who are considered antagonistic to the social order (Chui, Cheng, & Ong, 2015).

Although great value is placed on traditional Chinese values in Hong Kong, there have been negative attitudes toward mainlanders in Hong Kong. Since the handover, the relationship between Hong Kong and mainland China has not been without tension, particularly toward the influx of mainlanders to Hong Kong. The heavy influx of mainlanders in recent years whether as immigrants or tourists has resulted in tension with the local populace. Mainlanders are stereotyped, and they are often criticized for their rude behavior and disregard for rules and procedures (Li, 2013). The media regularly report on such unruly behavior, including a dispute that arose between a Hong Kong citizen and mainland visitor over allowing the visitor’s child to eat on Hong Kong’s public subway (passengers are prohibited to eat while riding the subway). The Hong Kong citizen asked the visitor’s child to stop eating a pack of dried instant

noodles, and the mother's companions laughed at his poor command of Mandarin. This led to a verbal confrontation that was caught on camera ("Mainland visitors," 2012). In recent years, there has also been the issue of parallel trading, where mainland visitors purchase household items such as baby formula and shampoo in Hong Kong for resale in the mainland. This practice have been accused of driving up retail prices in Hong Kong and causing nuisance, especially for inhabitants of towns closest to the mainland border. This has resulted in anti-parallel trading protests by local Hong Kong citizens (Cheung, 2015).

Lee (2007), focusing only on mainland Chinese sex workers in Hong Kong, asserts that the use of custodial sentences against mainland sex workers is a mechanism of migration control. Although sex work in Hong Kong is not a crime in itself, it is regarded as a form of work under immigration conditions, and visitors that engage in work are in breach of their condition of stay and are liable to be prosecuted. Mainland Chinese sex workers are regularly arrested by the police, uniformly charged for breaching their stay conditions, and quickly processed through the criminal justice system (Laidler, Petersen, & Emerton, 2007). In the criminal justice literature, the phrase "fear of Mainlandization" was coined to refer to Hong Kong residents' anxiety over the influence of mainland China in undermining Hong Kong's legal system and rule of law (Lo, 2012). Overall, the influx of mainlanders is seen as colliding with Hong Kong's cultural norms.

V. CURRENT STUDY

The current study examines which factors—both offense-specific, such as offense seriousness and the harm caused by the crime, and offender-specific, such as demographic characteristics and employment status—act as aggravating or mitigating factors in the sentencing of defendants in Hong Kong. The focus is on whether factors that point to non-conformity with cultural expectations will be associated with sentence severity as suggested by the disciplinary model. Several key hypotheses will be tested:

- H₁ Being single will serve as an aggravating factor for offenders. (There is a cultural expectation for people to get married, and the patrilocal household is viewed as the norm.)
- H₂ Being unemployed will serve as an aggravating factor. (Unemployment goes against the cultural value of industry.)

- H₃ Claiming to be under stress at the time of the offense will serve as an aggravating factor. (This is contrary to presumptions in Western literature that stress is a mitigating factor because it goes against the Chinese cultural value of enduring hardships.)
- H₄ Having a criminal record will serve as an aggravating factor.
- H₅ Good character will serve as a mitigating factor.
- H₆ Supporting parents or children and having family support will serve as a mitigating factor. (A high emphasis is placed on family cohesion and filial piety in Chinese culture.)
- H₇ Mainlanders will be sentenced more severely. (There is a perception that mainlanders disrupt the cultural expectation of maintaining Hong Kong as a place of good social order.)

There are no hypotheses for the other variables, so this study aims to explore their potential impact.

A. Methods

Data for this study were collected through direct observations of the sentencing process in a Hong Kong magistrate's courtroom during a six-month period in 2015. Although tedious work, when researchers expend the time and effort to conduct courtroom observations, it "has often produced considerable dividends" (Baldwin, 2007, p. 382). Only through courtroom observations were the aggravating and mitigating factors able to be recorded; to the author's best knowledge, there are no databases that track oral submissions relating to aggravating and mitigating factors in Hong Kong. All magistrates in Hong Kong are professionals and sit alone without juries.

