

**SENTENCING BURGLARS IN
CHINA AND ENGLAND AND WALES:
A COMPARATIVE STUDY OF
SENTENCING PRACTICE**

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ABBREVIATIONS

ACC	Adjudicative Committee of the Court
BCS	British Crime Survey
CAC	Central Advisory Commission
CBSS	China Bureau of Statistics Survey
CC	China Constitution
CCL 1997	Chinese Criminal Law 1997
CCP	Chinese Communist Party
CCPL 1996	Chinese Criminal Procedural Law
CCDF	Comparative Crime Data File
CDIC	Central Disciplinary Inspection Commission
CJA	Criminal Justice Act
CJPO 1994	Criminal Justice and Public Order Act 1994
CNJE	China National Judicial Examination
CNJQE	China National Judges' Qualification Examination
CNP	Chinese National Party
CPS	Crown Prosecution Service
DIC	Disciplinary Inspection Commission
JL 1995	Judges' Law 1995
MSA	Model Sentencing Act
NPC	National People's Congress
PLC	Political and Legal Commission
PRC	People's Republic of China
PSRs	Pre-sentence reports
RC	Residents' Committee
SAP	Sentencing Advisory Panel
SAPA1957	Security Administration Punishment Act 1957
SC	State Council
SGC	Sentencing Guideline Council
SPC	Supreme People's Court
SPCJISIALDTC 1998	SPC Judicial Interpretation for Several Issues on Application of Law to Deal with Theft Cases 1998
SPPI	Supreme People's Prosecution Institutions

INTRODUCTION

Background

Aims of the study

Access and ethical issues

In this study I will compare sentencing aims, policies and practice in China and England and Wales. To do this I conducted an empirical inquiry into the judicial practice of sentencing burglars. The emphasis is on what happens in China. Comparison is made to work conducted in England and Wales.¹ I compare what judges in China and England and Wales say about sentencing offenders for burglary of a residential property. The aim is to investigate the way burglars are sentenced in China and England and Wales, and to identify similarities and differences in the approaches adopted by judges in the two jurisdictions when sentencing burglars. The bigger issue of this study is to explore how we interpret sentencing decisions made in different jurisdictions and how we explain the differences between jurisdictions on matter of sentencing.

Background

The People's Republic of China (PRC) is a unitary and multi-national socialist country led by the Chinese Communist Party (CCP). There are 32 provinces, autonomous regions and municipalities under the authority of the central government. Chinese law is statutory law. Criminal justice is determined by the China Constitution (the CC). The Chinese Criminal Law (the CCL 1997) and Criminal Procedural Law (the CCPL 1996) set out to impose a coherent theoretical approach to sentencing. These major codes, along with other legislation, set up the criteria and procedure of punishment. The courts base on the criminal framework to sentence offenders.

Sentencing objectives derive from the aims of criminal justice in China, which is to punish crimes, protect public security, educate and reform offenders,

¹ The research was conducted in California, England and Wales and Finland in 1996 by Davies, Tyrer, Larsson and Takala.

prevent and reduce crimes and maintain social order.² It is apparent that sentencing policies in China are similar to the traditional western sentencing aims, such as, incapacitation, deterrence, rehabilitation, retribution, denunciation and restitution. Nevertheless, within a socialist legal framework, sentencing policies do not reflect the western sentencing theories exactly.

Retribution has been the major sentencing goal since the establishment of the PRC in 1949. Other sentencing aims play less significant role and shift the balance between them with the changing circumstances in the society.

With its different culture, traditional and political and social system, the criminal justice system in China is quite different from that of England and Wales. For example, retributive sentencing is the major sentencing goal. In the meantime rehabilitation has never been left out of the sentencing policies. The legal scholars describe this as a hybrid approach, and 'it is the act that deserves punishment, but it is the actor who is punished' (Qu, Xinjiu 1987a: 24). In this study, my interest is to find out how Chinese judges sentence offenders, i.e. burglars, and how sentencing in China is similar or different from that in England and Wales.

In an article Michael Tonry suggests that 'there are lessons to be learnt across national and sub-national boundaries that can help individual jurisdictions improve their systems while avoiding foreseeable mistakes' (Tonry 1995: 282). Currently the comparisons on sentencing are primarily limited to English speaking and European countries. As China is very different from the western countries in many aspects, it is not easy to conduct comparative research between China and the western world. In terms of criminal justice and sentencing matters, with different legal systems, criminal codifications and terminology, empirical studies can be more difficult. Pearson says negatively that 'China might almost deserve a comparative criminology all to itself' (Pearson 2000: 235). Nevertheless, I believe that this research can at least be

² Article 1 of the CCL 1997, Article 1 of the CCPL 1996, Article 3 of the Organisation Law of the People's Courts 1984 and Article 1 of the Chinese Law of Prison 1998

a pioneer comparative research study in sentencing between China and England and Wales. I hope that it may result in new insights in the field of comparative sentencing research.

Carrying out an empirical study on sentencing practice in China is not easy, and only a few surveys have been undertaken so far. Official statistics and other documentary information on this issue are fairly limited. Doing comparative research between China and a western jurisdiction is even harder, but it is of significance. I am interested in current sentencing issues in both China and England and Wales. I will base on the findings from my field research with the judges in China and compare them with the data from the same study in England and Wales to find out the different features of the two jurisdictions in sentencing practice.

Aims of the study

In this study, I aim to address the following issues:

- The methodology used for this cross-national comparative study
- A background to the Chinese criminal justice system and sentencing system
- An empirical inquiry into sentencing issues in judicial practice as perceived by the judges in China
- A comparison of sentencing systems in China and in England and Wales
- Contrasting the sentencing cultural differences in China and in England and Wales
- Interpreting the sentencing decisions made in different jurisdictions
- Introducing a method for analysing the differences between jurisdictions on matter of sentencing

In Chapter One I will set out the methodological and theoretical underpinnings of this research. The focus of this study is the existing sentencing framework, sentencing policies and judicial practice. I will discuss the judicial practice in

China, including the current sentencing system and procedure, sentencing framework and policies and sentencing reform. I will discuss my field research of interviews with the Chinese judges in Jiangsu Province in detail. With regard to England and Wales, I will employ the data from the research on sentencing of the same theme undertaken by Davies, M. and his colleagues to make the comparison.

In this study, I will include some sentencing theories which I believe to have significant influence on statutory criteria and sentencing decisions in different jurisdictions. Professor Malcolm Davies points out that:

All jurisdictions will endeavour to incorporate in some way aspects of the six major theories of sentencing. The balance between these will shift within the jurisdiction overtime, and contrast across jurisdictions will reveal differences in emphasis. Hence any study of comparative sentencing must start with an appreciation of the significance of these theories as they inform policy documents and underpin sentencing practice.³

As part of this study, I will explore the complexity in cross-national comparative studies. Again, I will borrow the framework from Davies and his colleagues⁴, which provides a list of factors. Those factors may help shape and influence sentencing decision. Also it helps explain the factors that affect sentencing issues.

Access and ethical issues

In recent years, China has become more open to the outside world. A lot of previously confidential information has been brought into the public domain although sensitive areas still exist in the judicial system in China. It is not always easy for a Chinese researcher to discuss some politically sensitive

³ This is part of the talk given by given by Professor Malcolm Davies at the tutorial on 11th June, 2002.

⁴ Davies, Takala and Tyrer, 2004, 'Sentencing burglars and explaining the differences between jurisdictions', in *British Journal of Criminology*, 44, 2004, p.1-18

topics about China with non-Chinese or outside China. In my research sometimes it is difficult for me to describe my homeland and present results of my empirical study. Nonetheless, I will try to provide the real findings from my fieldwork and express the objective views on the research questions.

My previous positions and personal experience have helped me to conduct this study. I was a criminal justice professional employed by the police force in Jiangsu Province. I had worked on criminal psychology research in prison for about five years. After leaving the police force, I had based in a Nanjing law firm and acted in the courts for the offenders as a defence lawyer in many cities of Jiangsu Province for several years. This experience has helped me to gain access. It has also helped me to understand the way judges think about sentencing issues from the perspective of a practitioner. During my studies in London, I have had unlimited access to all primary transcribed data of the interview from the identical study with judges in England and Wales. For the purpose of comparison, I have used some original quotes from the judges in that research.

I am aware of the need to identify and consider the ethical aspects of this study. Having been a Chinese public official and legal professional, I have had access to some confidential and internal materials. I will make sure the information I employed is published in public domain. I have also been conscious to make it clear that all case details and the judges' statements are to be confidential. In the interviews, I assured the judges none of their comments would be attributed to a named person but would be identified in the form of Judge 1, 2, or 3 from Court A, B or C and so on.

CHAPTER ONE

THE COMPARATIVE APPROACH IN STUDYING SENTENCING

1.1 Introducing cross-national comparative research

The nature of cross-national comparative research

Data and declaration in comparative research

Significance of cross-national comparative research

Problems involved in cross-national comparative research

Difficulties in conducting empirical studies in China

1.2 Data collection and analysis in this study

Data collection – the interviews

Data analysis – the qualitative research approaches

Difficulties involved in this study

1.3 Pilot study – the experience gained

1.4 Main study

Participants

Research questions

Conducting the main research

Summary

INTRODUCTION

This is a cross-national comparative study. The research aims to look into the sentencing practices in China and England and Wales, and compare the differences in sentencing between these two jurisdictions. In order to achieve the research objectives, I chose to study the sentencing practice of judges in China. The empirical study was carried out in Jiangsu Province, and it focused on one common offence – domestic burglary. Interviews were used for

collecting data. I applied the qualitative research methods for data analysis. Apart from using the data obtained from the fieldwork, I have also studied the information in the available documentary sources and official statistics in public domain. My previous personal experience as a police officer and defence lawyer has also informed my approach to this study.

In this chapter I will introduce the general methodological issues which may be involved in cross-national comparative research. Then, I will focus on the empirical studies I conducted in China and discuss the issues of research methodology I came across in my fieldwork including the research methods, techniques, difficulties and some solutions.

1.1 Introducing cross-national comparative research

The nature of cross-national comparative research

Cross-national comparative research is a term frequently used in social science research. With regard to the nature of comparative investigation, Sturmhthal defines that the cross-national comparative research is 'research dealing with the same (or similar or related) phenomena in different countries' (1958: 77). When discussing the comparative methodology applied in the social science research, Porter states:

Comparative study is a counterpart to the controlled experiment in the natural sciences, enabling observation of differences made to the phenomenon under investigation by the varying circumstances in different countries... (1967: 87)

One feature of cross-national comparative studies is that a multi-disciplinary perspective is required to examine the similarities and differences between two or more countries. The research can be descriptive, but analysis is emphasized. Poole (1986) states a cross-national comparative research should put 'emphasis upon explanatory variables rather than descriptive categories'. Bean also believes that comparative research approach is '...a

systematic method of investigation..., which has analytic rather than descriptive implications' (Bean 1994: 4).

In the criminal justice field, there are different approaches to cross-national comparative research. Some research papers entitled 'cross-jurisdictional' or 'cross-national' comparative research are, in fact, collections of articles written by the researchers from different jurisdictions, but no comparison is made. An example of this approach is '*A Comparative Research on Sentencing Issues between China and the UK*'⁵. This book puts several articles written by judicial experts and legal academics from China and the UK on sentencing theory and practice. The publication has articles on current sentencing problems in China without reference to elsewhere. It includes the results and findings of the surveys conducted in the Courts of Beijing, Shanghai and Yunnan Province, in which no foreign comparative elements are included. The paper from the UK includes '*Reform of Sentencing and Criminal Proceedings*' written by Lord Justice Brooke from England and Wales, '*Mitigation Trends among Sentencing and Non-imprisonment*' by Lord Gill from Scotland and '*Sentencing and Fairness: An English Perspective on Theories of Punishment and Sentencing Law*' by Nicola Padfield from the Institute of Criminology of University of Cambridge (2000: 243-257).

David (1994) applied the same form for his 'cross-national comparative study' on human rights. He describes the features of his research, and says that 'the unique combination of academic and judicial experience on which each of the authors of the country profiles is able to draw is itself one of the striking features...' (1994: Preface). The book collects the research paper on human rights in the selected states. No comparative analysis is applied. In USA, Fu, Hualing undertook a comparative study on sentencing in China (2000) which also adopted this form of presenting data.

⁵ The Criminal Law Research Centre of China University of Political Science and Law funded by the Education Section of the British Embassy carried out a project research on sentencing in China from 1999 to 2000. In November 2000, a conference on the sentencing issues in China and in the UK was held in Beijing. In 2001, the China University of Political Science and Law and the Education Section of the British Embassy jointly published a book which collected the research presented in the conference, and it is called '*A Comparative Research on Sentencing Issues between China and the UK*'.

Another type of cross-national comparative research is similar to the research conducted by the cultural anthropologists. The researcher examines the exotic places and focuses on the detailed features of the law and practice in several foreign jurisdictions. This research has actually no comparison. McLoughlin and Forster focused on the law and practice of pollution control in selected European states. The comparison between jurisdictions is made in a short section in the summary. The researchers write in the preface of their book, 'the purpose of those volumes was to explain the law and practice of pollution control in each of the member states and to provide a summary comparing all the countries in a separate comparative volume' (1982: preface). It is comparative in the sense of discussing different systems and practice but it does not directly contrast and compare or seek to explain the differences. The advantage of this type of cross-national comparative studies is that rich information on the research topics in different countries compared can be described in great detail.

Other cross-national studies focus on some specific issues for comparison. Studies on legislative activities, sentencing policies, prison population and crime control often adopt this research approach. A study carried out by Dale (1977) is an example. He compared the legislative drafting issues in France, Germany, Sweden, and the United Kingdom. The researcher applied the qualitative research approaches, and made the comparison based on the documentary data. In Dale's book, there is a separate comparison chapter, in which the features of legislative drafting in each selected state are described in detail, and the advantages and disadvantages of each state are pointed out. Based on the findings of this comparative study, the researcher concludes with recommendations on legislative drafting.

Research conducted by Davies, Takala and Tyrer in 1996 is another example of using this approach. Their research focuses on sentencing policies - the use of non-prison forms of punishment. Focus groups were undertaken in California, England and Wales and Finland, and comparison was made between these jurisdictions. Their book starts with a chapter which discusses the methodological issues. The following chapters describe the sentencing

policies and practice in the three jurisdictions respectively. Comparison is presented in a separate chapter titled as '*Penological esperanto and sentencing parochialism: convergence and divergence in sentencing policy*'. The difficulty in this type of research is that it requires that the researchers are familiar with the research questions in different countries and also their cultural and socio-political agendas and policy constraints.

Data and declaration in comparative research

Comparative research may use systematic cross-national data of a few variables based upon official statistics, such as the Home Office Statistical Bulletin or the Comparative Crime Data File (CCDF). Maguire comments critically on this approach:

Figures from numerous different countries – usually derived from official government statistics...The researcher picks out significant results. To take a crude example, it might be found that, when other variables are held constant, countries where Catholics make up a high proportion of the population tend to have higher murder rates than those predominantly Muslim. Some explanation might then be sought in the precepts of the two religions. However, not only is the accuracy of the data often questionable, but no account is taken of the different social meaning of apparently similar phenomena in the different countries. (1988: 557)

Dane and Gartner (1984) conducted a cross-national comparative study on violence and crime by using the data from the statistics in the CCDF. The data were collected from 110 nations and 44 major international cities. The researchers concluded:

Official statistics, including the comparative data in this book, are the end product of complex process that presumably includes self-definition, reporting, social reaction and official classification. These elements clearly contribute to the reality of crime rate, the

precise contribution deserve detailed investigation... The CCDF can assist a qualitative researcher in choosing nations or cities to study. (Dane and Gartner 1984: 162)

Dane *et al* pointed out that merely providing a numerical indicator of certain phenomenon in different countries without providing any way of knowing whether these comparisons are meaningful seems potentially misleading. In addition, official statistics included in CCDF may not be a totally accurate picture of the current state of the phenomena which is examined when the research is being carried out.

Mark Brown conducted a study comparing incapacitation policies in three English-based common law jurisdictions – New Zealand, England and Wales and the US (1998: 710-22). The research is based on the data from a cohort of New Zealand offenders to draw a conclusion on violence, prediction and sentencing policy. The findings of this study suggest that the special violent offender policies in New Zealand are ‘ineffective and wasteful of resources’. Brown compares the findings with the vast literature about the similar policies in the US and the recent development on this matter in England and Wales. Methodologically, he points out that ‘the change process is further impeded by a strong historical and philosophical aversion in English-based legal systems to transparent decision-making procedures.’ Brown states that ‘similar social settings and legal background facing the same problem, tried the similar approaches, and gained the similar outcome from the approaches’ (Brown 1998: 717).

Caroline Chatwin’s study (2003: 567-82) compares Dutch and Swedish drug policies in order to explain the trend relating to the drug problem that can be identified throughout the member states of the European Union. Before comparison, Chatwin introduces the details about the cultural tradition and people’s attitudes towards drugs and drug taking, the development of drug policies and the features of the current sentencing policies in the two countries. The data from the empirical research in the two countries are applied for comparison. Chatwin identifies the problems of Parochialism:

The policies of each country are so entrenched in their differing national values and so supported by their differing societal structures that the possibility of them embracing each other's ideas in an effort to achieve harmonization is extremely unlikely. The situation is further complicated by the fact that Sweden used to be a relatively liberal country in terms of drug policy, but has written this period off as a disaster in terms of drug control. It is ironic that both Sweden and the Netherlands have declared a reduction in the number of young cannabis users in recent years, and each country has claimed the reason for this trend in due to the success of their respective and very different drug policies. (2003: 572)

This statement shows how essential the social context is for the comparison of certain aspects of the criminal justice systems in different countries.⁶ Chatwin doubts about whether such comparisons constitute any useful information the reliability of the statistics, and she quoted a statement in the European Monitoring Centre for Drug and Drugs Addiction 2000 report:

There are differences across countries in methods of data collection, sample sizes and frames, which could influence the precision and validity of estimates. Until their issues and solved, direct comparisons between levels of use in member states should be made with caution. (2003: 573)

Godfrey's research (2003: 340-53) focuses on the advantage of qualitative methodology. He states that 'transcribed life histories can offer the researcher a greater understanding of public attitude towards violence...' This study makes a statistical comparison between England, Australia and New Zealand in violence and violent crime at the turn of the twentieth century. He concludes that 'it would be possible to speculate about the cause of this disparity. For

⁶ See Davies *et al* 1996, *Penological Esperanto and Sentencing Parochialism: A Comparative Study of the Search for Non-Prison Punishments*, Aldershot: Dartmouth Publishing

example the turbulence created by shifting economic and social conditions...’ In Godfrey’s view, a wide range of the factors may have impact on crime and other legal phenomenon. As to the reliability of official statistics, he comments that ‘most obviously and emphatically, the scale of violence never reported to official authorities, and therefore never recorded statistically casts doubt on the ‘peaceable Kingdom’...’ Godfrey provides his view on the interview material. He states that ‘researchers who take advantage of transcribed interview material, therefore, can contribute much towards an understanding of popular attitudes to violence and violent crime at the turn of the century...’ Obviously this may apply to the research on other topics in criminal justice field.

Based on her teaching experience in India, Cain states:

The issues which were most salient in the context might not be covered at all the western criminology texts, and ...the theoretical presumption of western criminology was as likely to be misleading or at best miss the point, as to be helpful. Indeed, the presumptions of western theories may be harmful for non-western consumers of them. (2000: 239)

Cain points out that comparative criminology should ‘...avoid comparison, for it implies a lurking accidentalist standard and user, and focuses on static and dyadic rather than dynamic and complex relations...’ (2000: 258)

In recent years there has been an increasing interest in criminal justice research in non-western jurisdictions, including China. In Volume 22 of the British Journal of Criminology in 2002 there are five articles about the crime-related issues of China. Three include the comparison with other western jurisdictions and the other two are the research purely on legal issues in China.

Frank Dikötter conducted a study on prison reform in the world but the focus was China. As to methodology, he concludes:

A comparative approach to the history of the prison highlights the extent to which common knowledge is appropriated and transformed by very distinct local styles of expression dependent on the political, economic, social and cultural variables of particular institutions and social groups. (2002: 241)

With this view, Dikötter says that when introducing the features of prison in China, the penal theories, referential framework, different social practices and complex and relationship between crime, punishment and prison reform should all be examined. This may also apply to the comparative research on any other topics relating crime, criminology and criminal justice policy.

Hong Lu and Terance Miethe's study is of legal representation in China. Their study is based on an empirical research conducted in 1999 in a district court of China by examining 237 summary judgments of theft cases, and the aim is to show the significance of Chinese legal representatives. In the beginning of the article, it points out that 'fundamental differences exist in the conception and practice of legal representation and criminal proceeding in the west and China'. Then the comparison is made between China and the US to show the philosophical and structural differences in the role of defence lawyers. In order to make sense of their findings from the empirical study, the researchers provide the detailed background information on Chinese criminal justice system. Pearson comments that 'this research provides a starting-point for the understanding of an undeveloped but emerging legal profession within a different political and juridical culture' (2002: 237).

Wong's study is about policing in China. This research mainly applies documentary information from one official Chinese newspaper and some criminal justice literatures. In the article, Wong outlines the difficulties involved in doing research on policing in China. The author states that this article aims 'to build up an accessible English literature on the PRC policing for China-bound criminal justice students and/or comparative police scholars' (2002: 281), and it includes some comparison but it is not the focus.

Nelken states that 'interest in learning more about different systems of criminal justice can be shaped by a variety of goals of explanation, understanding and reform' (2002: 176). An effective comparative methodology is essential.

Significance of cross-national comparative research

The objective of cross-national comparative research in criminal justice is to contrast the similarities and differences in framework and practice in the criminal justice systems in different countries. Obviously we need interpret why it happens in the particular jurisdiction and explain where the differences between the jurisdictions are from. The ultimate objectives to each research may vary. For example, the comparison can be made for exchanging information and experience in different countries, or one particular jurisdiction wants to learn from others for the purpose of criminal justice reform of its own. When doing a study on crime and violence, Dane and Gartner state the significance of cross-national comparative research:

National differences on these phenomena are of a remarkable magnitude...Since some countries appear to have escaped or minimised the cost of crime and violence, they may contain the answers to dilemmas which other societies are confronting with methods that are ineffective or even counterproductive... Cross-national comparison of crime and violence also can provide the empirical foundation for tests of theories about criminal law, demography, and social change. (1984: 4)

Cross-national comparative research allows the researchers to look into the research questions in depth. In most cases, it provides opportunities for different countries to share the findings of the research on certain issues in each jurisdiction compared. Each jurisdiction may compare with one another, exchange information and share the successful experience. Michael Tonry states:

In doing cross-national comparative research on criminal justice, different legal systems should, it would appear, want and be able to learn from one another about such elemental problems, and in current comparative research, jurisdictions contemplating changes can learn from the occasional successes and frequent failures of others. (1995: 267-268)

Exchange of experience helps the different jurisdictions to learn from each other and adopt promote the effective criminal justice approaches according to their own social contexts. Methodologically speaking, cross-national comparative research may provide rich international information on criminal justice field which may help with the future rigorous comparative research across jurisdictions.

In recent years, comparative studies in criminal justice have been conducted mainly between European and any other English-speaking jurisdictions. Current cross-national comparative research is not world-wide. Pearson points out that 'the dominant traditions of criminology as a discipline have been predominantly (some might say notoriously) focused on the metropolitan centres of North America and Western Europe. As a consequence, 'comparative' criminology is massively under developed... (2002: 235) Similarly, Archer and Gartner comment that 'the field has suffered from a spectacular lack of international information' (1984: 4).

In fact, more research can be, also should be, carried out between eastern and western world. I hope my study may help bring China closer to the western researchers who are interested in cross-national research on criminal justice and sentencing issues.

Problems involved in cross-national comparative research

Both methodological and practical problems may be encountered when doing cross-national comparative studies.

Language difficulties would immediately involve in a comparative study across the jurisdictions if the countries compared using different languages. Marsh states that 'the task of linguistic translation falls heavily upon the shoulders of the comparativists' (1967: 272). Language competence apart, concept equivalence across nations can also be problematic. With different use of language and cultural and system differences, meaning-equivalence may not always be easily identified. McLoughlin and Forster talk about the language problems in their research, and say that 'although in English texts we have tried to prepare as accurate a translation as possible, only the authors' original texts in their native language carry their full authority,' and 'presenting a nation's law accurately in summary form is always misunderstood...' (1982: Preface). Indeed, meaning and information transferring in cross-national studies is difficult.

Secondly, in order to make comparison between different jurisdictions, the researcher should be familiar with the research questions in all countries compared. That is not easy to achieve. Without knowing the different meaning contained in the theories and policies of the different jurisdictions, the comparable factors cannot be accurately recognised and sometimes, the findings may be misleading.

Thirdly, most cross-national comparative studies rely on official statistics. Problems may be involved in applying statistical data. Firstly not all the statistics gained in different countries could be comparable due to different terminology, definitions and methods of collection. For example, to gain crime rates different countries may use different indicators of crime, such as arrests, court cases, convictions, incarcerations, prison populations and so on. Dane and Gartner state that:

If maintaining different indicators of the same offence, it's obvious that direct comparisons of volume of the offence are problematic or impossible. The problems of underreporting and different indicators have caused the great methodological concern. (1984: 29)

Moreover, it is almost impossible to gain precise official statistics in every jurisdiction compared. Archer and Gartner say that 'over the past two decades, researchers have raised important questions about possible sources of inaccuracy, incompleteness and bias in official crime statistics' (1984: 29). In some countries, the official statistics might be underreporting the incidence of crime.

In criminal justice research, access might be another difficulty. Issues about criminal justice and sentencing may not avoid political sensitivity. Sometimes, the reliable data or helpful insights may not be readily forthcoming. Political sensitivity may result in a block on documentary information and data as well as the difficulties with data disclosure and maintaining anonymity for research sources.

All these difficulties make a cross-national comparative research extremely hard. In China it can be more difficult because it lacks of an empirical research background and a traditionally the government is not sympathetic to disclosing official data and documents.

Difficulties in conducting empirical studies in China

More than twenty years ago, Cohen discussed the difficulties in doing research on legal issues in China in his publication '*Contemporary Chinese Law: Research Problems and perspectives*' (1982). Most problems mentioned by Cohen still remain today.

In China, there is no empirical research tradition. Bakken comments that in China 'rational enquiry was put on hold for many years, and sociological research has been prohibited for the 27 years prior to 1979' (2000: 11). Although for nearly two decades China has been carrying out the reform and opening-up policy, old ideas have not been changed completely. In social research, it is not sufficient attention has been paid to the western research methodology. Empirical research is new to legal academics and ordinary people do not know about the concepts, methods, procedure and significance

of this research approach. With a tradition of centralisation of the political administrative system, in spite of the recent development of democracy and openness in public affairs in China, Chinese officials are still cautious when disclosing information or expressing their views on political and legal issues. Where there is a foreign element involved, it can be extremely difficult to gain access and cooperation.

Criminal statistical collecting and disseminating system has not been developed systematically in China. Before mid-1980, criminal statistics were not provided to the public. From 1987, some statistical data on criminal issues were published. However, compared with the statistics in most western jurisdictions, the statistics from China are fairly brief and not systematic. There are no regular official publications for criminal statistics, which have the similar status to 'Home Office Statistic Bulletins' in England and Wales. In China, the governmental statistics are not always reliable due to the unsure accuracy.

Technically speaking, as China is a multinational country with large population and it has 32 provinces, autonomous regions and municipalities which have different cultural and economical characteristics, it is not easy to gain the precise statistics in China. The recent example is showed in calculating the figures of infections by and deaths from SARS. The Guardian quoted the words of a journalist based in China's Guangdong Province, 'the truly upsetting thing is even the government doesn't seem to know any better than us.'⁷ In some cases, the local officials make up figures to show the central government for their personal or regional purposes. Again, reporting SARS, the official Xinhua news agency admitted that 'some officials have covered up the epidemic....because they weigh their own performance as more important than the life of the people.'⁸ Therefore, when we use official statistical data, accuracy and reliability of the statistics applied must be taken into account.

1.2 Data collection and analysis in this study

⁷ From www.guardian.co.uk/international/story, 22/04/2003

⁸ Reported by John Gittings on 22 April, 2003 in The Guardian.

In this study I applied semi-structured interviews to collect data, and I used qualitative research approaches to analyse the findings from my fieldwork.

Data collection – the interviews

An interview is defined as 'a face to face verbal interchange in which one person, the interviewer, attempts to elicit information or expressions of opinions or belief from another person or persons' (Maccoby and Maccoby 1954: 499). Interview techniques are especially useful when the variety of responses is of interest or the questions probe deeper thoughts requiring explanation.

Interviewing allows the researcher to interact directly with respondents, and the research questions can be clarified in a follow-up question from the interviewee where the initial answer is misunderstood or misleading, so complex questions can be designed. The researcher may obtain large amounts of data in the respondents' own words from the interviews, and the rich information helps the research go deeper. During interviewing, the researcher may observe and record the respondent's gestures, expressions and other non-verbal responses which may help the researcher fully understand the answers precisely. Interviews, in general, have higher response rates than questionnaires. A research shows that many people simply feel more confident of their speaking ability than of their writing ability.

Interviews are frequently used in social science research. From a research, 90% of all social science research is interview based. In recent years, interviews have been commonly applied to obtain information about human attitudes, motives and values.

Interviews are separated into three types of – structured, unstructured and semi-structured interviews. Structured interviews have finely designed schedule, and the form and order of the questions are fixed in a structured interview. In structured interviews, the respondents may directly answer the research questions, and the interviews are easy control. The disadvantage of

this type of interview is that they 'define situations in advance and do not allow the researcher to follow up any interesting ideas' (Bechhofer 1974).

Unstructured interviews are flexible, in which the research themes can be discussed openly and freely. It is stated that unstructured interviews may 'provide the opportunity for the researcher to probe deeply, to uncover new clues, to open up new dimensions of a problem and to secure vivid, accurate, inclusive accounts from informants that are based on personal experience' (Palmer 1928: 171). This type of interview is applied particularly where the research goals have not been fixed, and the research questions need to be found out. The problem involved in unstructured interviews is that the interviews are not easy to control, and data analysis can be difficult.

Semi-structured interviews offer an opportunity for the participants to talk about the research problems within certain scope, so the researcher may have relatively rich information on the research problems. The advantage of this method is that the questions are designed as triggers 'to encourage the participant to speak freely and openly, and to maximise their own understanding of what is being communicated in the interview' (Willig 2001: 22). Semi-structured interviews need some control.

I employed the semi-structured interviews in this study. I applied a set of five scenarios of burglary cases and a series of questions in the interviews, and the scenarios and questions were the Chinese version replicated from the field research undertaken in 1996 by Davies, Tyrer and Takala. The five residential burglary cases were designed in the scenarios, and the judges were asked to indicate and explain their decisions as to the appropriate sentence to each scenario case with different aggravating and mitigating circumstances.

The reason for choosing burglary as the research focus is to reduce the ambiguities associated with cross-jurisdictional comparison. Definitions and meanings of the concepts in sentencing do not always identical between China and England and Wales. As far as burglary is concerned, it is seen as not exactly the same in the two jurisdictions. In England and Wales burglary is a

separate offence and has a separate definition, whilst in China, it is a type of theft offence with dwelling house circumstances. In spite of the difference in definitions, like anywhere else, burglary is a common offence in both China and England and Wales, and it is thought to be a relatively specific crime that is understood across cultures. This does not mean to deny that legal categories defining burglary are not exactly the same or that there might be different significance attached to the nature and harm of burglary. Nevertheless in contrast to other offence categories such as assault, or behaviour categories such as violence, the likelihood of minimising the potential confusion across different cultures is reduced by the concrete focus upon the more limited and universally shared phenomena involving the act of housebreaking that result in loss of property. Therefore, choosing burglary to carry out this comparative study on sentencing is thought to be the least ambiguous.

Changes had been made to the Chinese version of the scenarios and questions in order to avoid confusion. For example, community sentences do not exist in China, so I changed 'community sentences' to 'public surveillance' which was the only one non-custodial sentence amongst the main sentences in Chinese sentencing system. I will explain the reason for the major changes in the later section of this chapter.

In my research I used interviews on an individual basis. The original research questionnaire was applied in the focus groups conducted in England and Wales, Finland and Norway. In my study, I applied the face to face interviews is because the judges would like to express their opinions individually rather than talk in the discussions. In China, people traditionally tend to be part of collective expression of opinion and to be deferential to authority. Arguing with others could be regarded as insulting sometimes. Therefore, people do not tend to insist on their own opinions in a group discussion. I thought that using focus groups in China might not have the same effects as those carried out in the western jurisdictions.

I chose to interview the judges in the courts of Jiangsu Province, which is in the middle of the eastern China. Jiangsu has political, economic and cultural features mixed with those of both northern and southern China. The views of the judges of Jiangsu Province were thought to be more general than those of some areas with extraordinary provincial characteristics. Another reason for choosing this province was due to the possibility of access to the judges. Jiangsu was the area where I had been practising as a legal professional for many years. Nanjing is the capital city of this province and also is where my law firm based. As a provincial capital city of China, there are a number of local basic courts and one intermediate court in Nanjing. High Court of Jiangsu Province is also located there. Therefore, I could access the judges of the courts at different levels within one city. Having worked as a defence lawyer for several years, I was familiar with most criminal court judges in Nanjing. Having also worked in the police force of Jiangsu Province, it was possible to have the interviews organised with the judges of the courts in other cities of Jiangsu Province. In my research, I selected 72 judges to interview. The participants of the interviews were mainly the judges in the local basic courts, a few of them from Nanjing Intermediate Court and High Court of Jiangsu Province.

The views of the judges interviewed might not be perfectly representative of those of the judges across China. In other words, some findings might only be the opinion of the judges I interviewed or most judges in Jiangsu Province. Nonetheless I believe my study may encourage further research to be carried out in other provinces and all over China, and therefore, the general views of Chinese judges could be concluded.

In addition to the interviews, I also scrutinised the government statistics and collected documentary information on sentencing for analysis. In many countries, government agencies collect rich sources of data which can be used for social research. Dale *et al* state that government statistics 'usually relate to a specific topic that is of current policy interest. They are commissioned not just for the purposes of providing background data but also with the aim of increasing understanding within the area of concern' (Dale, Arbers and Procter 1988: 9). Government statistics and documentary information should not be

ignored. Although official statistics in sentencing in China were limited, I managed to find some of them from various sources primarily from the official websites.

Documentary material relating to sentencing may be found in higher education journals and the journals edited and published by the judicial institutions. The judicial were criticised that 'their editors are neither specialists nor scholarly' (Jia, Y. S. 1999: 101-3), and I felt that documentary resources directly discussed sentencing issues were not sufficient for the purpose of research. Nevertheless, they had privilege to publish some data which were not available for the outsiders.

The leading law journals in China I searched included *Democracy and Law*, *Law Studies*, *Legal Science*, *Modern Legal Science*, *Comparative Legal Research*, *China University of Political Science and Law Xuebao*, *Legal Scientists* and *Chinese Legal Science*. The relevant newspaper included *Law Daily* which is the official newspaper of Ministry of Justice of China and *The People's Court* which is the only judicial newspaper and aims to guide to practice. Additionally, I relied on some online sources.

Data analysis – the qualitative research approaches

I employed qualitative approaches for data analysis. Qualitative research 'has tended to be associated with a concern on the part of the researcher with meanings, context, and a holistic approach to the material' (Hayes 1997: 3-4). As a result of their flexibility and open-endedness, qualitative approaches provide an opportunity to find out about causality, implication and effect amongst social phenomenon, and they are commonly used in different social research areas. In fact, many highly respected studies have been achieved with qualitative methods.

To apply qualitative research Willig suggests:

A good qualitative research design is one in which the method of data analysis is appropriate to the research question, and where the method of data collection generates data that are appropriate to the method of analysis. (Willig 2001:21)

I used on some qualitative techniques to analyse the data I gained from the fieldwork, such as coding and cataloguing.

Difficulties involved in this study

Due to lack of empirical background, doing field research in China is difficult. In my fieldwork, I encountered some common problems such as translation and gaining access. In my case, collecting statistics and searching documentary information were also not easy.

1. Translation

Language is a big issue in cross-national comparative studies. Between China and England and Wales, the languages are very different in form, structure and logic. With different cultures and traditions, the meanings of the same concepts are not identical. The most equivalent words in Chinese for some concept in England and Wales are not always available. Direct translation does not always make sense and indirect translation required the researcher to be well familiar with both languages and the terminology systems in the two jurisdictions. Also the researcher must take care and make sure that the original meanings would not be distorted. For this reason, I have been changing the translation of some terms from time to time in order to transfer the meanings between the two languages most appropriately.

Translation problems were involved before, in and after the interviews. Especially, when I was transcribing the interviews, I had to go back again and again to listen to the original tapes to make sure that what the judges said in the particular context had been correctly translated.

2. Access

Access to the judiciary is not easy for the social science researchers in general. In China, judicial institutions do not welcome external researchers, and the reason is that some internal information is thought may not be favourable to the public. Judicial officials are cautious when dealing with external agents because they tend to believe that information on legal issues includes political sensitivities. Controlling the access to the courts is thought to be the simple way to avoid the sensitive information being disclosed. Practically, the courts would refuse the external researchers to officially approach to the judges. It became more difficult in my case when I introduced that I was studying in an UK university, and the results of this research would be examined by the western academics. Initially, I was not granted access to the judges. My field research was eventually approved to take place in the courts with the judges after several group discussions between the senior officials in a court at a higher level in Nanjing.

Judges in general are different from other professional groups in terms of their special role and missions. Although Chinese judges do not have the high status as judges in England and Wales, they are not normally expected to be willing to answer questions from non-officials. Luckily in my interviews the judges spoke their views on research questions quite openly. The reason perhaps is that I sincerely ensured not to disclose their names and the courts they were in.

3. Collecting official statistics and documentary information

In China no systematic official statistics on sentencing are available in public domain. Most sentencing statistics I requested were for 'internal use only', such as 'how many thieves were sentenced annually' and 'which types of sentences they were given'. Although in my research I was not dependant on having access to confidential information or data as I was looking at the offence of burglary for which strictly restricted information and data would not be involved, I was not able to have the same types of statistics which could be

directly applied to compare with those of England and Wales. To get statistics, I relied only on some incidental information in the national publications, such as, *China Annual Law Book*, *the People's Court Report*, and *Annual Report of Ministry of Justice*. I managed to find some statistics in online documentary resources, but to look for official statistics and some relevant documentary information could be very time-consuming, and it could not be always straightforward in my case due to the geographic inconvenience.

4. Other problems

Practically, I encountered many practical problems in my study. For example, interviews were costly and time-consuming. For my fieldwork, I travelled from city to city and court to court to meet the judges. Sometimes the appointments were cancelled because the judges could not be available due to the 'emergency'. After the fieldwork, transcribing and translating took me more than two months to complete. Reading and making sense of the transcripts were also time-consuming. As the answers to the research questions were open-ended, summarising, coding and cataloguing the materials were fairly complicated.

Methodologically, the reliability of the information gained from the interviews with the judges is in doubt. In China, by law the judges are independent and free from any internal and external interference. In reality, judges are required to obey their superiors, and they are encouraged to follow the collective decisions and given up their own opinion. Also, the judges are required to carry on the CCP and government's policies, so they are careful about what they say. They, in fact, are not supposed to say anything against CCP and the State. It is unsure to what extent the answers given by the judges to the research questions are reliable. It might be possible that the judges only gave the views which they believed were favourable to their superiors rather than their own thoughts. In the interviews, a few judges tried to avoid some questions, as they thought those questions might be politically sensitive.

In addition, my field research relied on the co-operation of the judiciary in China, which could never be taken for granted. Due to various factors, I felt that nothing was certain with my research until I successfully conducted the main research. In fact, my study was affected once a while by various uncertainties. For example, because the situation of the SARS was extremely serious in May 2003 in mainland China, I had to rearrange my time scale and postpone my interviews with the judges. As a result, the whole project was delayed. Moreover, since I am a fully self-funded researcher, when carrying out a cross-national empirical study like this, the high expenditures involved had always been the pressure.

1.3 Pilot study – the experience gained

A pilot study was carried out in August 2002. I stayed 22 days in Nanjing City to contact the officials who could authorise the access for me to interview the judges. I managed to interview 13 judges from one intermediate court and six local basic courts of Nanjing. I recorded 11 interviews.

The findings from the pilot study provided a rough picture of sentencing practice in China, as well as the pilot study indicated what could be improved in the main study. The experience gained from the pilot study may be outlined in following aspects:

Firstly, the pilot study proved that it was possible to conduct empirical study on criminal justice and sentencing issues in China. I have also learned in order to gain access the researcher should prepare to flexibly apply variable tactics. I was initially told by a judge in High Court of Jiangsu Province that it was not practical to interview the judges, and record the conversation was almost impossible. In the pilot study, I employed both formal and informal channels to access the judges. In the beginning I tried to gain the support from the senior or key officials in the judicial system. With their help, I was able to contact the presidents of the local courts and eventually had the interviews organised. The same approach could also be continuously adopted in the main study.

Secondly, the pilot study showed that some research questions needed to be made clear to the Chinese judges. In the interviews, the judges commented that several questions were not very clear to them, and I had to explain a few circumstances in the scenarios to the judges. After the pilot study, it was the first task for me to clarify some details in the Chinese version of the scenarios and further questions in order that the same confusion would not be in the main study.

In the pilot study, a few interviews did not seem to be conducted properly due to inconvenient time arranged for the judges. For example, one interview took place on a Friday afternoon. It was arranged by the head of the criminal division in that court, and by the time the judge interviewed was about off work and going home. The judge interviewed looked distracted and indicated the sentences to the scenarios without carefully thinking, and she answered the questions also very briefly. In the main study, I tried to avoid this type of problems.

Other problems found in the pilot study include the control of the interview and judges' different attitudes to the interviews. I have found that the participants could not be equally enthusiastic. In the pilot study, some judges would like to talk about the research issues in depth. Some other judges directly answered the questions but did not want to talk more. There were a few judges who did not seem to be interested in the research questions but took part in the interviews as required by their superiors. I decided to make a list of some sub-questions to encourage the judges to provide more relevant information in the main study.

In spite of the problems, the pilot study had built up my confidence, and I think it was a very important stage in the whole project. After the completion of the pilot study, I estimated that I could possibly interview another 60 judges in the main research. In fact, 61 judges were interviewed.