All observations took place in Court No. 1, also known as the plea court. It is in this courtroom where most defendants plead guilty, and sentencing usually follows immediately (Upham, 2008). All sentencing hearings in this study resulted from guilty pleas by defendants. Most cases in the magistrates' courts are resolved by way of guilty pleas (Cheng, 2013). A guilty plea at the first instance garners a customary one-third "sentence discount" in Hong Kong (Cross & Cheung, 2015). All the sentences in the sample had already taken account of the defendants' guilty pleas and sentence discount. The hearings typically included the charge and facts of the case being read, the plea by the defendant, submissions by the prosecution, plea mitigation

by the defense, usually represented by a defense counsel, and the sentence by the court. During the study period, seven magistrates, all ethnic Chinese, presided over Court No. 1. Virtually all of the defendants were represented by a defense counsel, who made submissions to the court on behalf of their clients. Therefore, in plea mitigation, the defense lawyers did all the talking, raising potential mitigating factors for the court to consider. In the sentencing hearings, the prosecution also makes submissions, usually providing potential aggravating factors such as the criminal history of the defendant. Overall, a wealth of information was derived from these oral hearings.

All the proceedings during the research period were conducted in Cantonese, the dialect of the general population in Hong Kong.¹ This is not surprising since, after the handover, the use of Cantonese in proceedings in Hong Kong, particularly in the magistrates' courts, has increased (Department of Justice, 2011). In some instances, court interpreters translated for defendants who were not native Cantonese speakers, but the proceedings overall were in Cantonese. All members of the research team are native Cantonese speakers and were easily able to follow the proceedings. The contents of the sentencing hearings were recorded. This strategy of courtroom observations allowed for the collection of data that might otherwise have been overlooked (Mileski, 1971), or where certain aggravating or mitigating factors might be missed unless observers were present to collect the prosecution and defense presentations (Flood-Page & Mackie, 1998, p. 131).

B. Categorizing the Aggravating and Mitigating Factors

In total, 712 sentencing hearings were observed. Various aggravating and mitigating factors were recorded, coded, and categorized. The recorded factors used in the present study were organized according to the six categories of potential aggravating and mitigating factors² stipulated by

1. Cantonese is the spoken dialect of the general population of Hong Kong whereas Chinese is the written form.

2. Shapland (1981) categorizes aggravating and mitigating factors in a similar fashion. Her categories are: reasons for the offence; the gravity of the offence; attitudes of the offender to the offence; the present personal circumstances of the offender; past personal circumstances of the offender; future personal circumstances of the offender; factors concerned with the probation service; factors concerned with court processes; and others.

Jacobson and Hough (2007), which are (i) the criminal act, (ii) the immediate circumstances of the offense, (iii) the wider circumstances at the time of the offense, (iv) responses to the offense, (v) the defendant's past, and (vi) the defendant's present and future. These categories overlap in certain instances, but they serve to more clearly organize the multitude of aggravating and mitigating factors that are brought up in court proceedings (Jacobson & Hough, 2007, p. 9).

The first two categories relate to the criminal offense. The criminal act focuses on the seriousness of the offense and the level of harm inflicted. The immediate circumstances of the offense relate to the culpability of the offender and include aspects such as whether the offense was spontaneous and whether the defendant abused a position of trust in the commission of the crime. The subsequent four categories are offender-related, meaning that they refer to the defendant's circumstances and characteristics that are not directly related to the offense in question. The wider circumstances at the time of an offense include, for example, whether the defendant was in debt, on public assistance (known in Hong Kong as the Comprehensive Social Security Assistance or CSSA), unemployed, single, and whether he or she was under stress from other matters at the time of the offense. The responses to the offense by the defendant refer to whether the defendant attempted or is willing to offer appropriate reparations. The defendant's past focuses on matters such as the defendant's criminal history and possible mitigating factors, such as whether he or she is usually of good character and acted out of character in the commission of the offense. Lastly, the defendant's present and future examines his or her present and future circumstances, such as psychiatric problems and family support.