1.4 Main study

I carried out the main study in July and August 2003, and I took six weeks to interview the judges in the courts of Jiangsu Province. In the main study, I interviewed 61 judges from 21 local basic courts located in different areas across the province and one intermediate court and High Court of Jiangsu in Nanjing City.

Participants

Gender balance and educational background of judges in China are very different from those in England and Wales, so is the status of the judges. In the pilot and main study, there were 72 judges from the courts of Jiangsu Province took part in the interviews. Amongst the judges interviewed there were three presidents of the court, 20 heads of the criminal divisions in the courts including four assistant heads of the criminal divisions. 46 male and 26 female judges were interviewed.

With regard to the age of the judges interviewed, four were under 30, 23 were in the age group from 30 to 39, 36 were between 40 to 49, and nine judges were over 50. The youngest judge interviewed was 25 years old and the oldest was 55. (See Appendix 1.1)

Of the judges who took part in the interviews, 25 had the first degree in law, six had the degrees in other subjects, 25 judges had higher education certificates in law, and 12 graduated from law schools. Four judges had postgraduate law degrees, and three of them were in the intermediate court and high court. (See Appendix 1.2)

Nearly one third of the judges who were in the over 40 age group previously worked in other professions, such as, schools, prison service or local government offices. About another one third of the judges in this group were previous service people from the army. These judges joined the courts and worked as judges before the Judges' Law came into effect in 1995. The rest of

the judges in this group graduated from law schools or universities. All judges who had no legal education background had taken further legal education at least to HND level. In the group from 30 to 39, 19 judges had law degrees, one judge has degree in other subject and three of them graduated from law schools with Higher Education Certificates. All four judges in the group under 30 year's old had law degrees. 70 judges interviewed had passed the China National Judicial Examination and two judges over 50 were appointed as active judges under the exceptional circumstances stipulated in the law.⁹

Research questions

In the main research, I applied the same questionnaire as in the pilot study. I made some small changes with the description of the circumstances in the scenarios and questions in order that they were clear to the Chinese judges. (See Appendix 1.3)

The basic change was that in the English version the value of the stolen property was given in sterling. I changed it into Chinese RMB based on the average exchange rate when I was preparing the research questions which was approximately 1:13 from sterling to Chinese RMB. For example, in English version, the value of stolen jewellery was £1,000 which was changed to RMB 13,000 in the Chinese version. It is essential to make clear that in my point of view 13 RMB have similar importance to the ordinary Chinese citizen as one pound does for the ordinary British citizen. Therefore, I considered that it was an acceptable method of establishing parallel values.

In Chinese version of the research questions, I replaced 'community sentences' with 'public surveillance', the reason was that community sentences did not exist in China. Original Question 9 asked the judges to discuss community sentences. I had made a radical change to this question, and asked the judges to answer which aspect(s) in their mind were crucial to

⁹ By law the eligible candidates should be Chinese, who are not less than the age of 23 with law degree and have been worked as in the legal field for at least two years. Some judges may be exempted from the CNJE. (S. 9 of the Judges' Law 1995)

the reform of current sentencing practice in China. The purpose for asking this question was to find out what reform on sentencing the Chinese judges would expect.

When I was preparing my pilot study, the sentencing guidelines were not available in Jiangsu Province and presumably not even in any province in China¹⁰. I changed the original Question 2 'is the current tariff and guidelines sufficient detailed and comprehensive when sentencing for dwelling house burglary' to 'are the current sentencing law and policies sufficiently detailed and comprehensive when sentencing for dwelling house burglary' in order that the judges were not familiar with the concept. In the pilot study, it was indeed that only a few judges had heard of 'sentencing guidelines'. Their knowledge of the guidelines was fairly limited.

Other changes were made also to avoid confusion. For example, Question 4 asked 'which of the commonly mentioned sentencing objectives (rehabilitation, retribution, deterrence, denunciation, restitution and incapacitation) have priority in your mind when sentencing in dwelling house burglary cases'. This original question was applied in the pilot study, in which it showed that large majority of the Chinese judges had not heard about those western theories of sentencing. Therefore, I amended this question to 'to your understanding, what are the sentencing objectives according to Chinese criminal law and relevant policies' and 'which one or ones have priority in your mind when sentencing a case of burglary in a dwelling house'. The question allowed the judges to openly provide their views.

In the pilot study I found that some judges tended to give simple answers to some research questions, such as just 'yes' or 'no'. In order to encourage the judges to provide more information on their personal thoughts, I listed some further questions, which I had applied in the main research. It was quite practical and effective.

¹⁰ The first provisional Sentencing Guidelines in Jiangsu Province was issued in October 2003.

Conducting the main research

In the main research, more judges were interviewed in one court than in the pilot study. Sometimes there were seven or eight judges who took part in the interviews in the same court. It effected on the time of the interviews. In summer the judges worked fewer hours than usual, so each interview must be very much focused to the research questions, otherwise not all interviews could be conducted within a day. It would be very difficult to organise the interviews on the other days in the same court. As a result, the average time for the interviews in the main study was 40 minutes, which was about ten minutes shorter than the designed time of the interviews. However, the reduction of time did not seem to have affected the results. One reason was that in the main research the interviews were controlled well as the sub-questions made the judges focus on the research questions. In the main research it was no longer necessary for me to explain the scenarios and the questions to the judges. Other reason was that in some courts questions were given in advance to the judges, and it saved some time for the judges to read the cases and understand the questions. I initially planned not to distribute the questions to the judges too long in advance to reduce the opportunity for the judges to discuss the scenario cases with each other and they might offer a collective decision as a result. However, in the main study, some courts did have the research questions prior to the interviews because their presidents insisted. In one court, the judges worked out the same sentencing outcome to each scenario, and provided the identical answers to each further question in the interviews. So the views of the judges in that court were the collective decision rather than the individual judges' personal opinion. In the majority of the court, the scenarios and questions were given to the judges a few minutes before the interview started to avoid the collusion that might have resulted from group discussion.

All interviews were recorded with a micro-tape recorder. In both the pilot study and the main research I was making notes during the interviews of the sentences given to the burglar in each scenario, ranking of the seriousness of

the five given cases and the points from the judges' answers in order that I could transcribe the interviews efficiently and accurately.

SUMMARY

This chapter is about the common methodological issues in cross-national comparative research and the methodology of this study. I focused on the problems which involved in doing empirical studies in China.

I applied semi-structured interviews to collect data, and I employed qualitative approaches for data analysis. In the interviews, I replicated a set of scenarios cases and questions which were designed by Davies *et al* for their research on sentencing burglars in England and Wales. I explained why both the studies in England and Wales and in China chose burglary as the research focus, and why I selected the judges in the courts of Jiangsu Province to conduct my fieldwork. Then I discussed the common problems in doing empirical studies in China. Furthermore, I looked into the difficulties I encountered in this study on sentencing with the Chinese judges and the courts.

I outlined the experience I had gained from the pilot study. Importantly the pilot study showed that it was possible to carry out empirical research in China and the methodology chosen for this study was feasible. In fact, the pilot study helped improve the main study.

For the main study, I introduced the details about the participants - the judges, the amendments on the interview questions and the reason for the changes and how the main research were undertaken differently from the pilot study in order to show that many uncertainties could be involved in the empirical study, and how we could be flexible to control the research operations in practice.

In the following chapter, I will introduce the sentencing framework, policies and judicial system in China before I present my findings on what the judges said about sentencing practice in the interviews.

CHAPTER TWO

SENTENCING IN THE PEOPLE'S REPUBLIC OF CHINA

2.1 Contemporary Chinese criminal law - from Qing to PRC

2.2 Traditional Chinese penal philosophy

2.3 Chinese sentencing system

Background

Criminal justice agencies

The courts and criminal divisions

Sentencers

Trials

Sentencing approaches

Summary judgments

2.4 The framework of sentencing policy

Current criminal law

Sentencing guidelines

Evolution of the judicial role in sentencing

2.5 The sentencing law for theft offences

The range of sentences

The tariff for theft offences

2.6 The sentencing factors

Mandatory mitigation and aggravation

Sentencing factors under the judges' discretion

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Aims of sentencing and the judicial view

Problems in the sentencing framework

Issues in the judicial system

Political influences

Other influences on sentencing

Summary

INTRODUCTION

It is believed that Chinese penal system started from between 2300 B.C. and 2100 B.C. (Gao, Shaoxiang 2001: 6 and Zhou, Mi. 2000: 19-23). In ancient China, criminal law played a significant role in the development of the Chinese legal system. Ancient Chinese criminal law was strongly influenced by Confucian ideas. On one hand, harsh punishment was the tradition, and on the other hand, education and reform were also emphasised. Modern criminal law started from Qing dynasty. The current penal system was from the establishment of the People's Republic of China.

2.1 Contemporary Chinese criminal law - from Qing to PRC

The modern Chinese legal framework was initiated from about a hundred years ago during the Qing Dynasty. The first modern western style Chinese criminal code was made in 1928 under the regime of the Chinese National Party (CNP). The content of this criminal code was based on the criminal code of Qing Dynasty, but its format was learned from several western jurisdictions with continental law tradition, such as France, Germany and Italy. It was criticised that the CNP's criminal law still kept feudatories ideas. But the formality of this code was systematic.

Influenced by the western penal theory the CNP's criminal law 1928 stated the penal principle as 'crime should be defined by law.' In this code, the available sentences included the fines, criminal detention, fixed term prison sentences, life sentence and the death penalty. There were ancillary sentences, such as the penalty of deprivation of criminals' political right or confiscation of offenders' property.

Under the CNP's regime, the Chinese Criminal Procedure Law (CCPL1945) came into effect in 1945. It stated that 'criminals should not be prosecuted and punished, unless they are done so through the procedure stipulated in this

law.’¹¹ It required that the trials be independent, open and adversarial. In practice, however, for the political reason which was to suppress its opposite party – the Chinese Communist Party (CCP), the CNP’s criminal justice agencies did not implement the CCPL 1945 in a lawful way. Like its criminal law, the CNP’s criminal procedure law was remarkable in terms of its modern format.

The current Chinese legal system began from 1949 when the People’s Republic of China (PRC) was established. It is called the Chinese Socialist Legal System. The establishment of the PRC is seen as a new era in the history of China. With the socialist ideology and communist theories, the PRC’s penal system has totally different aims, tasks and principles from the previous systems.

The first China Constitution was promulgated in 1954 (the CC 1954), and it consisted of four chapters and 106 articles. It stated that the citizens of the PRC were equal under the law. Following the CC1954, the People’s Republic of China Organic Law of the Court (provisional) was issued in the same year. Based on this law, the people’s courts were established. The first Chinese Criminal Law was issued in 1979 (the CCL1979), and it stated that the task of the criminal justice system was to punish crime and protect the public.¹² In the same year the Chinese Criminal Procedure Law (the CCPL 1979) came into effect. It set its tasks as ‘to implement the law appropriately’ and ‘based on the facts of the offence to punish offenders, protect and educate public to obey the law’.¹³

Since the establishment of the PRC, China had experienced several unstable periods before late 1970s, such as the Movement for the Suppression of Counter-revolutionaries, Anti-Rightist Movement and Cultural Revolution. In the course of these radical political campaigns, the state’s constitution was

¹¹ S. 1 of the CCPL 1945

¹² S. 1 of the CCL 1979

¹³ S.2 of the CCPL 1979

swept aside. Although political structure in China stayed more or less intact, the judicial system was badly destroyed in the Cultural Revolution.

The second China Constitution was adopted in 1975, which was not much different from the CC 1954. The prosecution and courts remained diminished.¹⁴ The third China Constitution was adopted by the Fifth National People's Congress in 1978. In the CC 1978, there were 60 provisions, and some old bureaucratic provisions were taken away. But the influence of the Cultural Revolution remained in some of its provisions.

At the third plenum of the party's 11th National Conference in 1979, Deng Xiaoping's reform and opening-up policy was approved. Since then, judicial reform started. It was seen as a new era in the history of the PRC. The fourth, also the current China Constitution, was issued in 1982 (the CC 1982). Its s.126 states that the courts shall exercise their judicial power independently in accordance with the law. The courts shall not be interfered with by any administrative organ, public organisation or individual.

Based on the CC 1982, the Chinese Criminal Procedure Law and the Chinese Criminal Law were amended in 1996 and 1997 successively. The CCPL 1996 and the CCL 1997 are the major pieces of legislation in the current sentencing framework.

2.2 Traditional Chinese penal philosophy

The ancient Chinese penal philosophy has a long history. Before Qing Dynasty (1840), the criminal law had always been emphasised, and in ancient China, the emperors had super power to override law.

In ancient China 'Li' and 'De' combined with 'Fa' (law) to constitute the formal and informal social control system in the society. Li literally means courtesy,

¹⁴ In the Cultural Revolution, the policy was 'to smash the police, prosecution and courts'. Therefore, these three major criminal justice agencies had been damaged so seriously that they could not be able to work properly until the CC 1978 came into effect.

and it referred to 'internal and internalised moral concepts, which would be used to the emperor and high-level official' (Tan 1977: 20). De, means moral principles. Li and De told people what they should do, and they were informal social control to help the state maintain public order. Fa was the rules dealing with forbiddance, and it 'was external force, which applied where Li did not apply' (Tan 1977: 20). It was formal social control run by the state.

Li, De and Fa worked together to help the government run the society. Apart from Li, De and Fa, 'Xing' was an effective approach of formal social control. 'Xing' meant punishment. 'In order to keep society in good order, Xing should be applied to punish wrong doing, and force people not to commit crime.' (Zhou, Mi 1998: 118) Xing was emphasised together with Li and De in almost every dynasty in the past. It was believed that 'the principle of Li and De were the core for maintaining social order, and Xing was supplementary'. Confucius said that 'Li is the first and Xing is the second.'¹⁵ Confucianism had a strong influence on people's minds in ancient China and some Confucian' ideas are still respected today. As a result, in China the combination of formal and informal social control is a traditional approach, and to punish crimes is together with to educate and reform offenders.

In the past severe punishment was encouraged. Harsh criminal sanctions started from 'Wu Xing' (five criminal sanctions) in Xia¹⁶ and Shang¹⁷ Dynasty. The similar penal policies had been applied continuingly in the following dynasties after 'Fa Jing' was enacted in B.C. 407 (Gao, Shaoxian 2001: 45). Fa Jing¹⁸ provided that criminal sanctions must be harsh in order to deter the potential offenders. The death penalty and other sanctions of cruel bodily torture were applied even for less serious criminal offences. In dynasties of Tang, Song, Yuan and Ming the criminal codes all had harsh criminal sanctions. It was commented that 'the purpose of harsh sentencing policies

¹⁵ Kongchongzi Disusing about Politics (Kongcongzi lunzheng)

¹⁶ B.C.2000-1500

¹⁷ B.C.1500-1027

¹⁸ Fa Jing was compiled by Li Kui, the Prime Minister of Wei state in Zhan Guo period. Fa Jing is seen the start of the Chinese feudalism criminal law, and played a crucial role and had strong influence to the law in ancient China.

was for deterrence – especially to deter the potential offenders’ (Zhou, Mi 1998: 335).

In ancient China, it was required that ongoing social circumstances should be taken into consideration. The first ancient Chinese criminal code – ‘Lü Xing’ combined criminal law and criminal procedure law. It stated that ‘when the society is not stable, punishment should be harsh, whilst when the society is in good order, the lenient sanctions may apply’. For a particular case, it said that ‘all circumstances must be taken into account. Sentences should be decided under the law and the circumstances of the case should be taken into account. In Lü Xing, there were ‘tariff’ for punishing different kind of offences.¹⁹

In the mean time, the ancient Mencian view believed that human nature was inherently good. Therefore, the law breakers could be cured. It was another feature of the traditional Chinese penal philosophy which was education and reform of offenders. It is commented that ‘...punishment should be designed to educate people in ethical norms...the law was an instrument of moral education. Confucian scholars believed that ‘Jiao’²⁰ and other ethical norms should be brought about by education’ (Dikötter 2002: 242).

There were other objectives of punishment in ancient China. In ‘Shang Shu’²¹ it stated that ‘the ultimate purpose of punishment is not to punish.’²² It said that the punishments would be imposed with justification, and should not be exercised arbitrarily. It emphasised that punishment should be given for the purposes of prevention and elimination of crime²³.

In ancient China, law reflected only the emperors’ will. It is stated that ‘the wills of autocratic emperors were imposed through edicts, decrees and orders which were issued directly by, or through, ministers and other officials and then

¹⁹ Shang Shu – Cai Zhuan

²⁰ A term was used in ancient China means both educating and the basic norm.

²¹ Shang Shu, also translated as ‘the Book of Shang’ literally means a book about the ancient time. it was a compilation of the articles which talked about the events occurred in the ancient time and the official documentaries. Shang Shu – Lv Xin talked about sentencing, and it provided the types of sentences, sentencing principle, and other judicial principles and rules. it is recognised as a criminal justice code.

²² Shang Shu – Dayumo

²³ Shang Shu – Chenjun

executed by them' (Tan 1977: 17). The imperial commands always had super power to set aside the law. Commonly it is said that 'the ancient China was ruled by man other than ruled by law.' It could be one of the features of the Chinese penal system in the past.

It is a tradition in China that criminal rules combine moral code acting as an effective mechanism to help the governors maintain their regimes. From the establishment of PRC, there have been fundamental changes of the political system, ideology and social circumstances, however, the old ideas remain. To describe and explore the traditional Chinese penal philosophy and history of Chinese criminal law may help us understand the features and some problems in the current sentencing system and sentencing practice in China. Ultimately, it may help us make sense of the cultural differences in sentencing practice between China and other jurisdictions.

2.3 Chinese sentencing system

Background

In the 20th century, Chinese criminal law was influenced by both former Soviet Union (SU) and some European countries with civil law tradition, such as France, Germany and Belgium. Modern Chinese law is commented to imitate the European civil law models not only in formalities but also many legal concepts and doctrines.

After 1949 under the leadership of the Chinese Communist Party, the Chinese criminal justice system adopted the Soviet Union model. From 1949 to 1957, a series criminal legislation was enacted by imitating those of the Soviet Union. Many Soviet legal academics and scholars were invited to China to teach criminal law in the colleges and universities during that period of time.

China started to make its own legal codifications after the break between China and SU in 1958. The codifications were made in the European civil law style. The Chinese criminal justice system was also learned from those

European countries with civil law tradition initially, and it has gradually developed and now has the Chinese characteristics. In recent years, concepts and ideas from Anglo-American common law system have been introduced to China.

Criminal justice agencies

In China, governmental criminal justice agencies include the police, prosecution, courts and prisons. The police are a national force and under the authority of Ministry of Public Security. There are branches at different levels in each province. The police are responsible for the maintenance of the public security. Police officers investigate most criminal cases and they have power to impose administrative sanctions. The local police stations supervise offenders who serve public surveillance in the community. The local police stations are also responsible for up-to-dating the household register system, which is an effective method of formal social control in China, especially in towns and cities.

The Chinese prosecution system works under the Supreme People's Prosecution Institution (SPPI). The prosecution institutions at different levels are responsible for investigating some criminal offences and prosecuting all criminal cases to the courts. The prosecutors represent the prosecution institutions and they are required to prosecute all crimes that come to their knowledge. The Chinese prosecutors make formal statements at the end of the trial to summarise their points and condemn crimes. The prosecutors may appeal against the decisions for both conviction and sentencing where they find the facts of the case are mistakenly decided or the sentence is unduly lenient. Another function of the prosecution is to supervise the operation of the courts to make sure that the courts exercise their judicial power justly and effectively.

In China, prisons carry out the reform-through-labour policy based on education and reform goals. In prison, the offenders are required to work as well as study. Prison officers evaluate the offenders' performance and make

recommendations to the courts for those who are possible to be deducted some prison time. The offenders who are given criminal detention will be sent to the Criminal Detention Houses which are run by the police.

The courts and criminal divisions

The Chinese courts are established according to China Constitution and the Court Law 1997.²⁴ The courts are in a formal hierarchy in China, and there are four levels of the courts. From the high to the low level, they are the Supreme People's Court (SPC), the high courts, intermediate courts and local basic courts.²⁵

The SPC stands at the top of Chinese judicial system, which is located in China's capital city – Beijing. The SPC deals with the cases with national significance and the appeals or protests from the high courts. The SPC examines and approves all cases that involve the death penalty. It also functions to supervise the operation of all courts below. The legal documents issued by the SPC must be implemented by the courts all over China.

High courts are provincial. There is normally one high court in each province, autonomous region or municipalities directly under the central government. Large provinces, such as Hainan Province, have two high courts. The high courts deal with criminal cases at first instance with provincial significance and the appeals or protests against the decision made by the intermediate courts.

Intermediate courts are set up in the cities, and normally every city has one except the big cities which may have two. Intermediate court deals with the first instance cases which are predicted to have sentences of not less than 15 years' prison sentence, the life sentence and the death penalty. It also hears the cases transferred from the local basic courts, and the appeals or protests against the decision made by the local courts.

²⁴ It was enacted based on the previous the Chinese Organic Law of the Courts.

²⁵ A local basic court is also called a district court.

There are several local basic courts in each city, municipalities directly under the central government or autonomous prefectures, and they are district based²⁶. The local basic courts deal with all criminal cases including burglary. Where a local court finds that a criminal case is influential, difficult and complex, it will submit the case to the intermediate court in its jurisdiction. The latter will take over and try the case at first instance. The local basic courts deal with massive less serious crimes, and the maximum sentence they may give is 15 years of prison sentence.

In China, there are several divisions in each court, including civil law division, criminal law division, administrative law division, intellectual property law division and juvenile offenders' division. Criminal cases are dealt with in the criminal divisions in the courts. In an intermediate court or a high court, there are two criminal divisions – one deals with criminal cases fall into their jurisdiction at first instance, and the other deals with appeals. One senior judge is appointed to work as the head of each division. The head of criminal division is in charge of all administrative and judicial matters in the division. They are responsible to the presidents of the court.

Sentencers

A jury system does not exist in China. One judge²⁷ or a collegiate panel (Heyitin) makes decision on both conviction and sentencing. Whether a single judge or the collegiate panel hears the case depends on the features of the case. In general, a judge deals with the minor offences for which the offenders plead guilt. An adversarial model is applied in trials, and the judges play a neutral role. They listen to the arguments between the prosecutors and the defence lawyers and they make decisions independently.

The judges

²⁶ Municipalities directly under the central government refer the cities with the status of provinces. There are four municipalities directly under the central government in China, and they are city of Beijing, Shanghai, Tianjing and Chongqing.

²⁷ A simplified criminal procedure has been introduced in the Chinese Criminal Law 1996. It states that trivial cases may be tried by only one judge.

There are currently about 200,000 judges in PRC, and they work at roughly 3,000 courts (Wang, Liming 2003: 32). The number of the judges who work in the criminal courts is not available.

Before the 'reform and opening up policy', the judicial system in China had been badly undermined after several political campaigns especially the Cultural Revolution. From late 1970s, the social circumstances have changed dramatically. In Pearson's view:

...more recent changes in Chinese society are different, both in terms of scale and velocity. China remains, fundamentally, an agrarian peasant society, but the speed of urbanisation and industrialisation in the past two decades is quite exceptional, bringing with it a vast human migration to the expanding cities, new forms of prosperity and independence, and different systems of economic organisation, each with their attendant anxieties and associated generational divisions. (2002: 236)

With the changes of social circumstances, more and more new offences had emerged and the crime rates were increasing. The central government realised that the judicial reform was preoccupied. Therefore, from 1978 the Chinese government started to take a series actions to formalise and professionalize the legal system. Since from 1957 to the end of the Cultural Revolution the criminal justice system had been totally destroyed including the courts, and the schools and universities had also been shut and almost graduates who were formally trained as legal experts. The judges were recruited from other professions, and many judges currently over 40 years old were from school, factories, government offices and the army. Most of these judges had no legal education background before they came to work in the courts. They had only limited legal training and mainly gained judicial experience in practice.

In 1995, the Judges' Law came into effect (the JL 1995). 'Judge' (Faguan) is, for the first time, officially recognised as a title of a profession. The China National Judges' Qualification Examination (CNJQE) was set up after the JL 1995 came into effect. It was replaced by the China National Judicial Examination (CNJE) in 2003. CNJE is the national examination for qualifying judges, prosecutors and lawyers. Statistics show that only 7% of the 360,000 candidates from the court passed the first CNJE in 2003. In Neimenggu Autonomous Region, only eight amongst 2,000 candidates from the courts passed the exam (*The People's Daily*, 26 September 2003).

The Judges' Law 1995 requires that the existing judges must have a relevant qualification, and those who have no required higher legal education background are asked to take further education to meet the requirements. Nevertheless, the further legal education programs focus on helping the judges to pass the exams in relatively short terms, and the actual effectiveness of these programs was challenged by YU, Keping - the president of Hailar District Court of Hulunbeir City. He states:

It is shown that 98% of the existing judges have taken further legal education and they have had the law college certificates or higher degrees. Most of them who took the short courses from the night colleges or through distance learning programs have not really improved their legal knowledge significantly. (*The People's Daily* 26 September 2003)

Due to the historical reasons, there are some judges who are not about to deal with cases properly. In order to get rid of incompetent judges, in recent years the Chinese government has introduced a series of policies to encourage the incompetent judges to leave their judicial positions. One policy provides that the judges who have been working for about 20 years may retire immediately. They are guaranteed to be paid at the same amount as they would receive if they continued as judges after their early retirement. In some provinces there were judges who retired at 40. Retired judges may choose to find work as legal counsellors or engage in various legal services. They may work as lawyers to

represent their clients in courts two years after their retirement. In terms of financial benefit, they will be much better off than judges. As a result, not just a few judges have chosen to retire at an early age. The policy of early retiring is made to get the unqualified judges out of the courts. On the other hand, some experienced senior judges have also left the courts early and work as legal professionals for the better pay and higher reputation.

The judges have been recognised as a special group of legal professionals since 2002.²⁸ This change is commented to be a milestone in the history of Chinese legal system (Su²⁹ 2004: 8), although the judges have the same status as ordinary civil servants. However, the entry requirements for the active judges have indeed been tightened.

The collegiate panel (Heyitin)

A collegiate panel³⁰ consists of several judges or several judges and people's assessors³¹. People's assessors are chosen from citizens who are at the age of 23 or over, and they must have the right to vote and be voted.³² Unlike jurors in a jury system³³, people's assessors only take part in the trial for less serious criminal cases. By law, the people's assessors have rights equivalent to the judges, whilst in reality they tend to play a subordinate role in the trial

²⁸ In July 2002, National Conference for Development of the Courts was held. In the conference, this statement was made. It was also required to train the professional judges.

²⁹ Su, Zeling is the director of Political Department of the SPC of China. He is one of the second-class supreme judges, and a member of the Adjudicative Committee of the SPC.

³⁰ Heyitin is a special term used in judicial system only, which means a collegiate panel.

³¹ The following table illustrates how a collegiate panel can be constituted according to s. 147 of the CCPL 1996

Instance	Sentencers	Local basic court	Intermediate court	High court	Supreme court
First instance	Judges	1 or 3		1-3	or 3-7
	People's Representatives	2	0	-	-
Appeal	Judges	-	3	At least 3 judges	

³² S. 38 of the Organic Law of the Court (Revised Version 1983)

³³ The people's assessor system is similar to the trial participation system applied in Germany and France.

process, as in the collegiate panel the judges tend to be dominant when making decision on both conviction and sentencing. There is a chair judge in each collegiate panel. The chair judges are normally senior judges in the criminal divisions.

Adjudication Committee of the Court (the ACC)³⁴

A hierarchical administrative management mode applies in the judicial system in China. The superior judges have power to order their subordinates, and they have power also to amend the case decisions made by the judges who are below them.

In a court, the president is at the top of the hierarchy, who is in charge of all matters in the courts. In each court, there is a committee which deals with the influential, difficult and complex cases. It is called the Adjudicative Committee of the Court (the ACC). The ACC is the power centre of the court, and it consists of the president and vice-presidents of the court, the heads of all divisions and departments. The president chairs the ACC meetings. S. 11 of the JL 1995 states that 'the task of the ACC is to collect the judicial experience from practice, discuss the influential, difficult and complex or cases and deal with the major issues involved in trials.' S. 149 of the CCPL 1996 states that '...the influential, difficult or complex cases shall be submitted to the president of the court, who then makes decision whether the ACC should take over and deal with those cases.'

The decision made by the ACC is collective opinion, which must be followed by the judges or collegial panels. It is commented that the ACC plays a crucial role to pursue consistency in sentencing (Hu 1998: 226). On the other hand, it is criticised that the ACC can be internal interference to the judges. First of all the ACC takes over a particular case in the half way, and the decision makes in the ACC are not the judges who hear the case from the beginning. Therefore, they might not be able to have full information about the case. It is

³⁴ S. 149 of the CCPL 1996

also argued that where a case is taken over by the ACC, '...the judges who hear the case will not be able to determine the sentences (Fu 2000: 178). It is also criticised that 'the involvement of the ACC might result in dampening the judges' initiative, creativity and enthusiasm' (Hu 1998: 227).

Trials

In China, a two-instance system is applied, and avenue of appeal is from one level to the next. Normally, a criminal case is firstly dealt with in the local basic court. If the defendants are not satisfied with the conviction or sentencing decision, they may appeal against that decision to the intermediate court. The latter will try the case at the second instance, or send the case back to the first instance court for re-trial. If the case is sent back for re-trial in the first instance court, it can be appealed again.

The decision made in a second-instance court will be the final decision, and the case cannot be appealed any more. If there is new evidence found later which makes the decision of the case turn to be wrong, the defendant can bring a protest against the final decision to the intermediate court or the high court. However, whether to accept the protest is under the courts' discretion. Where the courts accept the protest, the case protested would be deemed as a new case to be sent for re-trial.

Sentencing approaches

The traditional approach to sentencing in China was called the 'empirical operation approach'. (Fan 1994: 481) When sentencing criminals, the judges look at the facts of the crime to determine the seriousness of the offence, and decide an appropriate sentence for a particular offender. Under this approach, the judges choose sentences for offenders from a range of the sentences based on the seriousness of the offence. Since traditionally there is no tariff available for the judges, and the status of the previous cases has not been identified, they deal with sentencing could only rely on their personal experience, and it is criticised to 'lack of deep analysis and objective

measurement', and 'you may say a sentence given to a particular case is appropriate, but you cannot tell why it is appropriate. In other words, sentencing is not measurable and it cannot be consistent' (Ma 1999: 302-3).

Summary judgments

In China, sentencing decisions are presented in the summary judgments. A typical judgment includes five parts for a particular case. First section states the defendants' personal details. The second part is about the pre-trial information, such as when and how the defendant was found and arrested, when the case was transferred to the prosecution, when it was brought to the court and where the defendant is detained. The third part states the facts of the cases found by the court and the evidence. The fourth part is the judges' view on the nature of the case. The last section is to give the law applied in the case and the sentences. Unlike in England and Wales, Chinese courts do not normally state the detailed reasons for their sentencing decisions. But statutory mitigation and aggravation which have been taken into account in the decisions may be explained in some criminal case judgments.

2.4 The framework of sentencing policy

The source of law in China consists of different codes, acts, regulations which are approved by the China National People's Congress (CNPC). The Supreme People's Court issues formal judicial interpretations which are deemed to be law and applied by the courts at all levels. Case law is not a formal source of law in China, but the courts may look at some influential cases as references. Under a statutory law system, in China the courts deal with criminal cases strictly in accordance with the statutes.

Current criminal law

Criminal code

The major piece of legislation is the Chinese Criminal Law 1997 (the CCL 1997), and it consists two parts. Part 1 is titled as 'General Provision' including five chapters. Chapter 1 provides the task, principles and scope of the application of this law. Chapter 2 focuses on the basic legal terminology and concepts, including the definition of crime, criminal liability, legal meaning of crime preparation, uncompleted and discontinued crime, joint crime and crime committed by organizations, and so on. Chapter 3 introduces the type of sentences and their application. Chapter 4 is the main section of the CCL, and it includes the principles of sentencing and statutory mitigation and aggravation. Some concepts are also defined in this section, such as the minor offenders, deaf-mute and blind offenders who are stated to be given mitigated sentences³⁵. Chapter 5 includes the ancillary provisions.

Part 2 is titled as 'Specific Provisions', and it deals with the specific offences. This part provides the definition of each offence, range of available sentences and their application and other specific sentencing rules. There are ten chapters in Part 2, in which each chapter deals with one category of crimes. 'Crime against property' is included in Chapter 5, and all property offences in this category are defined respectively. They are robbery, theft, fraud, criminal seizing, conversion of property, conversion of property in occupation, misappropriating public or organisation's funds, misappropriating materials and funds prepared for special needs, blackmail, intentionally destroying public or private property and sabotaging production and operation. In this section, each offence is given a range of sentences which may be chosen for the offenders who commit offences of different seriousness and with different circumstances.

There are a lot of changes made in the CCL 1997, and it is necessary to outline the reform in the sentencing framework to look at the current sentencing policies and sentencing trend in China.

³⁵ Article 17, 19 of the CCL 97

First of all, the CCL 1997 is not as harsh as the previous criminal law. S.13 of the CCL 1997 states that 'if an offence is minor or the consequences are not very serious, it shall not be charged for a criminal offence.' In the CCL 1997, the courts are encouraged to apply less severe sentences such as the fines instead of short-term prison sentences for the minor offences. It is commented that 'currently there is a de-penalisation tendency in China' (Gao, Mingxuan and Ma, Kechang 1999: 456). For most new crimes, short-term prison sentences are introduced to the judges.

In the CCL 1997, custodial sentences are major criminal sanctions. A survey conducted in the courts of Shanghai shows in practice prison sentences were commonly applied by the courts. In 1999 1,710 offenders were received at least ten years' prison sentences, a sentence or the death penalty, 4,097 for prison sentences between three and ten years, 5,913 for not more than three years' prison sentence, 1,431 for criminal detention, 1,013 for public surveillance and 160 for the fines.³⁶ For crime against property cases, the imposition of the fines is mandatory. The fines can be given independently or in a concurrent manner.

A radical change is that the death penalty has been restricted its application significantly. The death penalty now is available for much fewer offences than it was in the past. The CCL 1997 states that the death penalty shall not be imposed on anyone who is under the age of 18 when the offence is committed and neither shall it be applied to a woman who is pregnant at the time of the trial. For some crimes, such as theft, the death penalty is not available any more, except the two very special circumstances stipulated in the law.³⁷

Another crucial part of the criminal code is the Chinese Criminal Procedure Law which was amended based on the CCPL 1979. The profound changes were also made in the new CCPL, such as the adoption of presumption of

³⁶ Criminal Law Research Centre 2000: 340

³⁷ For the two extremely serious circumstances either the life sentence or the death penalty are available. They are a. stealing from a financial institution and the value of the stolen property is extremely large, or stealing the protected national treasures and the circumstances are serious. Also see pp. 46 in the later section.

innocence. Under the amended criminal procedure law, the judges' role becomes neutral.

The Supreme People's Court's judicial interpretations

In China, the Supreme People's Court issues directives and judicial interpretations which guide judges to apply law to particular cases in practice. Another function of the SPC judicial interpretations is to help the judges and other legal practitioners to understand and implement the law accurately and fairly.

Strictly speaking, the SPC judicial interpretations are not law, because they are issued without going through the formal legislative procedure. But as a matter of fact, the validity of the SPC judicial interpretations has not been strongly challenged because it is inevitable for the courts to have the SPC judicial interpretations when they apply law to deal with particular cases. For instance, for theft offences the value of stolen property is the key factor for both conviction and sentencing. The CCL 1997 only provides the general terms such as 'relatively small', 'large' and 'very large' but it does not define how much amount to 'relatively small', 'large' or 'very large'. A SPC judicial interpretation recommends some criteria which allow different provinces to set their own tariff for theft offences. In Jiangsu Province, the starting point for 'relatively small' is RMB 1,000, for 'large' is RMB 10,000 and for 'very large' is 60,000.

In practice, the SPC judicial interpretations have the same legal force as all criminal codes. Not being law, the judicial interpretations can be fairly flexible. They may be enacted, amended or abolished followed the changes of the political policies and social circumstances.

Legislation for non-penal code crimes

The provisions for non-penal code crimes are included in the legislation regarding other matters. For example, the Chinese Company Law defines all offences relating to the company and its operation. These pieces of legislation

including non-penal code crimes are issued or approved by the CNPC or its standing committee. Therefore, they are formal source of law. These pieces of legislations regulate criminal offences in the specific areas and they are applied by the courts as extension to the criminal law. The local People's Congress and its standing committee may also issue legislation, which is locally applicable. Where there are conflicts between the local and central legislation, the former prevails over the latter.

Secondary legislation involving sentencing rules and policies

The China State Council and all ministries issue secondary legislation which may include sentencing rules and policies. Secondary legislation is bound to all criminal justice agencies, and the judges are required to apply them in judicial practice. The titles of these regulations are variable, and they may be titled as 'notice', 'reply', 'explanation', 'concrete rules' and so on.³⁸ Some regulations may be issued jointly by several ministries.³⁹

Sentencing guidelines

Sentencing guidelines are a new concept for the judges in China. In my pilot study in 2002 only one out of 11 judges had heard of sentencing guidelines. But in the following year, this concept has been introduced to the judges. In July 2003 when I carried out my main research 82% of the Chinese judges knew about the sentencing guidelines, and they believed that the guidelines could help promote consistency in sentencing.

Nevertheless, so far there have not been the countrywide sentencing guidelines which are issued to in the courts all over China. In Jiangsu Province,

³⁸ The examples can be seen like 'Notice of the Ministry of Public Security Concerning Several Issues in Respective of Re-education-through-labour in Fully Implementing the Decision of the Standing Committee of China National People's Congress (1983)', and 'Bureau of Re-education-through-labour in the Ministry of Justice Judicial Rules on Re-education-through-labour (1985)'.

³⁹ For example, 'Notice of Ministry of Justice, Ministry of public Security, the Supreme People's Prosecution Institution and the Supreme People's Court Concerning the Release of Part of the Persons Temporarily Detained after Completing their Sentences or Release from the re-education-through-labour Camps (1983)' was issued by four ministries.

Jiangyan Court⁴⁰ was the first court that drafted internal sentencing guidelines in early 2003. Since then, several courts in Jiangsu Province started to make their own sentencing guidelines. In order to promote the consistency in sentencing in the courts in Jiangsu Province, Jiangsu High Court issued a copy of provisional sentencing guidelines to the judges in October 2003, and all courts in Jiangsu Province were required to study the guidelines and bring the feedback to the high court. The amended sentencing guidelines were issued in June 2004. (See Appendix 2)

Evolution of the judicial role in sentencing

In order to enhance the Chinese legal system, maintain social order and protect foreign investment, Chinese government started a series of legal reforms. Pearson comments that 'it is generally felt...that crime and crime-control has become a more central preoccupation in China in the course of the modernizing project of the late 1980s and 1990s' (2002: 236).

As mentioned before, in criminal procedure the fundamental reform is the adoption of presumption of innocence. In the current criminal procedure law, it states that 'no one shall be regarded to be guilty until the court has rendered a verdict according to the law'⁴¹. It is the first time that presumption of innocence has been adopted in China. It changes the judicial role dramatically.

Based on presumption of innocence, the adversarial mode has replaced the previous inquisitorial mode in trials. The judges' role completely changes since then. Under the old system, the judges had to actively participate in investigation in order to prove guilt of the defendants. As a result, 'an innocent verdict was almost impossibility' (Fu 2000: 177). In the new system, the courts do not conduct the pre-trial judicial investigation any more. Therefore it is a 'hand-off' approach, and 'judges have started to remove themselves from criminal investigation, focusing solely on the review of evidence and to application of the law' (Chen, *et al* 2000). It is commented that under the

⁴⁰ It is a city court at a district level in northern Jiangsu area.

⁴¹ Article 12 of the CCPL 1996

adversarial mode, 'announcement of innocent becomes most likely possible in Chinese courts' (Fu 2000: 177).

The criminal procedure has been simplified under the new criminal procedure law. A summary proceeding is introduced in s.147 of the CCPL1996, which applies to deal with the minor criminal cases. Under the summary proceeding the criminal cases are tried by one judge who is normally a judge of the local basic court⁴². The summary proceeding greatly simplifies the traditional criminal procedure, and it requires that the court should give a sentence to an offender within 20 days from the day when the proceeding commences⁴³. In the summary proceeding, normally less severe sentences are applied. In practice, the application of the summary proceeding is limited because the conditions for a summary proceeding are strictly controlled.

The CCPL 1996 'provided the most comprehensive changes of the rights of the accused and the role of defence attorneys' (Lu and Miethe 2002: 270). The new system enhances the role of the defence lawyers and they are more autonomous and independent than before. The CCPL 1996 allows the lawyers involved in the criminal cases at an early stage after the suspected persons were arrested, and they may apply for a release on bail for their clients although most bail application might not be approved. At trial, the lawyers may sit opposite to the prosecutors⁴⁴. Both sides could have equal opportunity to argue the facts of the case and submit evidence to the court. Both defence lawyers and prosecutors may question defendants and debate the use of law in court. The judges, therefore, listen to the argument between the defence lawyers and prosecutors. They make decisions based on the evidence submitted from both sides.

⁴² S. 174 of the CCPL 1996 states, the offences within the scope as following, can be applied to simplified proceeding and will be tried by only one judge: (1) Cases are prosecuted by the state, in which the facts are clear, the evidence is sufficient and by law it might be sentenced to not more than three years' prison sentence, criminal detention, public surveillance or the fines, and to which the prosecutor recommends or agrees to the application of summary proceeding; (2) Cases to be dealt with only upon complaint; (3) Minor criminal cases which initiated by victims and proved with evidence.

⁴³ S. 178 of the CCPL 1996

⁴⁴ In the past, the prosecutors sat next to the collegiate penal on the front platform at the courtroom in the court room, and the defence lawyers sat below with the defendants in front of the audients.

The significant reform in criminal procedure is commented as 'a major step forward in developing the rule of law in China' (Fu 1999: 178). However, it is criticised that 'due to structural, historical cultural and political constraints in the legal sphere, it is also possible that political changes in the books will not have a transformative effect in practice' (Lu and Miethe 2002: 268). In reality, the judicial reform has brought some positive outcomes as well as problems. Currently, the focuses are the inconsistency in sentencing and the internal and external interference. There are indeed problems remaining in the sentencing framework and practice, and the legal practitioners and academics call for further reform. Positively speaking, it is stated that 'although problems and difficulties remain, the judicial reform is regard as a milestone in the reform of China's legal system' (Yue 1994: 1).