The descriptive statistics relating to potential aggravating and mitigating factors in this study are presented in Table I. The list of factors is not intended to be exhaustive, but these were recurring factors that were raised in the sentencing hearings during the study period. In terms of the criminal act itself, as it can be seen, a small amount of offenses were violent ($n = 98$; 13.7%). During sentencing hearings, a number of cases ($n = 98$; 13.7%) were claimed to have caused little harm. The number of charges ranged from one to seven, with a mean of 1.24 charges per defendant. For the immediate circumstances of the offense, approximately a quarter ($n = 185$; 25.9%) were indicated as a spontaneous offense. A small percentage of the offenses ($n = 30$; 4.2%) were the consequences of a breach of trust by the

Table 1. Descriptive Statistics of Potential Aggravating and Mitigating Factors (n = 712)

Factors	n (%)
<i>1. The criminal act</i>	
Violent offense	98 (13.7)
Low level of harm	98 (13.7)
Number of charges (mean)	1.24
<i>2. Immediate circumstance of the offense</i>	
Spontaneous	185 (25.9)
Breach of trust	30 (4.2)
Admission to the police	159 (22.3)
<i>3. Wider circumstances at time of offense</i>	
Debt	22 (3.1)
Public assistance	121 (16.9)
Living alone	54 (7.6)
Stress	121 (16.9)
Unemployed	299 (42.0)
Single	218 (30.6)
Divorced	88 (12.4)
<i>4. Responses to the offense</i>	
Reparation	66 (9.3)
Addressing personal problems	48 (6.7)
<i>5. Defendant's past</i>	
Good character	25 (3.5)
Criminal record	393 (55.2)
<i>6. Defendant's present and future</i>	
Family presence/support	80 (11.2)
Support parents	196 (27.5)
Support children	254 (35.6)
Mitigation letter—self	57 (8.0)
Mitigation letter—others	44 (6.2)
Psychiatric problems	20 (2.8)

defendant. Less than a quarter of defendants ($n = 159$; 22.3%) made an admission to the police.

In terms of the defendant's wider circumstances at the time of the offense, nearly half ($n = 299$, 42.0%) were unemployed, with a smaller proportion ($n = 121$, 16.9%) on public assistance. A portion of defendants ($n = 121$, 16.9%) claimed that they were under stress at the time of the offense. A significant portion of defendants were single ($n = 218$, 30.6%). Only a small percentage of defendants provided or were willing to provide reparations to victims ($n = 66$, 9.3%). Regarding the defendant's past history, more than half had previous criminal records ($n = 393$, 55.2%),

Table 2. Descriptive Statistics of Sentences and Demographic Characteristics (n = 712)

	n (%)
<i>Sentences</i>	
Non-custodial	341 (47.9)
Custodial	371 (52.1)
<i>Demographic characteristics</i>	
<i>Gender</i>	
Male	490 (68.8)
Female	222 (31.2)
<i>Ethnicity</i>	
Local Hong Kong inhabitant	605 (85.0)
Mainlander	77 (10.8)
Others	30 (4.2)
Age (mean)	43.25

with a mean criminal record of 3.50 previous convictions. A small number ($n = 25$, 3.5%) claimed to be of good character, meaning that he or she had acted out of character in committing the offense. Most factors related to the defendant's present circumstances and future prospects. Some defendants pointed out that there was family support during their court hearing ($n = 80$, 11.2%). More argued that the defendant was providing support either to their parents ($n = 196$, 27.5%) or children ($n = 254$, 35.6%). Other factors included letters of mitigation, which are written letters by the defendant or other people, such as family members, to the court asking for leniency and noting whether the defendant was suffering from any psychiatric problems.

Besides the potential aggravating and mitigating factors, the sentences that defendants received and their demographic characteristics of gender, ethnicity, and age were recorded. Table 2 illustrates the descriptive statistics for the sentence outcomes and demographic characteristics. As can be seen, the sentence outcomes of a custodial sentence versus a non-custodial sentence were distributed fairly evenly, where slightly over half of defendants received a custodial sentence ($n = 371$, 52.1%). Most of the defendants sampled were male ($n = 490$, 68.8%; females: $n = 222$, 31.2%). Likewise most of the defendants were local Hong Kong inhabitants ($n = 605$, 85.0%), followed by mainlanders ($n = 77$, 10.8%), with the rest categorized as "others" ($n = 30$, 4.2%). The mean age of defendants sampled was 43.25 years.

Demographic characteristics can also serve as mitigating factors; for instance, younger defendants may be sentenced more leniently because the

court may view them as having a lower capacity for appreciating the consequences of their actions, therefore deeming them to be less culpable (von Hirsch & Ashworth, 2005).