In my research, I included some open-ended questions for the judges to discuss the current sentencing practice in China and their views on the further sentencing reform. In the following section, I will firstly introduce the background information on sentencing system, framework and practice in China and then present my findings from the interviews with the judges.

2.5 The sentencing law for the theft offences

The range of sentences

The available sentences are prescribed in the section of general provisions in the CCL 1997, and they are divided into two categories: the main sentences and ancillary sentences.

1. Main sentences

(1) Public surveillance (Guan-zhi)⁴⁵

⁴⁵ Article 38-41 of the CCL 1997.

The length of public surveillance is from three months to two years. This type of sentence shall be imposed on offenders who commit minor offences. The offenders serve their public surveillance in the community. They may work and be paid equally. When serving public surveillance, offenders must regularly report to the local police and they should apply for permission to travel. Public surveillance is the only non-custodial sentence amongst the five main sentences.

(2) Criminal detention (Ju-yi)⁴⁶

Criminal detention is a type of custodial sentence, but it is distinct from a prison sentence. Offenders who committed minor offences may be given criminal detention, and they will serve their sentences in the Criminal Detention Houses which are administrated by the police. Under criminal detention, the offenders have limited freedom, and they are allowed to go home one or two days every month. The reform-through-labour policy is implemented in the Criminal Detention Houses. The offenders may get paid for work. The length of criminal detention is from one month up to six months. With regard to theft offenders, it is stated that 'there are offenders who committed minor theft to be put into the detention houses frequently. They disturb public security and social order...' (Fang 2000: 23).

(3) Prison sentences⁴⁷

Prison sentences are commonly used for all sorts of crimes. 'A prison sentence under the Chinese criminal law is the most serious form of punishment a defendant can receive except for a death penalty' (Lu and Miethe 2002: 272). The offenders are normally confined in prisons⁴⁸ to serve their prison sentences. The length of prison sentence is from six months up to 15 years. The length of prison sentence has several ranges, and each range

⁴⁶ Article 42-44 of the CCL 1997

⁴⁷ Article 45-47 of the CCL 1997

⁴⁸ The youth offenders serve their sentences in Juvenile Reformatories.

has the starting point and the maximum. Currently prison sentences are major option of criminal sanctions.

(4) Life sentence⁴⁹

The life sentence is imposed on offenders who commit serious crimes, such as murder, robbery, arson, serious theft and other serious offences. The offenders who serve the life sentence would not be kept in prison for the rest of their life. Normally a life sentence could be reduced to 18 or 20 years of prison sentence after the offender has served two years in prison, and he or she is not found further offences or does not re-offend.

(5) Death penalty⁵⁰

The death penalty remains in China. S. 48 of the CCL 1997 states that 'the death penalty shall only be applied to the offenders who committed the most serious criminal offences'. 'The most serious offences' refer to those may endanger the state, harm public interest and disturb social order and other offences with serious consequences. In recent years, the death penalty has been mainly applied to the offenders who committed the serious gang offences, explosion, murder, robbery, kidnapping and drug trafficking. The death penalty can only be applied to the crimes for which the death penalty is available in the law. For burglary, the death penalty is not available.

2. Ancillary sentences

Ancillary sentences are normally applied together with a main sentence, but the fines can be applied in a way as a main sentence as well.⁵¹ There are three types of ancillary sentences in the CCL 1997.

⁴⁹ Article 46-47 of the CCL 1997

⁵⁰ Article 48-51 of the CCL 1997

⁵¹ S.34 of the CCL 97 states that accessory sentences include :

(1) Fine penalty;

(2) The deprivation of political right penalty;

(3) The confiscation of criminal's property penalty.

Ancillary sentences may be implied in a separate manner.

(1) The fines⁵²

The law states that 'offenders who are ordered to pay the fines shall pay the required amount to the state'. In the CCL 1997, there are 147 articles (nearly half of all the articles) involving the fines. Although the fine penalty is an ancillary sentence, it may be given in a separate manner as an alternative to a short-term custodial sentence for offenders who commit minor offences, such as criminal negligence and other less serious offences⁵³. For the property offences, the fines are most likely imposed in a supplementary manner. The fines are frequently chosen for the first time or occasional offenders if they commit only minor offences. As to theft offences, if the case is not very serious the fines could be given in a separate manner, whilst for a serious theft case the fines must be given in a supplementary manner together with one of the main sentences.

(2) Deprivation of political right penalty⁵⁴

Under the deprivation of political right penalty, the state deprives criminals of certain political rights, stops the offenders from participating in the administration of the state and stops them taking part in any other social or political activities. When the deprivation of political rights penalty is imposed, an offender cannot enjoy the following political rights:

- The right to elect and to be elected;
- The right of freedom of speech, press, assembly, association, procession and demonstration;
- The right of holding a senior position in a state organ;
- The right of holding a senior position in any state-owned company, enterprise, institution or public organisation.⁵⁵

⁵² Article 52-53 of the CCL 1997

⁵³ For example, s. 345 of the CCL states that persons who commit crime against forest administration regulations by illegally denuding forest trees or the other woods with large numbers, shall be sentenced not more than three years imprisonment, criminal detention or public surveillance, and the fines can be given concurrently in a separate manner.'

⁵⁴ Article 54-58 of the CCL 1997

⁵⁵ Article 54 of the CCL 1997

The deprivation of political right penalty can be imposed in either concurrent or separate manner. 'Where an offence is serious, the deprivation of political right penalty imposed in a concurrent manner with any other main sentences. For a less serious offence, it may be given in a separate manner as an alternative to a short-term prison sentence' (Gao, Mingxuan 1989: 259-60).

(3) Confiscation of property penalty⁵⁶

The court may order to confiscate part or all properties of the offenders⁵⁷. The confiscation of property penalty is available for 59 provisions involving 69 offences in the CCL 1997. Unlike the fines, the confiscation of property penalty is imposed together with the main sentences for very serious criminal offences. For example, s. 113 of the CCL 1997 states that 'committing offence endangering the state security shall be sentenced to the confiscation of property penalty in a concurrent manner.' In practice, this type of sentence is commonly given to offenders who commit serious bribery and embezzlement. It is believed that confiscating their property could financially crack those offenders down.

In addition, s. 35 of the CCL 1997 prescribes the sentence only for the foreign nationals. It states that foreign nationals who commit offences in China may be given the deportation penalty in either concurrent or separate manner.

The Chinese criminal law provides several ranges of available sentences for each criminal offence. For some offences, the provisions are very detailed. The typical example is the provision dealing with the crime of embezzlement in s. 383 of the CCL 1997.⁵⁸ For some other offences, the provisions are not

⁵⁶ Article 59-60 of the CCL 1997

⁵⁷ Article 34 and 59 of CCL provide the definition of the confiscation of property penalty.

⁵⁸ Article 383 of the CCL 97 provides that committing crime of embezzlement shall be respectively sentenced according to the seriousness of the criminal circumstances and in accordance with the following provisions:
(1) Embezzling not less than RMB 100,000 yuan, shall be sentenced to not less than 10 years' prison sentence, life sentence and may also be sentenced to the confiscation of property penalty concurrently. Committing such crime under especially serious circumstances, shall be sentenced to life sentence and shall be sentenced the confiscation of property penalty concurrently.
(2) Embezzling not less than RMB 50,000 yuan, but less than 100,000 yuan, shall be sentenced to not less than 5 years' imprisonment, and may also be sentenced to the confiscation of property penalty concurrently. Committing

always sufficiently detailed. If the law is not very clear, the judges must look at the SPC judicial interpretations and provincial judicial interpretation to deal with the cases. The judges' personal judicial experience may also be influential when sentencing offenders.

The tariff for theft offences

S. 264 of the CCL 1997 deals with crime of theft, including burglars. It states that stealing 'relatively small' value of stolen property or stealing 'many times', the available sentences are public surveillance, criminal detention and less than three years' prison sentence. Stealing 'large' value of stolen property or having serious circumstances in the offence, the available sentences are not less than three years but not more than ten years' prison sentence. Stealing 'very large' value of stolen property or having 'very serious' circumstances in the offence, the available sentences are not less than ten years' prison sentence or the life sentence. The fines or forfeiture of property penalty may be given in a concurrent manner with the main sentences. For the two extremely serious circumstances either the life sentence or the death penalty are available. They are:

- a. Stealing from a financial institution and the value of the stolen property is extremely large, or
- b. Stealing the protected national treasures and the circumstances are serious.

such crime under especially serious circumstances, shall be sentenced to life sentence and shall be sentenced the confiscation of property penalty concurrently.

(3) Embezzling not less than RMB 5,000 yuan, but less than 50,000 yuan, shall be sentenced to not less than 1 year but not more than 7 years' imprisonment. Committing such crime with serious circumstances, shall be sentenced not less than 7 years but not more than 10 years' imprisonment. Embezzling not less than RMB 5,000 but not more than 10,000, showing remorse after the commission of the crime, and giving up the embezzled money back actively, the offender may be imposed a lighter sentence within the range of statutory sentences, or be exempted from sentencing, but shall be punished administrative sanctions by his or her work unit or the competent authorities at a higher level.

(4) Embezzling not more than RMB 5,000 but under relatively serious circumstances, shall be sentenced not more than 2 years imprisonment or criminal detention. Committing such crime under relatively minor circumstances, the criminals shall be punished administrative sanction under the discretion of his or her work unit or the competent authorities at a higher level.

Committing crime of embezzling repeatedly without been punished shall be sentenced on the basis of the cumulative amount of money he has embezzled.

The CCL 1997 does not define the concepts of 'relatively small', 'large', 'very large', 'many times', 'serious', and 'very serious'. It gives only the general rules and principles of determining the sentences based on the seriousness of the offences. S. 3 of the *SPC Judicial Interpretation for Several Issues on Application of Law to Deal with the Theft Cases 1998* (the SPCJISIALDTC1998) provides the ranges of the starting points for 'relatively small', 'large' and 'very large', and it allows the provinces to make their own tariff according to the local economy and other social circumstances.⁵⁹

In Jiangsu Province, the tariff is provided in *Opinion of Jiangsu High People's Court, Jiangsu People's Prosecution Institution, Jiangsu Bureau of Public Security regarding the Criteria of 'Relatively small', 'Large' and 'Very large' Value of the Stolen Public or Private Property* (SGFF [1998]4). It states:

- The stolen public or private property from RMB 1,000 to 10,000 amounts to 'relatively small';
- The stolen public or private property from RMB 10,000 to 60,000 amounts to 'large';
- The stolen public or private property more than RMB 60,000 amounts to 'very large'.

The following table illustrates tariff for theft cases in Jiangsu Province.

⁵⁹See page 12 for details.

Table 2.1 The value of stolen property and available sentences for normal theft cases (Jiangsu Province)

Value Groups	Relatively small	Large	Very large
Value of stolen property (RMB)	1,000-10,000	10,000-60,000, or having serious circumstances	60,000 or over, or having very serious circumstances
Available sentences	<ul style="list-style-type: none"> • Fine penalty on its own • Public surveillance • Criminal detention • Not more than three years' prison sentence 	Not less than three years, but not more than ten years' prison sentences	<ul style="list-style-type: none"> • Not less than ten years' prison sentence • Life sentence

The fines are avoidable for all offenders who commit theft offences. The courts determine the size of the fines based on s.13 of the SPCJISIALDTC 1998. It states:

The fines shall not be less than RMB 1,000, but shall not be twice more than the value of the stolen property. Where it is impossible to calculate the accurate monetary value of the stolen property, the amount of the fines shall be determined from RMB 1,000 to 100,000.

The financial circumstances of the offenders are not relevant when determining to impose the fines.

2.6 The sentencing factors

There are mandatory mitigating and aggravating sentencing factors in China, and they must be taken into account by the courts. There are other mitigating and aggravating factors which may be considered under the judges' discretion. These factors are commonly taken into account by the judges in practice.

Mandatory mitigation and aggravation

1. Mitigation

a. Voluntary confession

S. 67 of the CCL 1997 defines voluntary confession. It states that 'those who voluntarily confess to the criminal justice agencies shall receive the mitigated sentences. Where an offence is minor, the offender shall be exempted from a criminal sanction.' Voluntary confession is a statutory mitigation, and the judges will reflect this factor in their sentencing decision. The offender may only choose to voluntarily confess before the offence has been detected or before he or she has been arrested. Mitigation through voluntary confession is an effective approach to persuade offenders voluntarily surrender to the criminal justice agencies, and in China it is not unusual that offenders choose voluntary confession.

b. Performing meritorious actions

S. 68 of the CCL 1997 deals with the offender who performs meritorious actions. It states:

An offender who performs the meritorious actions, such as, reporting the offences of other offenders, which are proved to be the truth, or providing the important information which helps the investigators to fine the offences shall receive a mitigated sentence. If the offence is minor, the offender may be exempted a criminal sanction.

The meritorious actions are normally performed after the offenders have been arrested, charged or sentenced. Helping rescue during natural disasters, saving other people's lives in an accident, reporting crime and inventing new products or technique at work in prison are common meritorious actions. A

meritorious action will result in mitigated sentences or sentencing deduction if the offenders are serving the prison sentences.

2. Aggravation - Leifan

S. 65 of the CCL 1997 defines 'Leifan', and it tells how to sentence a Leifan offender. The legal definition for 'Leifan' is stated:

If an offender who has received a prison sentence or other severe sentence (except a sentence for criminal negligence) and been released from prison for less than five years commits an offence which will be subsequently given a prison sentence or other severe sentence, he or she is a Leifan. Leifan shall be given an aggravated sentence.

According to this definition, to identify a Leifan the judges should satisfy several conditions:

- The defendant is a recidivist;
- The latest sentence of the recidivist was a prison sentence or more severe sentence;
- The offender was released less than five years ago from the date when the current offence was committed;
- The possible sentence for the current offence is expected to be a prison sentence or more severe sentence;
- The previous sentences were not for criminal negligence.

Leifan is mandatory aggravation, and it persuades aggravated sentences.

Sentencing factors under the judges' discretion

The SPC judicial interpretations provide many mitigating and aggravating factors for sentencing. Whether to consider these sentencing factors depends

on the individual judges and the circumstances of the offences and offenders. As this study focuses on burglary, the sentencing factors discussed here are those regarding sentencing burglars.

1. Mitigating factors

Some mitigating sentencing factors are listed in s. 6.2 of *the SPCJISIALDTC* 1998. They are:

- Juvenile offenders, who are at the age of 16 or over, but under 18;
- Returning the stolen items, or paying compensation to the victims;
- Admitting guilt;
- Being forced to participate the crime without sharing the stolen property or sharing only small portion;
- Other less serious circumstances.⁶⁰

The courts would normally take into account the above circumstances. Whether to give a mitigated sentence or how much a sentence could be mitigated is under the discretion of the individual judges.

2. Aggravating factors

Some aggravating factors for theft cases are listed in s. 6.1 of *the SPCJISIALDTC* 1998. They are:

- Using the destructive means to enter the house and causing loss or damage of the public and private property;
- Stealing from the disabled, the old or those who have lost their ability to work;
- Where the crime of theft caused serious consequences, or the crime of theft had other serious circumstances.

⁶⁰ S. 2 of Article 6 of *the SPCJISIALDTC 1998* states - Although the offender has stolen public or private property which amounts to a figure more than the minimum chargeable value, if the circumstances are minor or the case has one of the following circumstances, the offender may be exempted from a criminal sanction.

Some other aggravating factors are included in s. 6.3. This provision also defines the concepts of 'serious circumstances' and 'very serious circumstances' which are written in s. 246 of the CCL 1997. All the circumstances listed are regarded to the aggravating factors for sentencing thieves. The aggravating factors listed in the provision include:

- Being a principal offender of a gang or a joint offence and having serious circumstances;
- Stealing from the financial institutions;
- Travelling between different places to steal, and seriously harming the society;
- Being a Leifan offender;
- Causing death, mental disorder or other serious consequences to the victim;
- Stealing funds prepared for disaster and emergency rescue, flood control, distress relief, migration or medical treatment and causing serious consequences; stealing pension granted to the families of the injured or dead servicemen;
- Stealing material and badly affecting manufacturing and economy;
- Having any other serious consequences.

All the above listed aggravating factors may be taken into consideration under the individual judges' discretion.

2.7 Current sentencing issues and the judges' view

Several of my interview questions asked the judges to discuss some the current sentencing issues. In the semi-structured interviews, the judges talked about even a wider range of sentencing issues than that of pre-designed. I will include the judges' views on the relevant issues which are thought to help make sense of the research findings.

Aims of sentencing and the judicial view

The aims of sentencing are not written in the criminal law, whilst the aims of criminal justice are stated in the CC1995, CCL 1997 and CCPL 1996⁶¹. They can be summarised as:

- To punish crime
- To protect the security of the state and public and maintain social order
- To educate and reform offenders
- To reduce and prevent crime

Academically, the aims of criminal justice is seen either the aims of sentencing. Gao, Mingxuan says that 'the aims of criminal justice in this context (criminal law) refer to the aims for which the state punishes offenders. They are the goals of the courts for sentencing offenders' (1989: 229). In fact, in the law textbooks, there are no clear lines between the aims, tasks and functions of sentencing in China, and all of these concepts contain the points summarised above. It seems that sentencing aims to punish crime, protect the state and public, maintain the social order, reduce and prevent crime and educate and reform criminals.

Historically, punishment has been the major sentencing goal in China. The courts are required to punish offenders according to the harm done. S. 61 of the CCL 1997 says that 'sentencing shall be given based on the facts and circumstances of the offence, harm done to the society. The courts shall follow the law strictly.' Ma states that 'commonly the criminal law text books accept that this provision lays out the sentencing goals and principles and tells the courts how to sentence criminals' (1999: 262).

⁶¹ See: Article 28 of the China Constitution 1995 (the CC1995) – The state shall protect social order, suppress crime of treason and other crime against socialist revolution, and punish and reform criminals.
Article 1 and Article 2 of the CCL 1997
Article 1 of the CCPL 1996
Article 3 of The Organisation Regulation of People's Court
Article 1 of The Prison Law 1998

The legal academics have views on sentencing aims with different focuses. One view says that firstly sentences should be commensurate with the seriousness of the crime and secondly the circumstances of the individual offender should be taken into account (Qu, Xinjiu, 1987b). Chen, Xinliang argues that sentencing must be based on the seriousness of the offence and all the circumstances of the offender. Also, it is necessary to emphasise that an unlawful action should not be charged for a criminal offence unless it is a crime defined in the law (1992: 600). Ma lists three points of sentencing aims – the first is that the sentences must be commensurate with the harm done; the second is that sentencing should be individualized; and the third point is that sentencing should follow the criminal law, relevant regulations and political policies (1999: 264)⁶².

In China, sentencing policies require that the courts should give severe sentences to the offenders who commit very serious criminal offences in order to protect public security and maintain social order. Therefore, crime prevention is another focus in the aims of sentencing in China. Prevention of crime includes individual and general prevention. Individual prevention aims to prevent the offenders from re-offending in the future, and general prevention aims to prevent the potential offender in the society from committing the same crime. In legal documents, it is frequently stated that ‘sentencing aims to educate the public, and deter the offenders and those potential offenders from committing crimes in the future’ (Xie 1999: 103-107). To educate and reform offenders is another emphasis in the criminal justice system in China, also the criminal justice agencies are required to condemn crime throughout the whole criminal proceedings for the purpose of denunciation.

My interviews show the judicial view on the aims of sentencing in China. It seems that the multiple sentencing approaches are applied. The term ‘punishment’ used by the judges had the similar meaning as retribution. General prevention in China is similar to general deterrence. Accordingly, individual prevention is very close to individual deterrence in England and

⁶² Ma, Kechang provides a particular phrase for this principle as ‘the principle of legality’. (1999: 264)

Wales. Obviously, to educate and reform offenders shares some similarities with rehabilitation.

1. Punishment with retributive ideas

Almost every judge interviewed claimed that sentences must fit the offences the most appropriately. They believed that sentencing must be given based on offenders' culpability, and it is similar to the western retributive ideas. Judge 22 stated:

Sentencing purposes to punish criminals but sentence must be given according to the harm done to the society. For instance, for the offenders who commit serious offences and cause very serious consequences, sentences must be severe.

The answers of the judges show clearly that the term of 'punishment' was quite similar to retributive sentencing approach. The judges believed that the offenders should receive sentences they deserve. All judges regarded this to be the major aim of sentencing.

2. To educate and reform offenders – rehabilitation

In China, to educate and reform offenders has always been the focus although it is not always considered when sentencing ordinary adult offenders. In practice, some judges believed that offenders could be separated into two groups. Judge 11 stated:

Some criminals have very strong criminal intentions and they re-offend again and again. In my view they are impossible to change anything. This type of offenders should be taken away from the rest of the society and put into prison. For first time offenders, reform is worthwhile and possible.

This view coincides with the views of Duff and Garland who believe those more modest rehabilitative goals can sometimes be achieved (1994: 24).

Judge 58 said that 'I believe that sentencing aims to educate and reform offenders. We should help them to choose a correct way of living.' Judge 7 stated:

Punishment is the mean rather than the purpose. I think rehabilitation is very important. We sentence criminals in order to educate them and change their behaviour in the future. The eventually prevent crime in the society.