C. Analytical Strategy

Logistic regression analyses were performed because the outcome variable, of whether a custodial sentence was imposed or not, is dichotomous. In Model 1, only the offender-related factors—categories 3 to 6 plus the demographic characteristics of defendants—were entered into the analysis. Given that it has been established that offender-related factors have a strong influence on sentencing outcomes (Jacobson & Hough, 2007), the objective of this analysis was to determine which aggravating and mitigating factors relating to offender-related factors are significant in the Hong Kong context. In Model 2, the factors that are offense-specific—namely the criminal act and immediate circumstances of the offense—were incorporated into the analysis. Tolerance and Variance Inflation Factor (VIF) were used to determine whether multicollinearity was an issue. The lowest tolerance level was 0.618 and the highest VIF was 1.619, indicating that multicollinearity was not an issue (O'Brien, 2007).

D. Results

The results of the regressions are presented in Table 3. In Model 1, only variables relating to offender-related factors were included. H_1 was supported, as unmarried defendants were more than one and a half times more likely to receive a custodial sentence than those who were married. H_2 was also supported, as offenders who were unemployed were found to be more likely to receive a custodial sentence than those who were employed. But it should be noted that the significance level for this variable was not high. The variable of stress provided an interesting finding. Not only was stress *not* perceived by the court as a mitigating factor, as suggested by previous studies (Jacobson & Hough, 2007), it acted as an aggravating factor. The result suggests that the defense did not help its case in sentencing hearings by highlighting the fact that the defendant was under stress at the time of committing the offense. In this sense, H_3 was supported, and it would appear that the courts frown upon defendants trying to reduce their culpability by stating that they committed crimes because of stress.

Table 3. Influence of Aggravating and Mitigating Factors on Custodial Sentence

Factors	Model 1		Model 2	
	B (s.e.)	Exp(B)	B (s.e.)	Exp(B)
<i>1. The criminal act</i>				
Violent offense	–	–	0.461 (0.290)	1.585
Low level of harm	–	–	–0.590 (0.270)*	0.554
Number of charges	–	–	0.950 (0.216)***	0.685
<i>2. Immediate circumstance of the offense</i>				
Spontaneous	–	–	–0.250 (0.216)	0.779
Breach of trust	–	–	0.981 (0.466)*	2.667
Admission to the police	–	–	–0.379 (0.230)†	0.685
<i>3. Wider circumstances at time of offense</i>				
Debt	0.608 (0.524)	1.837	–0.046 (0.557)	0.955
Public assistance	0.231 (0.283)	1.260	0.222 (0.294)	1.249
Living alone	–0.323 (0.361)	0.724	–0.217 (0.374)	0.805
Stress	0.585 (0.248)*	1.795	0.530 (0.260)*	1.698
Unemployed	0.362 (0.208)†	1.436	0.362 (0.217)†	1.437
Single	0.580 (0.253)*	1.786	0.544 (0.261)*	1.724
Divorced	0.250 (0.281)	1.284	0.183 (0.290)	1.201
<i>4. Responses to the offense</i>				
Reparation	0.411 (0.309)	1.508	0.464 (0.328)	1.590
Addressing personal problems	0.562 (0.388)	1.755	0.781 (0.396)*	2.184
<i>5. Defendant's past</i>				
Good character	–1.692 (0.569)**	0.184	–1.448 (0.582)*	0.235
Criminal record	1.561 (0.219)***	4.762	1.561 (0.219)***	4.762
<i>6. Defendant's present and future</i>				
Family presence/support	0.257 (0.323)	1.293	0.208 (0.330)	1.231
Support parents	0.181 (0.218)	1.199	0.112 (0.227)	1.118
Support children	0.385 (0.232)†	1.470	0.371 (0.238)	1.449
Mitigation letter–self	0.354 (0.361)	1.424	0.517 (0.373)	1.676
Mitigation letter–others	0.533 (0.428)	1.705	0.468 (0.438)	1.596
Psychiatric problems	0.462 (0.577)	1.588	0.793 (0.597)	2.211
<i>7. Demographic characteristics</i>				
Female	0.111 (0.222)	1.117	0.019 (0.233)	1.020
Ethnicity				
Mainlander	1.537 (0.336)***	4.652	1.379 (0.344)***	3.970
Others	0.837 (0.471)†	2.310	0.867 (0.499)†	2.379
Age	0.007 (0.009)	1.007	–0.005 (0.009)	1.005
Nagelkerke R ²	0.235		0.299	

Notes: Model 1 includes only offender-related factors, and Model 2 adds the factors relating to the criminal offense.

s.e. = standard error; *Exp(B)* = odds ratio.

†*P* < 0.1; * *P* < 0.05; ** *P* < 0.01; ****P* < 0.001.

As expected, a criminal record was also found to be a significant aggravating factor, as defendants with a criminal record were over four and a half times more likely to receive a custodial sentence. Therefore H_4 was supported. On the other hand, when the defense noted that the defendant was usually of good character, it was treated as a significant mitigating factor. Therefore H_5 was also supported. The factors relating to the defendant's responses to the offense—including reparation and addressing personal problems—were not found to be statistically significant.

Contrary to expectations, H_6 was not supported as family presence and supporting one's parents were not found to be significant, and providing support for children was actually found to serve as an aggravating factor although the significance level was not high. A potential reason may be that in terms of the need to support family members, it is something expect of every individual and not something extra that would be deserving of a more lenient punishment. With respect to children, there may be an expectation that parents ought to act as role models, and so the failure to do so would result in a more punitive response by the courts.

Lastly, H_7 was supported as well. Mainlanders were over four and a half times more likely to receive a custodial sentence than local Hong Kong offenders. The same was also true for other ethnic minorities, albeit to a lesser extent.

The results overall demonstrate that the most salient factors in influencing sentence outcomes were the wider circumstances of the offense, the defendant's past history, and his or her demographic characteristics. In particular, defendants who were perceived to have violated cultural expectations were sentenced more harshly. The results show endorsement of the disciplinary model.

As illustrated in Model 2, four variables were found to be significant. If the criminal act was deemed to be "low harm," this served as a mitigating factor but, if the offense involved a breach of trust, this would be considered as an aggravating factor. Admission to the police was negatively associated with a custodial sentence. The number of charges positively correlated with sentence severity. Whether the offense was non-violent or was committed spontaneously did not affect the sentence.

Taking into account offender-specific factors, H_1 and H_2 were supported, as single offenders were more likely to receive a custodial sentence and being unemployed remained an aggravating factor. Once again, stress at the time of the offense was found to serve as an aggravating rather than

mitigating factor; H_3 was therefore supported again. Consistent with H_4 and H_5 , criminal record was a significant aggravating factor and good character a mitigating factor in affecting the likelihood of receiving a custodial sentence. Mainland defendants were once again found to be more likely to receive a custodial sentence. The results demonstrate that, even after offense-specific factors were taken into consideration, offenders who were seen as non-compliant with cultural expectations received harsher sentences for committing crimes. The results from Model 2 further support the disciplinary model.

E. Discussion

The findings of this study provide empirical evidence of how culture can shape sentencing decisions. By examining the sentencing process in Hong Kong, what constitutes an aggravating or mitigating factor takes on a unique, culture-related character. It is likely that “society’s cultural patterns come to be imprinted upon its penal institutions” (Garland, 1990, p. 249). The disciplinary model is proposed to explain why certain factors were found to be salient in aggravating or mitigating an offender’s sentence in the Hong Kong Chinese cultural context.

The results demonstrate that offenders who are single, unemployed, have criminal history, and claim that they committed the crime out of stress receive a harsher penalty. In other words, offenders who do not conform to the cultural expectations of family, industry, enduring hardships, and maintaining good social order are sentenced more severely, that is, further “disciplined” for not meeting these cultural expectations. The cultural expectations can aggravate sentences even when offense-specific factors are taken into account. This is not to say that offense-specific factors are irrelevant, because they are important; the results show that offense-specific factors—including the harm caused, the number of charges, and whether the offense involved a breach of trust—served to either aggravate or mitigate the sentence. But when certain factors are brought to the attention of the court, such as the defendant’s unemployment or the defendant being single, these factors can serve to aggravate the sentence as well. These factors can take on a unique cultural interpretation. For instance, whereas stress may be considered by some as a mitigating factor, it may be viewed as opposing the cultural emphasis on enduring hardships. Hence, when stress is used as a factor in the commission of an offense, not

only will this *not* result in leniency, it may be interpreted as an aggravating factor.