In practice, however, the rehabilitation goal at sentencing stage is primarily relevant to juvenile or youthful offenders. The judges may consider a less severe sentence for a first time offender if the offence is not very serious. In the interview, Judge 13 said that the juvenile offenders and some first time offenders did not normally have deep evil intention, so a mitigated sentence would be enough to teach them lessons and change their behaviour in the future.

Practically, the judges commonly stated that in order to implement education and reform policy, they tended to apply short term prison sentences or try to apply non-custodial sentences for those who were treatable. Judge22, however, believed that prison sentence might be helpful for achieving education and reform goal. He said:

I personally think that sentencing should aim to educate and reform offenders...To put offenders in prison may give them an opportunity to reform themselves. Some offenders have indeed changed their mind and behaviour after their prison sentence. I had not a few examples to show that prison can change offenders and make them become new persons.

With regard to how effective the education and reform approach implemented in practice, the judges did not seem to be sure. Judge 5 stated that 'for youthful offenders, we may think about mitigated sentences in order to educate and reform them. However, in practice this approach is like a slogan and not easily reflected in sentencing. It is the major policy in prison though.'

3. Crime prevention – deterrence

Crime prevention is another focus in sentencing aims. In the interviews, Judge 4 stated that sentencing should be tough enough to stop offenders from re-offending. Judge 46 said that the severe sentences could deter the potential offenders from thinking of offending in the future. Judge 49 and Judge 57 stated that 'we sentence offenders in order to deter them from re-offending. In the meantime, sentencing helps stop the potential offenders committing the similar offences. In fact, crime prevention in China is quite close to deterrence in England and Wales.'

As to implementation of crime prevention in practice, some judges were not optimistic. About twenty judges believe that the current sentencing law were not tough enough to deter criminals. Judge 41 said that '...current law may not effectively prevent crime. In the current criminal law, the sentences are not tough enough.' Judge 23 said that 'it did not mean that we will often apply the death penalty. However, it really deters. We should have it available for most offences. It may be just symbolic and only for the purpose of deterrence.'

4. Public protection – incapacitation

'Incapacitation' is not a sentencing aim in China. However, in my research I find that 'to protect public' was meant similarly to incapacitative sentencing in England and Wales. For example, Judge1 said that 'in order to protect public we have to put offenders in prison. Prison may stop offenders harming the society.' Judge 6 stated that offenders who have strong criminal intention are dangerous and they must be locked up. He said:

Sentencing should aim to protect innocent people. Some offenders must be lock up, therefore, they cannot commit offender to harm other people. Dangerous offenders are those who have strong criminal intention, such as the recidivists. We should not consider applying non-custodial sentences for them.

Judge 68 said straightforwardly that 'offenders cannot harm public and the society if they are all locked in prison...'

5. Denunciation

In China, to condemn crime is a duty of all criminal justice agencies. Judge 2 said that '...sentencing tells people what they should not do and if they try it, what the legal consequences would be. I think it is a good opportunity for general legal education for people.' Judge 19 stated that 'sentencing may effectively teach the public what the legal consequences are for certain wrong doing. As judges, we really should take the opportunity to make it clear through sentencing.'

6. Restitution

Restitution is not emphasised in sentencing in China. In the interviews only two judges talked about this sentencing aim. Judge 31 stated that 'I believe that restitution is one of the aims of sentencing. To punish criminal itself is a way to compensate the victims.' Judge 47 said that sentencing should aim '...to punish offenders and compensate the victims. But in practice I do not think we do enough for victims.'

Problems in the sentencing framework

The judges discussed the problems with regard to sentencing in the interviews. There are problems remaining in sentencing framework and sentencing practice.

The judges pointed out that the statutes were not always sufficiently clear and detailed. Some provisions in the CCL 1997 were too general to apply. The SPC judicial interpretations might solve some problems, but there are still other provisions remained unclear. Judge 29 stated that:

...the law is not detailed enough, and it does not tell you how to take into account of the circumstances in the particular cases. I felt it was so difficult to following the law itself when I just worked as a judge. You need a lot of experience.

Judge 12 said:

...some provisions in the CCL are not clear enough for me to understand what the law really says. When you apply the law to deal with the particular cases in practice, it can be so difficult to determine the facts of the cases and the use of sentences. Sometimes you have nowhere to find how to identify the circumstances in the case. You may not make sure if you rely only on the provisions in the law.

A legal academic suggested that 'the law should be written clearly and it should be easy for the judges to follow' (Ma 1999: 243).

With regard to the law concerning theft offences, Judge 47 said that 'the law is all right for theft offences.' Judge 64 said that 'I would say that it (our law) is sufficiently detailed for us to deal with theft cases.' In contrast, Judge 16 stated that 'there is no detailed tariff for sentencing thieves. Although we have the ranges of the value of the stolen property and ranges of available sentences, we still confuse sometime because there are different circumstances in the cases and how to deal with them?' Similarly, Judge 46 said:

The sentence for a theft offence is determined by the value of the stolen property and the law gives the criteria for this. Besides, we must consider all aggravating and mitigating factors which are not

available in the law. We do not have sentencing guidelines. We rely on mainly our judicial experience.

Two judges criticised that the ranges of available sentences for theft offences were too wide. Judge 14 said that 'it causes confusion to the judges'. Judge 35 said:

Because the range of available sentences is too wide, I am not quite sure whether the sentence I choose is the most appropriate one. It seems that various options are all possible. For example, someone who stole property valued RMB 15,000 may be given sentences from three years' prison sentence to a prison sentence of ten years. Without a more detailed tariff, how we make sure the consistency in sentencing?

Burglary is not a separate offence in Chinese criminal law. When I asked 'do you think it is necessary to make burglary a separate offence' in the interviews, more than half of the judges said that it was not necessary to do so. Judge 24 said:

I don't think it is necessary to separate burglary from the normal theft offences. In China, it has been commonly accepted that burglary is a type of theft with the circumstance of a dwelling house. This circumstance would distinguish burglary from normal theft. If a burglary causes other serious consequences, the offender may be charged for other offences, such as criminal injury, robbery, rape or murder...Also, we have the SPC judicial interpretations.

Regarding the SPC judicial interpretations, Judge 27 stated: 'we hope that we can have the SPC judicial explanations for all unclear provisions in the statutes.' Judge 33 criticised that even the SPC judicial interpretations could be unclear. Some judicial interpretations themselves were not detailed enough. He said, 'we do not need another interpretation for a SPC judicial interpretation.'

Another problem the judges mentioned was the criminal law did not provide the practical mechanism for implementing. For instance, the law did not provide any practical methods to deal with the offenders who refused to pay the fines. Therefore, the fines could not be collected even if the offenders had enough money to pay.

The judges criticised that after the judicial reform, the status of case law remained unclear. Currently, there were previous cases collected and issued to the legal practitioners, but they are not regular and systematic. Case law in China is not authority in sentencing. However, it can be quite influential to the sentencing judges. The judges would like to know to what extent they could rely on the previous cases, and he would like to be given rules of using case law. Judge 26 stated that 'we see the previous similar cases as references. I suggest that the model cases should be collected systematically and issued regularly to us.' Another judges said that to give a proper status to case law could promote the consistency in sentencing.

The judges realised that the old ideas remained strong influence on the judiciary. Hence interpreting and implementing the new laws could not be straightforward. For example, an adversarial mode of trial adopted since the CCPL 1996 came into effect, but it had not been applied properly. Similarly, Fu comments that 'it is commented that 'in fact, the court hearing is a formality' (2000: 177). However, the judges believed that 'it took time to reform, and we can see the progress we have made in the judicial practice.'

Issues in the judicial system

The judges said that the judicial system had problems which needed to be solved. In some way, the Adjudicative Committee of the Court (the ACC)⁶³ was seen as an internal interference. In the interviews, about 65% of the

⁶³ See the introduction in Chapter Two on pp. 39

judges admitted that the ACC could be a feasible and practical approach for pursuing consistent sentencing. Judge 37 stated:

We submit the influential, difficult and complex cases to the ACC. The ACC members will discuss the case and then made a collective decision. It will take responsibility from the judges who initially hear the case. Therefore, in this way, the ACC is a good approach.

The rest of the judges, however, felt that currently the ACC could be interference because the ACC took over a case from the judges who firstly dealt with the case, and the ACC may make a decision totally different from the sentencing judges' opinion. Six judges said that they did not felt they could exercise their sentencing power independently due to the involvement of the ACC. Judge 51 said:

Judges should be able to make sentencing decisions independently. However, in practice sometimes the judges who make sentencing decisions are not those who hear the cases. I mean the ACC change the decision made by the judges who hear the cases initially. I doubt whether it can turn out an arbitrary decision without knowing the whole picture of the case.

The judicial capacity of the judges might be another problem. More than half of the judges interviewed agreed that the Chinese judges' judicial capability varied. They believed that a few judges should not work as active judges to hear the cases. Judge 61 suggested that the entry requirements of the judges should be tightened. Judge 39 believed that it would be helpful to recruit new judges from the university graduates and those who had higher degrees. He explained that 'it doesn't mean that a person with a higher degree will definitely be a good judge. It is just a gesture to say that the judges should be the experts in law.'

Judge 62 said that judicial training and further education were a practical approach to improve judges' judicial skills, but currently the training was not

sufficient. Judge 29 commented that the current judicial training was not systematic and not everyone could have the opportunities. Judge 50 pointed out that the judges in local basic courts had fewer chances for the legal trainings. Besides, they had too much work to have time to study.

Twenty three percent of the judges interviewed felt that they spent too much time on administrative work rather than dealing with cases. In China, the sentencing judges have also do general office administrative work. Judge 21 said that ‘...we should focus on judicial work. But we have so much administrative job to do, such as bonding the case files and attending lots of irrelevant meetings.’ Judge 37 stated that ‘as a judge in a local basic court, I have no time to think about theoretical issues.’ More than half of the judges urged that the administrative work be taken away from the judges’ responsibilities. They suggested that the officials who did administrative and management work should be separated into a different work category from the active judges. It was not appropriate to give all officials of the courts the title of ‘Judge’. Currently, it was the fact.

Political influences

The CCPL 1996 states:

The courts shall exercise their judicial power and prosecution agencies shall exercise their prosecuting power independently in accordance with the law, and they are free from any interference of any administrative organ, public organization and individual.⁶⁴

In reality the courts cannot avoid the political influence, which is from the CCP and its agencies, the government organs, local authorities and political policies.

CCP and its legal agencies

⁶⁴ Article 5 of the CCPL, 1996

China is a one-party state under the dominance of the Chinese Communist Party. As the leading political party, CCP may have influence on all matters, including criminal justice. CCP issues regulations and legal documents which content its political policies. In practice, the CCP's legal documents have the same power as legislation, and the courts cannot set aside the CCP's policies regarding the criminal justice issues.

In reality, CCP influences the judicial system through its agencies. The institutions of collective leadership exist in Chinese political system, such as the Central Committee Military Commission, the Central Commission for Discipline Inspection, State Economic and Trade Commission, State Development Planning Commission, National Population and Family Planning Commission, and so on. These institutions are formed based on various notions of functional specialization. CCP controls criminal justice system through these institutions, especially the Political and Legal Commission (PLC) and DIC. There are central PLC and DIC within the central government, and both PLC and Disciplinary Inspection Commission (DIC). The PLC is commented to 'have special political responsibilities, which the government is accountable' (Fu, Hualing 2000: 175). DIC has active involvement in dealing with criminal offences involving CCP party members or related matters.

a. PLC

The function of PLC is 'to ensure that criminal judicial system works under the correct political polices, to co-ordinate the relationship between the police, prosecution institutions, courts and other criminal justice agencies, to maintain public order in the society and to prevent crimes' (Wang, Shengjun 2004: Preface).

PLC has many branches from central to local levels, and they may directly influence over the courts or other criminal justice agencies at the same level or below them. In practice PLC has power to organise group discussions between all criminal justice agencies including the police, prosecution and

courts. Where an influential case is regarded as major, politically sensitive or controversial, the PLC may organise group discussions in order to achieve a collective decision for the case. It is not unusual PLC puts pressure upon some criminal justice agencies to force them take the collective decision. Sometimes the sentencing decisions are made before the trial with the 'help' of PLC. In this case, the trial becomes a 'formality'. Under the CCP's policy, the courts are under the guidance and supervision of PLC.

PLC has a duty of conducting criminal justice research. Therefore, it may provide views on implementing law to the criminal justice agencies. PLC may speak to the mass media about its opinion on some particular cases.

b. DIC

In late 1970s, two new agencies of collective leadership - the Central Advisory Commission (CAC) and the Central Disciplinary Inspection Commission (CDIC) were created. The initial aim of CDIC was to supervise the CCP members to obey the party disciplines and to enforce the party norms. Like PLC, DIC has branches at different levels from central to local. In recent years, DIC have been enhancing its power in criminal justice practice. Based on the CCP 'two-givens'⁶⁵ policy (Shuanggui), the DIC branches have power to detain the suspected CCP members at given places such as guest houses, hostels or hotels. They have power to investigate any anti-party discipline behaviour, unlawful actions or criminal offences which a party member may be involved in. Once DIC finds sufficient evidence to prove the inspected committed a criminal offence, they will then pass the cases to the prosecution for formal legal investigation. Initially DIC primarily dealt with party member discipline checking or investigating bribery or embezzlement cases involving party members. Currently, its power has expanded. 'Shuanggui' policy allows the DIC to detain

⁶⁵ 'Two-givens' refers to 'a given period of time' and 'a given place'. The policy states that a questioned CCP member shall make a clean breast of his or her anti-party discipline actions or unlawful behaviour or confess the offences committed in a given period of time at a given place. Two-given policy should be carried out by each level of DIC. In other words, DIC has power to detain any CCP member who is suspected.

the suspected for unlimited period of time until they find the evidence. However, the validity of such detention power is challenged by legal academics.⁶⁶

In the interviews Judge 13 commented:

It seems that PLC can make decisions for some influential and major cases and it may override the courts at the same level. DIC is not an institution in criminal justice system, but it may play a role as prosecution, and it is very powerful. It's not proper I have to say, but this is a Chinese characteristic.

2. Political policies

In China, political policies have strong influence on judicial system. It is a characteristic of Chinese society that politics mixes with law. It is commented that 'throughout Mao's life and even after, his words and thoughts remained the basis of reference for all political actions and initiatives. Likewise, China's current leadership constantly refers back to Deng Xiaoping's ideas in their speeches and policy directives...' (Brahm 1996:15) The courts must implement the political policies in judicial practice.

Political policies can be made directly for dealing with current problems. They can be national and applicable for the courts all over the country, or it can be regional, and applied only in certain areas. Political policies are quite flexible, and they are enacted, revised or abolished with the change of the social circumstances.

The forms of the political policies vary, and they can be any of the following documents:

- a. The legal documents issued by the National People's Congress (NPC) or its standing committee;

⁶⁶ Due to the political reasons, the articles regarding DIC ect. can hardly be found in documentary resources.

- b. The documents issued by CCP, State Council (SC), or the documents jointly issued by them;
- c. The documents issued by the departments of the Central Committee of CCP and SC;
- d. The documents issued by local committees of CCP, government authorities and their departments;
- e. The official reports or speech given by the senior officials of CCP, the government or local authorities.

Most policies are not law, but the judges must look at those political policies regarding legal issues, because the policies may help them understand the principle in law. For example, minority nationality status is not a mitigating factor. But a CCP policy states that the preferential treatment should be given to the minority nationalities. Under this policy, the courts would consider mitigated sentences for the offenders who are minority nationalities. Otherwise, the sentence given would not be regarded as appropriate. Similarly for juvenile offenders, a CCP policy states that 'education is the first consideration for the juvenile offenders, and punishment is the second.' Therefore, the courts would give less severe sentences to the juvenile offenders under this policy.

In practice, where a provision in law is not very clear to the judges, and neither is a SPC judicial interpretation available, the courts may look at the relevant political policies to interpret the law. Again, the validity of the political policies has been challenged, but their influence on the judicial practice cannot be denied.

In the interviews, when discussing the influence of the political policies, most judges mentioned 'Yanda' campaign. 'Yanda' refers to the anti-serious violent crime campaign launched under CCP's policy. It was initially created in 1983, and was commented as 'iron-fist policies' (Bakken 2000: 391-8). Yanda has been proved to be a powerful method of social control, as in the campaign the criminal procedure is dramatically simplified in order to punish the targeted crimes quickly and harshly. It is criticised that Yanda 'may have undermined the substantive and procedural criminal laws' (Copper *et al.* 1985).

PLC plays crucial role in Yanda campaigns.⁶⁷ It is required to mobilise the whole criminal justice system when a campaign starts, check the operation of the campaign and coordinate the operation of all criminal justice agencies to achieve the effective results of the campaign. But it is argued that 'PLC should not be a law enforcement agency, and CCP's policies should not interfere with the operation of the judicial system' (Hu 1998: 225).

In the interviews, seven judges said that Yanda campaigns were launched under the political policies. Judge 7 stated:

Yanda aims to attack serious criminal offences which are targeted. The policy says in Yanda the courts should sentence the offenders who commit the targeted offences harshly and quickly. As a result, the mitigating factors are ignored. For the same offence with similar circumstances, an offender would be given a much more severe sentence than usual. I am not sure whether it is fair, but we must implement the policies.

3. Government components and local government authorities

The courts in China are under a dual-leadership. One is called vertical leadership, in which the Supreme People's Court is on the top. The SPC provides professional guidance to the courts at different levels. The other leadership is called horizontal leadership, by which the courts are under the authority of the local government. The local government authorities and their competent organs are powerful because they are in charge of the judges' appointment and promotion. They make decision on the budget and material supplies to the courts. It is not unusual that the government authorities put pressure on the courts and try to force the courts to make sentencing decisions favourable to certain senior officials of them.

⁶⁷ Yanda is a special term applied only in criminal justice domain. Literally it means the campaigns launched to attack the targeted certain crime(s) in order to maintain social order and protect public security. During Yanda campaign criminal procedure may be simplified, and it is required to sentence the offenders committed targeted offences quickly and harshly.

Judge 55 said that 'the local government authorities tend to put pressure on the heads of the court but the ordinary judges do not really feel the pressure. The senior official of the courts will balance the things. As ordinary judges, we do what we are told to do.'

Positively speaking since reform and opening-up policy started, CCP and Chinese government have been moving towards a more legally based structure. Currently the development of a complete and effective legal system has been set as priority. With the continuing reform in the judicial system, we have reasons to believe that the political influence would be less on the judicial practice in the future. Judge 59 in the main study said that 'I feel the interference from CCP and the government authorities has become less and less.'

Other influences on sentencing

Traditionally, Chinese media spoke euphemistically. In other words, the public realm in China is 'morally pure' and criticisms have to be voiced indirectly. The bizarre and sensationalism are not encouraged. Nowadays, there are relatively lower entry barriers to the economic and political domain, and media speaks more openly than it did in the past.

In China the media tends to speak on behalf of the 'people', and the official media is required to persistently promote the socialist and communist ideology. It is called Yulun, which represents the official views. The state and CCP in China are dominant. The media is supposed to relay the party and state's policies. A western writer comments that 'the CCP leaders have consistently supplied direction to the masses' (Dittmer 1994: 126), and 'the mass media are part of the propaganda system' (Dittmer 1994: 119). Obviously the media may have influence on the judicial practice.

Public opinion includes two aspects, one is the opinion of a wide range of people, and the other is the view of the media, which, in fact, is the official view.

In China, 'any public demand or grievance must be expressed in terms of universal validity' (Dittmer 1994: 113). Therefore, media tend to emotionally express their views to show that they care for the public. If they fail to do so, their performance will be criticised as 'indifferent' for 'lack of public caring'. In order to show their care for the public, the media may report the cases which are still in the legal proceeding in order to persuade the courts to accept the 'public's opinion'. Where a sentencing outcome is different from the public's expectation, the media may criticise the courts by showing the public's disagreement or anger. Sometimes the post-trial critics may influence the second instance courts to make their decision. Another problem is that the role of public opinion is sometimes overestimated.

On the other hand, public opinion reflects the current social circumstances through the media, which 'are relevant to conviction and sentencing because it may help to judge the degree of harm done to the society of an unlawful action' (Wang, Yong 1990: 236). In some cases, public opinion should be taken into account by the judges. Secondly, apart from under the formal supervision of PLC and the prosecution, the courts are also under supervision of public, actually media. It is believed that media may help examine whether the courts exercise their sentencing power effectively and justly. In addition, media help the courts achieve denunciation goals by reporting offences and their sentencing outcomes.

In my field research, the judges from the courts of northern Jiangsu Province said that they did not feel any pressure from the mass media probably because the media were not interested in legal matters in small towns and countryside. Though all judges interviewed believed that public opinion could be powerful, and they could not avoid the influence sometimes. Judge 59 feels that he sometimes were strongly influenced by the public opinions especially in some cases where the public showed their outrage to the offenders. Judge 62 said that 'sometimes I feel under pressure because the media report the public opinion on the case I am dealing with. If my view is different from the public opinion, I would ask whether I should change my mind to satisfy the public.'

Another interference the judges pointed out was Shuoqing, which literally meant a mercy plea for those involved in criminal cases. It is said that Shuoqing rooted from nepotism from thousands years ago in the feudal society. It is common in China that if someone gets a trouble, for example involving in a criminal offence, his or her family members, relatives or friends would try to look for the 'capable people' and seek help. The 'capable people' might be the sentencing judges' superiors, subordinates, colleagues, family members, relatives and friends. Shouqin may be through different channels to the judge who are dealing with the cases, and 'sometimes it is so hard to refuse a mercy plea through someone very close to you' (Judge 61).