Why does culture play such an influential role in sentencing in Hong Kong? Two possible reasons are offered. The first is that, as legal bilingualism has increased in the justice system in Hong Kong—especially in criminal proceedings—magistrates and judges have been better able to express their moral values, and local culture was able to seep into the English-dominated courtroom (Cheng, 2015; Ng, 2009; Leung, 2012). In other words, as there are more Chinese magistrates and judges in Hong Kong than in colonial times—and as proceedings are increasingly conducted in Cantonese—magistrates and judges can directly reprove defendants, as opposed to relying on interpreters, and can voice their moral opinions more clearly and forcefully for all to understand (Cheng, 2015).

The second reason has to do with the absence, in Hong Kong, of clear and definitive guidelines with respect to aggravating and mitigating factors. Case law provides a long list of factors that individual magistrates and judges should take into account when deciding a sentence (Cross & Cheung, 2015). The magistrates and judges are therefore left to make decisions using their personal judgment. While this is not to say that discretion should be eliminated—because it is certainly important—the lack of guidance leads to drawbacks as well.

Many factors taken by the courts to be aggravating or mitigating are “extraneous” to the seriousness of the offense or the culpability of the offender (Ashworth, 2011, p. 27); employment status, for instance, has an effect on the sentencing outcome. The courts may be hesitant to sentence employed defendants to a prison term because the defendant may lose his or her employment if given a custodial sentence (Ashworth, 2011). At the same time, the courts may punish unemployed defendants more severely because the offender failed to meet the cultural expectations of hard work; however, a defendant may be unemployed for a variety of reasons unrelated to the criminal offense.

The findings of this study shed light on how cultural expectations influence judicial decision making and paves the way for different aspects of the findings to be further explored. It would be valuable for future studies to examine each of these factors. For instance, future research can focus on ethnicity and sentencing, particularly with reference to mainlanders in the Hong Kong criminal justice system. The present study interpreted this finding through the lens of culture and discipline, arguing that

mainlanders are often stereotyped as disrupting the Hong Kong cultural value of social order. When they commit a crime, then, they are likely to receive a harsher penalty. Other works have regarded the imprisonment of mainland offenders as a form of migration control (Lee, 2007).

This study focused only on sentencing hearings in the courts, it would also be useful to see whether the public shares the same views on punishment as the courts. Additionally, if penal institutions do indeed reflect society's values (Garland, 1990), then it would be valuable to determine whether public sentiments about aggravating and mitigating factors are consistent with those of the courts. Roberts (2011, p. 4) points out, "If sentencing factors are not conceptually sound and systematically applied, the public image of sentencing will suffer . . . public misunderstanding of sentencing and criticisms of sentencers will grow."

Given the scarcity of research into aggravating and mitigating factors generally, it is unsurprising that there has not been much research into public views in this area. The few studies that were conducted point to the impact of offender-related factors on the public's attitudes to punishment; for instance, in a study conducted in Victoria, Australia, where judges presented actual criminal cases to members of the public, it was found that the public took offender-related factors—such as the defendants' background circumstances—into greater consideration than did the judiciary (Lovegrove, 2011). In this way, sentencing by the courts was harsher than public sentiments might have suggested. Similarly, in a survey of public opinion in England, it was found that the public were supportive of a range of mitigating factors that might result in more lenient sentencing (Roberts & Hough, 2011). In the future, public surveys should be conducted in the Hong Kong Chinese context to ascertain whether the cultural factors illustrated in this study play a role in aggravating or mitigating sentences in the minds of the public.

CONCLUSION

What the present study does is expand the limited literature on aggravating and mitigating factors on sentencing in a common law jurisdiction where this vital topic has been neglected. Relatedly, this study underscored the salience of the "elusive" factor (Manson, 2011) of culture in the sentencing process. Certainly, culture should not be ignored when examining

aggravating and mitigating factors. In the case of Hong Kong, offenders who do not conform to cultural expectations are sentenced more severely when they are convicted of a crime. A unique disciplinary model was proposed to give meaning to the results. Non-conformity to the norms of family, industry, enduring hardships, and maintaining good social order is likely to warrant “discipline” in the sentencing process. This model can be tested in future sentencing studies in the Hong Kong Chinese context and elsewhere as well. The extant literature in the fields of law and society and penology has shown that different societies draw on different cultural norms and values in judicial decision making, and this study adds to our understanding of how culture influences punishment. It would be beneficial for researchers to continue to examine how culture interacts with the formal law in other postcolonial jurisdictions, and specifically to ascertain whether culture, and which cultural norms and expectations, influence sentencing.

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