The judges believed that social network (Guanxi) was similar to Shuoqin, and it was also quite influential. Social network is very essential in the Chinese society, and to keep a good 'Guanxi' is crucial for Chinese people, including the judges. One's superiors, subordinates, colleagues, friends, and relatives are the crucial in the network, and the judges admitted that people in the network helped each other encounter the difficulties. They felt awkward when they refused a mercy plea from someone in their social network. Some judges said they were struggling to balance Guanxi and justified sentencing.

Moreover, in the interviews the judges provided their views on the tendency of sentencing policies in China, and they commented that it seemed that they were encouraged to apply the less severe sentences in practice because the law was not as tougher as it was in the past, and non-custodial sentences such as the fines were available for many cases. The judges also felt that the criminal procedure was emphasised, and they were required to deal with the criminal cases strictly following the legal procedure.

SUMMARY

This chapter provided an introduction of the background information on sentencing in China. It included the development of the criminal law from the Qing Dynasty (1616-1911). To introduce the contemporary development of the

Chinese criminal law was to aid to understand the traditions and judicial cultures in China. It is believed to help make sense of the findings from my field research, and then explain the differences between China and England and Wales in terms of sentencing.

The second part of this chapter introduced the traditional Chinese penal philosophy. Since the philosophical traditions may still have strong influence to the current judicial practice, to know about the traditional Chinese penal philosophy may help us understand the current aims of sentencing and sentencing policies. For example, in the traditional sentencing philosophy 'Fa' encouraged the harsh sentencing. Therefore, harsh sentencing has been a penal tradition in China. On the other hand, 'Li' and 'Jiao' focused on rehabilitation, so to educate and reform offenders are also emphasised in China.

In the following part, I discussed the sentencing system in China, which included the brief background information about the Chinese legal system. In detail, I introduced the criminal justice agencies, especially the courts, sentencers and criminal procedures. For some issues I included the judges' comments and views from my field research. The purpose to introduce the sentencing system in China was to provide sufficient background information in order to compare sentencing practice between China and England and Wales at later stage.

I introduced the sentencing framework and sentencing policies in China in order to explain the sentences indicated by the judges to each scenario sentences. I outlined the tariff for sentencing theft offences including burglary, and also I introduced all the mitigating and aggravating factors for sentencing in this part. This information was essential as it allowed me to explain the results from my field research with the judges in China. Again, I included the judicial views from my fieldwork to show how the judges interpreted the law and what their views regarding general sentencing issues were.

In the last part of this chapter, I explored the current sentencing issues in China, including the aims of sentencing in China and the problems remaining in the sentencing framework and practice. Some judges pointed out that the currently law was not clear and detailed for all offences, and the SPC judicial interpretations played a significant role. The judges criticised that the current criminal law did not seem to be as harsh as it was in the past, and it was not sufficiently effective to deter the offenders. More than half of the judges interviewed were against the abolition of the death penalty.

With regard to the problems remaining in the judicial system, the judges pointed out the problems in the judicial system itself, and also the external problems. Internally the judges were required to report some cases to the senior judges and those cases would be dealt with by ACC. Some judges believed that it could be interference and it affected the judges to exercise their sentencing power independently. However, some other judges believed that ACC might take over the responsibilities from the judges, and also it helped pursue consistent sentencing.

Then I discussed the political influences on sentencing in China which included the influence from CCP and its agencies, political policies and local government authorities, even some senior officials.

As far as other external interferences are concerned, the judges said that media tended to put pressure on the courts especially when the courts were dealing with some influential cases. Public opinion could be influential as well. In addition, the Chinese characteristics - 'Shouqin' and 'Guanxi' were introduced and I included the judges' views about them.

On the whole, this chapter is mainly about the background information on sentencing in China. Some information may not directly relevant to the research theme, but they may help explain the sentencing practice in China and help me make sense why the scenarios were so indicated by the judges in China and why they were so different from the sentencing outcomes in England and Wales.

In next chapter, I will focus on the results of my field research in sentencing burglars and I will provide the explanations.

CHAPTER THREE

JUDGES' VIEWS ON SENTENCING BURGLARS IN CHINA

3.1 Empirical study in China

Sentences indicated to the scenarios

Findings and a brief interpretation

3.2 Judges' views on sentencing burglars

Definition of burglary in China

Sentences and applying sentences for burglars

Sentencing factors: mitigation and aggravation

Case-specific information

3.3 Sentencing culture

Perception of the harm of burglary

Perception of the punitive elements in the sentences

Other cultural factors for sentencing burglars

Summary

INTRODUCTION

This empirical study in China started with a pilot study in August 2002. In the pilot study I interviewed 11 judges from one intermediate court and seven local basic courts in Nanjing - the capital city of Jiangsu Province. I conducted the main research in Jiangsu Province from 9th July to 15th August 2003. I visited 23 courts and interviewed 61 judges who were from 21 local basic courts across Jiangsu Province, Nanjing Intermediate Court and Jiangsu High Court.

3.1 Empirical study in China

I recorded and transcribed all the 72 interviews, and translated all transcripts from Chinese into English. I will firstly present the sentences indicated to scenario cases by the judges in the interviews.

Sentences indicated to the scenarios⁶⁸

Case 1

Case 1 is a burglar of a residential property during hours of daylight. Access was unlawfully but easily gained through an open window, with no damage to property. The offence was unplanned and the items stolen were food for the defendant's family. The defendant pleaded guilt to the police. Also the defendant has no previous criminal records. He was only person who worked to support the family. All judges said non-custodial sentences should be the most appropriate for the burglar in this case. Judge 21 said:

...in Case 1 the defendant had no previous convictions. If we assume that the value of stolen food just reaches the minimum chargeable amount which is RMB 1,000 (otherwise he would not be prosecuted), so custodial sentences are not necessary.

In the interviews, 49 judges indicated the fines to this burglar and 23 gave public surveillance. Four judges said possibly they would exempt this offender from criminal sanctions. One judge did not think that this offender may possibly be charged for burglary because 'this is too minor to be charged as a crime of theft as the stolen items were just food' (Judge 64). Fourteen judges indicated criminal detention for this burglar. The reason for choosing this sentence was that although a non-custodial sentence could be an ideal sentencing option, considering the scenario the judges would assume that this burglar could not afford to pay the fines even if they must give him the fines. Public surveillance was possible but its enforcement was problematic. In order the offender would be actually punished, criminal detention might be the best choice. One judge

⁶⁸ See Appendix 1.1 for the details of the scenarios and research questions

would consider a short term prison sentence. Two judges said that a suspended short term prison sentence might also be possible. (See Appendix 3)

Case 2

Case 2 is a burglary of a residential property at 2am at deep night when residents were asleep upstairs. The burglary was premeditated, and entry was gained by forcing an outer door, causing some damage. Jewellery of sentimental value was taken, and the value was RMB 13,000. The defendant has three previous criminal records for burglary, and the latest was for a dwelling house burglary for which he served a custodial sentence. The victims are a retired old couple, and the wife is semi-valid. This case deliberately included many serious circumstances. (See Appendix 3)

All judges interviewed said the prison sentences would be unavoidable for this burglar. All judges determined the lengths of the prison sentences based on the value of the stolen property. By law, the minimum sentence for this offence is three years' prison sentence. Because in the case the burglary could be either Leifan or non-Leifan, the judges indicated sentences for the two situations. Considering the case specific information and the circumstances of the offender, the judges indicate a range of prison sentences was from 51 to 96 months, if the offender was a Leifan. For a non-Leifan they gave the prison sentences from 43 to 55 months. Judge 2 explained:

The value of stolen items valued as RMB 13,000, and it was thus in the large value category. Given that the victims were an old and retired couple, it was not a small amount. So this burglary is serious.

Leifan was a factor which drew the judges' attention in this case. All judges interviewed said that this offender looked like a Leifan. If he was a Leifan the sentences would be much more severe than if he was not a Leifan. Judge 19 said that 'if this burglar was a Leifan, I would give him a prison sentence of four and half years. If he was not a Leifan, I would give him a four-year's prison

sentence.’ Judge 14 would consider a prison sentence of eight or ten years for this burglar. He explained that ‘for a Leifan I would give a long-term prison sentence because he did not seem to be learn the lesson, and I assume that he cannot change his behaviour easily.’

The fact that the burglary was committed at night was designed as a key aggravating factor originally. In China, ten judges said that night time burglary was serious because people were at home sleeping. 62 judges, however, believed that daytime burglary could be more serious. Judge 51 said:

The day time burglary is called as ‘Bai-ri-da-chuang’⁶⁹ in our area. The situation sometimes is very serious. We have had Yanda campaigns which particularly targeted the daytime burglary. The offenders who commit burglary in the day light are dangerous offender I would regard.

Half of the judges mentioned the factor that the offender forced the door and window to get into the house. These judges believed that this fact showed the seriousness of this burglary. 11 judges thought that the value of the damaged property should also be measured and added to the value of the stolen property. But they said in fact in practice the judges did not do so.

Thirty one judges looked at the fact that the jewellery with sentimental value was taken, which could not recover. Ten judges felt that this fact should be seen as an aggravating factor because it harmed the victims, whilst 21 judges said that sentimental value should not be considered because it was not measurable. Judge 24 did not think that the loss of the jewellery would cause any trouble in the victims’ life. She believed that the courts should not consider this factor because different victims would have their own problems after being victims of offences, and in practice the judges did not normally consider factors like this. The rest of the judges did not comment on this aspect.

⁶⁹ This phrase literally means breaking into people’s houses stealing in the day light in Chinese language.

Case 5

Case 5 is a burglary committed at night when the residents were asleep. The burglar forced the lock and took a TV set valued at RMB 3,900 away. The offender has no previous convictions. The victims are a professional couple who are both middle aged. This case was the second least serious cases ranked by the Chinese judges. 69 judges imposed prison sentences for the burglar in this case and the lengths were from nine to 17 months. One judge imposed a suspended prison sentence. Four judges chose criminal detention for this burglar. One judge indicated public surveillance and two judges gave the fines as a main sentence. (See Appendix 3)

It seems that the factor of 'being a first time offender' was drawn the judges' attention in this case. Judge 58 said that 'there are quite a lot serious circumstances in this case. But I do not think that this burglar should be given a severe sentence because he is a first time offender. I would give him a chance to reform.'

Like Case 2, this burglary was designed to be committed at night. Again this factor was not commonly seen as an aggravating factor by the judges interviewed. Judge 34 said he would look at the circumstances in a particular case to decide whether to consider when the burglary was committed. He said:

I cannot to say a daytime burglary or night time burglary which one is more serious. It depends on the circumstances in a particular case. It is crucial to look at whether the defendant knew that there was someone in the house. If the burglar knew the house was most likely occupied before he took the action, it is no doubt very serious. In practice we tend to pay attention on the consequences. For Case 5, I do not think it is particularly serious because the burglary was committed at night. After all no serious consequence was caused by this offender.

Judge 11 had a different view and he said:

This burglar (in Case 5) was so dangerous because he committed burglary at deep night while the residents were at home sleeping. But since the burglary caused no serious consequences, I might not consider this factor as particularly influential.

Case 3 and Case 4

In both Case 3 and Case 4 a burglary of a residential property was committed in the daylight. The house was unoccupied. A TV was stolen, and it valued RMB 3,900. All judges said that Case 3 and Case 4 were very similar.

There are slight differences between Case 3 and Case 4. In Case 3 the burglar had two previous convictions which were for non-dwelling house burglary in the last two years. Given the circumstances included in the scenario, almost all judges said that this offender looked like a Leifan. They gave prison sentences from 16 to 36 months if the burglar was a Leifan in this case. If the offender was not a Leifan, the sentences would be a range of prison sentences from 12 to 24 months. Three judges indicated a criminal detention and one judge said public surveillance might be possible but only if the burglar was not a Leifan.

The sentences indicated for Case 3 show that the offenders' previous conviction is a very influential sentencing factor. But which type of offences the offenders committed in the past does not seem to be relevant. The judges said that as long as the offenders had previous convictions, they would see it as an aggravating factor. But how long from the day when the offender was released to the time when he or she committed the current crime did matter. Judge 44 said:

...As long as an offender has previous convictions which were not very long time ago, I would think that he could not be easily reformed. I don't care what type of offences he committed before. Obviously criminal negligence is excluded. In contrast, if an offender has no

previous conviction at all, I would give him a mitigated sentence because he needs a chance.

In Case 4, 38 judges mentioned that the burglar in this case had only one previous conviction, whilst the burglar in Case 3 had two. Do they make difference? 27 judges believed that one or two previous convictions would not make much difference in sentencing outcome. 11 judges said that there should be some differences between one and two convictions, but the differences were too subtle to be practically reflected in the sentencing decisions. Judge 56 said that 'you cannot simply say that because the offender in Case 4 has one previous conviction which is once fewer than the burglar in Case 3, he deserves a less severe sentence than the offender in Case 3.' Judge 30 said that 'we believe that if an offender has previous convictions which were not long time ago, he does not seem to be successfully reformed. I would not give him a chance again.'

In Case 4 it is said that the burglar had successfully completed his previous public surveillance. Nearly half of the judges said this fact was not relevant to the current sentencing decision making, whilst other judges believed that it was relevant because 'this is a sign of showing that non-custodial sentence was not effective for this burglar. If possible, I would definitely go for a prison sentence for him this time' (Judge 11). Judge 34, however, thought differently, and she stated:

The fact that this offender completed his previous sentence successfully means that he was willing to change his behaviour, although actually he could not be able to really achieve the change. I would probably take it into account with other circumstances in the case. I might give him a chance.

The rest of the judges did not comment on this circumstance, and I assume that they did not think this factor was so important.

In Case 4 the burglar was a heroin taker. The judges took different views on this factor. 56 judges, about 78% of the judges interviewed, believed drug taking should be considered as an aggravating factor. Judge 21 said:

It looks heroin taking has nothing to do with the current burglary offence, but logically I would believe it relates to commission of the property offences, such as in this case, a burglary. Taking drugs costs lots of money. Assuming if he has money to pay for drugs, why did he commit burglary?

Judge 69 said that 'drug taking is always regarded as an unlawful action. I would consider it as an aggravating factor anyway.' Judge 71 believed that drug taking harmed not only the drug takers themselves but also the society. Judge 25 said that 'drug taking, like gambling and prostitution, does harm to the society. We should condemn these bad things through sentencing.'

Eleven judges, however, claimed that drug taking was not relevant to judging the seriousness of the burglary case. Judge 62 said that 'drug taking breaches the administrative regulations, but it has nothing to do with sentencing the current offence.' Judge 19 said 'I would not take this factor into consideration but some other judges would do.' Judge 2 said that 'drug taking might be just an incidental fact in this case and he might commit the burglary for other purposes.'

Findings and a brief interpretation

For Case 1 the sentences were chosen by the judges mainly were the fines, public surveillance and criminal detention (See Appendix 3). 49 judges said they would impose only the fines. Public surveillance and criminal detention were also commonly considered by the judges. A few judges mentioned some other options, but they were exceptions.

Almost all judges would impose prison sentences for Case 2, 3, 4 and 5 (See Appendix 3). Three judges believed that criminal detention might be possible

for the offender in Case 3 if he was not a Leifan. Four judges said that criminal detention might be an option for the offender in Case 4. Also four judges thought it was possible for the burglar in Case 5. There was one judge from Court H who indicated public surveillance could be considered for the burglar in Case 3 if he was not a Leifan. He would choose this sentence also for the burglary in Case 5. Two judges gave the fines as an independent sentence for this case. On the whole, for Case 2-5, majority of the judges indicated different lengths of the prison sentences for the burglars in the scenarios. The details are presented in Table 3.1.

Table 3.1 Prison sentences the judges indicated for the burglars in Case 2 – 5 (in months)

Court	Case 2		Case 3		Case 4	Case 5
	Leifan	Non-L	Leifan	Non-L		
A	60	48	36	17	17	13
B	96	60	-	18	20	12
C	66	50	-	17	17	15
D	59	54	-	12	15	10
E	60	54	-	15	18	12
F	68	49	20	16	19	17
G	51	45	-	16	16	13
H	58	45	21	20	24	14
I	60	51	22	16	17	14
J	60	50	29	17	17	14
K	68	51	24	19	21	14
L	75	48	24	18	14	9
M	54	43	30	15	21	12
N	56	45	24	16	19	13
O	68	55	29	24	21	16
P	84	53	16	17	17	15
Q	68	49	27	19	17	14

(Note: a. the courts are identified in letters; b. the longest and shortest prison sentences given by the judges are in bold.)

Table 3.1 shows that the lengths of the prison sentences indicated by the 72 Chinese judges for the offenders in Scenarios 2, 3, 4 and 5. In Cases 2 and 3, the judges said that the offender looked like a Leifan. Therefore, they indicated the sentences for the two possibilities - one was to assume the offender was a

Leifan, and the other was to assume he was not a Leifan. The lengths of the prison sentences were originally given in years. For example, the judges tended to say that ‘I would give five years’ prison sentence to this burglar...’ I used months in the tables to present the length of the prison sentences in order to compare the results from the research in England and Wales. For the same purpose, when the judges indicated only a range of the sentences, e.g. from six to 12 month, I have presented the average in the tables. Table 3.1 shows that the lengths of the prison sentences given by the judge vary. For example, in Case 2 where the offender was assumed to be a Leifan, the longest prison sentence given by a judge from Court B was 96 months⁷⁰, and the shortest prison sentence for him was only 51 months which was given by a judge in Court G. It is notable that Court B and Court G were in the same city.

Table 3.2 shows the average length of the prison sentences for each burglary case and a ranking of the severity of the sentences the judges indicated to the five scenarios. In Table 3.2a the offender in Case 2 and Case 3 was assumed to be a Leifan. In Table 3.2b, the burglar was not assumed to be a Leifan in Case 2 and Case 3.

Table 3.2: The rank of the severity of the sentences the judges indicated to the five scenario cases

a. If the offender in Case 2 and 3 was a Leifan

	Case 1	Case 2	Case 3	Case 4	Case 5
Average of 72 judges	-	62	24	19	14
Rank Order	5 th	1 st	2 nd	3 rd	4 th

b. If the offender in Case 2 and 3 was not a Leifan

	Case 1	Case 2	Case 3	Case 4	Case 5
Average of 72 judges	-	49	17	19	14
Rank Order	5 th	1 st	3 rd	2 nd	4 th

⁷⁰ The longest imprisonment given to the burglar in Case 2 was 10 years by a judge in Court B.

The tables show that Case 1 was the least serious case because no judges would impose a prison sentence on this burglar.

Case 2 was ranked as the most serious case amongst the five scenario cases no matter whether he was assumed as a Leifan or non-Leifan. If the burglar was a Leifan, the average prison sentence for him was 62 months. If he was not a Leifan, he would get a prison sentence of 49 months.

Cases 3 and 4 may be ranked in different orders depending on whether the offender in Case 3 was a Leifan or not. If the burglar was a Leifan, Case 3 was the second serious case indicated by the judges. However, if he was not a Leifan in Case 3, Case 4 would be the second serious cases.

Case 5 was the fourth serious case in the five cases. The average prison sentence for this case was 14 months. Non-custodial options were also considered by the judges because the burglar was a first time offender.

3.2 Judges' views on sentencing burglars

In the interviews, apart from indicating the sentences, the judges also provided their views on how they sentenced offenders, especially burglars in practice. The topics included the definition of burglary, range of sentences available for burglars, sentencing factors and the case-specific information which may be considered when sentencing burglars.

Definition of burglary in China

In China by law burglary is not a separate offence. Judge 60 said that 'burglary is a type of theft, and it has a serious factor of dwelling house.' In Judge 4's view 'burglary is more serious than normal theft.' According to the judges, two elements were essential in burglary cases. One was the value of the stolen property and the other essential factor was the frequency of committing burglary offences within a year.

1. Value of stolen property

The judges confirmed that to constitute a burglary offence the value of stolen property was the key element. In China, the law says that a theft will not be charged unless the monetary value of the stolen property reaches the minimum chargeable amount. The value of stolen property is an essential element of both conviction and sentencing.

In scenario Case 1 the monetary value of the stolen food was not provided. Almost every judge said that it was not possible to indicate a sentence without knowing the value of the stolen items. Judge 1 stated:

I cannot indicate a sentence to Case 1 because I do not know the essential element - the value. Under Chinese criminal law, the value of stolen property is the key factor. I even doubt whether this offender should be charged for theft without the value of the stolen food. Also he stole just food which should not be valued as much as the minimum chargeable amount.

In fact, the reason why the judges chose the least severe sentences for this case was due to the low value of the stolen food. Judge 14 said that 'assuming the value reaches RMB 1,000, I have to sentence him, but I would choose the most lenient sentence for him.'

The sentences indicated by the judges for the burglars in the other scenario cases were all based on the value of the stolen property.

2. Frequency of burglary committed

A provision in the SPCJISIALDTC 1998⁷¹ indicates that burglary offence has an additional element, which is that committing burglaries three times or more within a year, the burglar shall be charged for theft offence even if the total value of the stolen property does not reach the chargeable amount of the stolen property. This provision distinguishes burglary cases from the normal theft offences, and the judges saw this provision particularly regarding burglary cases as both an additional definition for theft offence and aggravating factor for sentencing theft cases. In other words, this provision is not only essential for conviction, but also confirms with the judges that burglary is more serious than ordinary theft cases. Judge 24 said that 'this judicial interpretation makes me feel that burglary is more serious than the normal theft offences.' Judge 45 stated:

Under this provision, even if the total value of the stolen property is below the minimum chargeable amount, the burglar would still be charged for theft if he commits burglary three times a year. So, the frequency of committing dwelling house burglary becomes an additional definition for theft.

With the same value of the stolen property, Judge 5 said that 'I would add half a year more on top of the prison sentence for a burglar if he commits many times burglary within a year.'

Once the value of the stolen property and the frequency of the burglary committed by a particular burglar have been determined, the judges may be able to choose the type of the sentence for an offender.

Sentences and applying sentences for burglars

⁷¹ S. 4 of the SPCJISIALDTC 1998 states that 'a person who committed burglary three times or more within a year is defined as having committed burglary 'many times'. A person who has committed burglary many times, even if the value of stolen property in total does not reach the minimum chargeable value of stolen property for the crime of theft, the offence of theft will still form.' It has been accepted that the offenders have committed crime of theft three times or more would be seen 'committed crime of theft many times'. (Zhou, Daoluan, Shan, Changzong and Zhang, Sihan 1997: 578 and Cao, Zidan and Hou, Guoyun 1997: 249)

All sentences are available for burglary except the death penalty. In the interviews, the judges explained how they applied different sentences for the burglars in practice. The results show that custodial sentences were commonly applied for theft offences in general, and the judges were required to impose fines for all property offences in a concurrent manner.

1. Custodial sentences

One of the interview questions was 'are there in your view any offence, offender or victim characteristics/circumstances in cases of dwelling house burglary that almost always would result in a custodial sentence'. Almost all judges interviewed answered that 'it was not necessary that a domestic burglary must result in a custodial sentence.' In fact, they chose mainly the custodial sentences for the burglars in the scenarios except Case 1. It shows that prison sentences are frequently applied for the theft cases including burglary.

By law the judges are free to choose prison sentences in the range from six months to 15 years according to the value of the stolen property in theft cases particularly. Traditionally, the judges imposed the prison sentences in years or years plus three, six or nine months. Six months were applied frequently. Three judges who were in their twenties suggested that prison sentences should be given in months. They criticised that currently custodial sentences were given in years, and it was too tough. In fact, they could not be able to reflect some factors in sentencing. Judge 41 stated:

It is quite unusual that the judges give prison sentences in months. I start doing so and find it helps me to take more factors into consideration. I believe that to give prison sentences in months would achieve the most appropriate sentences for the offenders. But the old judges do not want to change.

The law gives only the ranges for the value of the stolen property of 'relatively small', 'large' and 'very large' and their according ranges of the available

sentences. In fact the judges only have the minimum and maximum sentences in each range and they must determine a sentence for the particular case from the range. The CCL does not provide the methods for determining a sentence based on the value, neither do the SPC judicial interpretations and any other legal documents. In practice, the judge determined the sentences with their own ways. The judges of Jiangsu Province said that they adopted a similar method to calculate the value and its relevant sentence for a particular case.

In order to determine the length of a prison sentence, the judges calculated a unit value for each range of available sentences. For example, for the range of value from RMB 10,000 to 60,000, the range of available prison sentence was from three years to ten years. The judges had worked out that every RMB 7,500 of the stolen property deserved one year's imprisonment. It means that for one more RMB 7,500, the judges would add one more year on the top of the three years' minimum prison sentence for this group.⁷² Judge 3 explained:

In Case 2 the value is RMB 13,000, which falls into the range of three to ten years' prison sentences. The minimum sentence of this range is a three-year prison sentence. If the offender stolen RMB 10,000, he deserves at least three years' prison sentence. Since this offender stolen RMB 3,000 more than RMB 10,000 and every RMB 7,500 deserves one year, I would add half a year for him. So a sentence for this burglar, without considering any other circumstances, would be a prison sentence of three years and half.

Judge 17 also explained how to work out RMB 7,500 for a year's prison sentence. He said that 'if the stolen property is RMB 10,000, the prison sentence would be at least three years. If it is RMB 17, 500, the length of imprisonment would be four years and so on up to ten years.' Similarly for the other value ranges the judges had also found the similar methods for calculation.

⁷² According s. 264 of the CCL1997, in Jiangsu Province where the value of stolen property is from RMB 10,000 to 60,000, the range of the available sentences are the prison sentences from three to ten years.

The judges felt that the methods they adopted for calculating the prison sentences were fairly practical and they had been using them for many years. As the range of available sentences includes not only prison sentences, it could be a bit difficult to quantify. The judges said that they would look at the value first and see it was close to the minimum or maximum. The sentencing factors in this case were crucial, as well as the judges' judicial experience played a significant role.

2. Criminal detention⁷³

Criminal detention is a common sentence for the theft offences with less serious circumstances. In the interviews, all judges commented that a criminal detention was quite different from a prison sentence although to serve either of them the offenders were locked up. The major difference was that a criminal detention was less severe than a prison sentence. Judge 22 explained, 'criminal detention cannot be long term. It is very often we give criminal detentions to the offenders who are pre-detained, and the lengths allow them to be released shortly after the trial.' Judge 31 said that 'sometimes I would give a criminal detention to a defendant for whom I found a non-custodial sentence might also be available. Since he has been pre-detained, a criminal detention would be the only choice.'

After all, the criminal detention is not imprisonment. Judge 53 said that 'we know that criminal detention is different from a prison sentence, but the public and offenders themselves do not understand their legal consequences. There are, in fact, a lot of restrictions for someone who have been served a prison sentence but not for that who has been given a criminal detention.'

3. Public surveillance

The judges in China gave custodial sentences to the burglars in the scenarios except Case 1. All judges said that it was not necessary to send this burglar to

⁷³ See definition of criminal detention in Chapter two on p. 53

prison. 34% of the judges interviewed said that they would consider public surveillance for this burglar and the burglars who the burglary cases with less serious circumstances in general.

To determine public surveillance the circumstances of the case and offender were crucial. Judge 16 said:

I would choose public surveillance for the minor burglary cases. But the personal circumstances of the burglars are very important. In my experience, I only gave public surveillance once to a burglar who was disabled.

Almost all judges interviewed criticised the poor enforcement of public surveillance in practice. More than two thirds of the judges said they had not really imposed public surveillance on burglars because of the poor enforcement. Judge 50 said that 'nobody actually supervises the offenders who they are serving public surveillance. It should be the local police station's responsibility, but they are always short of staff to do this.'

4. The fines

The CCL 1997 allows fines to be imposed in a separate manner, as a main sentence, on the offenders who committed property offences. The judges believed that the fines were unavoidable for all theft offenders including burglars. In the interviews, the judges gave the fines to every burglar in the scenarios without asking the burglar's financial circumstances.

When determining the fines, the judges would look at the factors, such as, the value of the stolen property, the statutory mitigation and aggravation, previous convictions, other circumstances of the case and offender. All these factors were the same as those which they looked at to determine other sentences. Judge 2 stated:

I impose a fine penalty on a burglar if the case is relatively less serious. The factors I normally look at include 'young offender', 'first time offender', 'relatively low value involved', and so on. For those who commit serious theft cases, only the fines would not be enough, and I would choose other type of the sentence to go with the fines.

As far as how to determine the size of the fines is concerned, the law states that 'the amount of the fines should be determined according to the circumstances of the offence.'⁷⁴ The *SPCJISIALDTC 1998* provides the range of the fines.⁷⁵ Again, the judges must mainly rely on the value of the stolen property to calculate the amount of the fines. In addition, they would take all circumstances of the offence and offender into consideration.

In China when the judges determined the size of the fines, the circumstances of the defendant were irrelevant. One third of the judges disagreed with this policy. Judge 31 said:

It does not make sense to give the fines to the offenders who cannot afford. If the fines cannot be actually collected if the judgments include the fines, people will lose their respect to law. They will lose their confidence with the law and criminal justice system as well.

Judge 59 suggested that the mechanism of enforcement of the fines should be made. Something must be done for those who could afford but were reluctant to pay the fines.

In practice, the judges were allowed to determine the amount of the fines for a particular offender based on the information available to them before the trial. They would suggest the defendant to pay the provisional amount of the fines in advance of the trial. If the defendant did so, most likely the judges would mitigate the sentence for the offender. All judges interviewed said that they would like to encourage the defendant to pay the fines in advance of the trial,

⁷⁴ S. 52 of the CCL 1997

⁷⁵ S. 13 of the *SPCJISIALDTC 1998*. See the details on the previous page 64.

and if an offender paid the full amount of the fines recommended, the sentence would be mitigated.

The judges admitted that to pay the full fines recommended at an early stage of sentencing would strongly persuade them to have a less than three years' prison sentence suspended. They would shorten a prison sentence for this factor as well. Judge 69 stated that 'in some local basic courts if the defendants can totally pay the fines before the trial, the judges may significantly mitigate their sentences. It is not unusual the fines may replace a prison sentence.' Obviously, this judge was not for this approach. She said 'I do not think it is appropriate.'

The judges provided that most theft offenders from cities were willing to pay the fines in advance. Even if they could not afford it, they would borrow money from their family, relatives or friends to pay the fines. Two judges said that to encourage defendants to pay a fine in advance might have side effects because if the offenders borrowed money to pay the fines, they might quickly re-offend to get the money to pay the debt when they left prison. The judges said it was almost impossible to collect the fines if an offender was given a prison sentence as the main sentence.

The judges made sentencing options based on the value of the stolen property and also the frequency of the burglary committed within a year. To make the final decision of the sentences for the particular burglars, the judges would look at all relevant sentencing factors.

Sentencing factors – mitigation and aggravation

In the CCL 1997 the statutory aggravation is Leifan. Voluntary confession and performance of meritorious actions are the only statutory mitigation.

1. Aggravation - Leifan

Leifan is a statutory aggravation, and it would persuade an aggravated sentence for offenders in general. The judges explained that if a burglar was identified as a 'Leifan', we had to aggravate the sentences. Certain sentences were not available for the Leifan offenders whatsoever, i.e. the suspended the prison sentence.

In sentencing reality, sentences can be tough for the Leifan offenders. Judge 40 said that the previous president of their court required that the judges should give the maximum sentence in the available range to the Leifan offenders. This judge stated:

I understand that Leifan is the only statutory aggravating so it means we must take it into account when we sentence offenders. I think a relatively tougher sentence for a Leifan than a non-Leifan is ok. But the maximum is not necessary.

Judge 63 said that 'Leifan is the statutory aggravation, so we must consider this factor. I always taking all previous convictions into consideration because I think they are also relevant to sentencing.'

(2) Statutory mitigation: voluntary confession and meritorious action

The judges confirmed that they must take into account the statutory mitigation which included voluntary confession and performing the meritorious actions. In the scenarios this factor was not included. 81% of the judges interviewed mentioned at least once as 'considering there are no statutory mitigation in the case...' It showed that they did look at the statutory mitigation at the early stage of sentencing burglars.

There are many circumstances which the judges would look at when they make a final sentencing decision for a particular theft case. These circumstances are mainly included in the case-specific information.

Case-specific information

The case-specific information includes the information on offence, offender and victim. Judge 68 said that 'we look at all relevant circumstances of the case, offender and victim to decide the seriousness of an offence. After balancing all the factors, we then make a final sentencing decision.'

1. Information on offence

Information on offence reflects the seriousness of the offences. The judges said that they would particularly look at the time, place and method of the offences. For theft offences, how the stolen items were disposed of and whether there was other damage caused to the victims' property would also be considered. For burglary, whether the house was occupied when the burglary was committed seems to matter.

- The time of the burglary was committed

The judges would consider when a burglary was committed. The interviews in China show that the judges would not rely on only during the day or at night a burglary was committed. They looked at also other circumstances and the consequences to decide the seriousness of the case. About 63% of the judges interviewed believed that daytime burglary was more serious than night time burglary. The reason for this was because those judges thought that in the daytime the house were normally occupied by old people and the children who were too young to go to school. Judge 51 lived in the town and she said:

During the day, the retired people are at home and they look after the little their grand children who are little. This is very common in Chinese. If a burglary is committed in the daylight, those vulnerable people will be the victim. Daytime burglary is a very dangerous offence. In my area, there are high daytime burglary rates. I am worried when my son is on the school holidays and stays home alone. So people hate day time burglary.

The Chinese judges considered whether the offenders knew the houses were most likely occupied before they broke the houses to commit the burglary. It would be an aggravating factor if the house was occupied when the burglary was committing the dwelling house burglary.

- The means by which the burglary was committed

Particularly for burglary cases, the judges would pay attention on how the burglar entered into other people's houses and whether he or she caused other damage to the other property in the house and the house itself. The judges commonly believed that the destructive means were aggravating factor. Judge 10 stated:

By what means the offender committed the dwelling house burglary reflects the seriousness of the offence. For example, two burglaries were committed in the same building. In one case the burglar entered the flat on the ground floor, and he entered the flat from the window which was unlocked. But in another case the burglar crawled to a 15-floor flat through the tube outside the building. As a judge, I would say the latter is more serious because the burglar did not care about the consequences and he had very strong criminal intention to steal from other people's house.

In fact, the means were emphasised by the judges in China when they dealt with the theft cases.

- The way the stolen property was disposed of

When dealing with theft cases the judges must look at how the stolen property was disposed of by the offenders. For example in scenario Case 1 all judges mentioned that the food was consumed by the defendant's family. I would believe that the implication was that the burglar was somehow forgivable. Judge 33 said that 'what he stole and what the stolen items was for are very

important to this case (Case 1). From this fact, I would determine that this case is not a serious one. Actually it is very persuasive.' In contrast, in Case 4 the offender was a regular heroin taker. Judge 51 said:

I cannot say definitely but most likely this burglar will sell the stolen TV to get the money and buy drugs. If this burglar stole the TV for other purposes, I would know what that was. Probably it could be a mitigating factor for this offender.

Therefore, when sentencing burglars in China, the judges would consider how the offenders consumed the stolen items and what the stolen goods were used for. Obviously, in most cases the burglars would sell the stolen items to exchange money. But if there were other reasons for the offender to steal property from other people's house, the judges would pay attention on what they used the stolen items for.

2. Information on the offender

Information on the offender is crucial. The judges said that they would look at all the circumstances of the offenders, including their age, mental state, occupation and any other personal details, their previous criminal records, motivation of commission, and other relevant circumstances. Any special circumstance of the offender may reflect the seriousness of the offences, and therefore, it would be influential.

- Nature of the offender

Under the current sentencing policies certain groups of offenders are dealt with differently in China, such as the juvenile offenders, deaf and dumb offenders and other disabled offenders. S. 4(2) of the SPCJISIALDTC 1998 lists the circumstances under which the juvenile offenders who are 16 or over but under 18⁷⁶ should not be charged for theft. Judges 67 stated that 'when a

⁷⁶ Under Chinese Criminal law, the age of criminal responsibility is 14. The young offenders at the age of 14 or older but not over the age of 16 shall be regarded as criminally responsible if they commit very serious crimes,

case is passed to us, we would first look at the nature of the offender to find whether he or she falls in a special group. If so, what the policies are relevant to that group.’ In our scenarios the burglars were 24 years old, who were assumed to be in a normal mental state. Therefore he was regarded as an ordinary adult offender by the judges interviewed.

- Habitual theft

‘Habitual theft’ was an aggravating factor in the previous CCL 1979. Although in the new criminal law this concept is taken out, the judges still thought that the repeated theft offender should be seen as an aggravating factor and given a harsh sentence. This view did not conflict with the current sentencing policy, though. ‘Repeated thieves’ was listed as one of the aggravating factors of the theft offences in a SPC judicial interpretation said by the judges. In the interviews, 13 judges said they did not understand why the current criminal law take ‘habitual theft’ away. Judge 55 said that ‘repeated thieves are more serious and this group of thieves should be separated from ordinary thieves and punished heavily.’ Judge 52 stated:

If an offender commits theft repeatedly, he must have pernicious habit of stealing. In the old CCL, for ‘crime of habitual theft’ the starting point of the prison sentences was five years. For all thieves including the repeated thieves the starting point of the prison sentences is three year. It means the repeat theft is not seen as particularly serious as before.

Seventeen judges still applied the term ‘habitual theft’ in the interviews. They believed that the ‘habitual offender’ should be an aggravating factor. Judge 68 said, ‘the burglar in Case 2 had three convictions for burglary. I would identify him as a habitual theft. Although the term ‘habitual theft’ is not officially applied any more, I keep using it because habitual theft is indeed different from normal

such as murder, serious intended bodily injury, arson, bombing, poisoning, kidnapping, robbery, and other serious offences listed in the statute. Offenders aged 16 but under 18 have the same criminal liability as adults, but the death penalty is not available for them.

theft.’ Judge 60 was one of the presidents of the courts interviewed, and he said that ‘it’d better to keep the concept of ‘habitual theft’. It’s a sign to say that ‘repeated theft is an aggravating factor.’

Habitual theft would be taken into account by the judges when they sentenced burglars. In the meantime, we may see how the judges interpret law and actually implement law in judicial practice. It is not sure whether ‘habitual theft’ was taken from the criminal law by the law makers, but the study shows that the judges might exercise their discretion when interpreting law.

- Previous convictions

Previous conviction is an importance circumstance in sentencing. We discussed this factor briefly when we talked about the sentenced indicated for each scenario. Here we would find out some details about how the judges took the previous conviction into consideration.

The interviews show that first time offender was very persuasive for the judges to consider a mitigated sentence. In contrast, any previous conviction, except criminal negligence, would be seen as an aggravating factor. The judges commonly believed the difference between one or two convictions was subtle for sentencing purpose, but if the convictions were more than three, it would draw the judges’ attention.

Judge 21 believed that ‘three times’ was a threshold. He said:

One and two convictions do not make too much difference, but if this burglar has three convictions or more, I might have to take it seriously. If a prison sentence is the sentencing option, I would add half a year for this factor.

Judge 70 said that ‘this offender already has had two convictions, and it has automatically made a suspended prison sentence impossible. It’s better to put him in prison.’

The type of the previous offences did not seem to be relevant according to the judges interviewed. Judge 41 said that 'I would think that as long as the offender had a previous conviction, he might re-offend again after this.' Judge 45 believed that 'it is lightly different if the burglar had a previous conviction for a minor offence, such as traffic offences, or if his previous conviction was for a serious violent offence.' Judge 47 said similarly:

If the offender committed serious offences such as murder, robbery, criminal injury and other serious crimes previously, I would punish him harshly for the current offence no matter what offence it is. He is too dangerous to be left in the community.

Where the previous convictions were all burglary offences, Judge 15 said 'in fact, the SPC judicial interpretation tells that it's an aggravating factor.'

What types of the sentences given to the offenders in the past might be also relevant. Judge 58 said that 'the offender in Case 4 had only public surveillance for his previous conviction. If this time public surveillance is also available, I would not choose it because I am not confident it would work.'

Not only the previous convictions were crucial for the judges to determine sentences, but also records of bad behaviour would be considered in some cases.

- Records of bad behaviour – 'Qianke' and Lieji'⁷⁷

In Chinese criminal justice jargon, previous convictions are called 'Qianke'. Qianke is normally applied together with 'Lieji' which refers to the records of the law breaking actions and bad behaviour of the offender. Qianke and Lieji can be seen as aggravating factors.

⁷⁷ Like Leifan, Qianke and Lieji are only applied in criminal justice domain. The difference between Leifan and Qianke and Lieji is that the former is a very strictly defined in the law and it is aggravation in sentencing, but the latter has not been officially defined, and they might be considered as an aggravating factor. See details about Leifan in Chapter Two on pp. 62-3

Lieji includes minor unlawful actions and other immoral behaviour. Lieji is normally recorded in the local police station or work unit of the offender. Lieji may not always be formally recorded, but the prosecutors tend to discover Lieji of the offender to support their prosecution.

In the interviews, the judges said that if the information about the Lieji of the offender was available to them, they might consider this fact, because it helped them determine whether the offender tended to re-offend in the future. Where the burglar had administrative sanctions previously, especially if he or she was given re-education-through-labour sanctions in the past, the judges would take that factor seriously. Other administrative punishment such as administrative detention, police caution, and administrative fines might also be looked at. However, 'after all, administrative sanctions are not given for criminal offences. To what extent this factor should be considered really depends on the individual judges' (Judge 27).

- The attitude of the defendant

The criminal law in its General Provision requires the courts considering the attitude of the offenders. In sentencing practice, if the courts recognise an offender had good attitude, they are willing to take it into consideration. In contrast, bad attitude makes some mitigated sentences impossible.

The law does not define what 'good' and 'bad' attitude are. In practice, the judges made judgment with their personal judicial experience and common sense. Judge 11 said that 'refusing to show remorse is a sign of the bad attitude.' Judge 2 stated:

I rely on my judicial experience to identify the good and bad attitude of the offenders. I may look at the files and listen to what the offenders say to find out. Basically you can be quite sure whether a defendant is really sorry or pretends to be.

Judge 35 said that 'it is not necessary that the offenders have to keep saying how sorry they are but they need do something.' To return the stolen property or pay compensation to the victims are commonly recognised as good attitude. Judge 69 said that 'those who voluntarily returned the stolen items or paid the compensation to victims have good attitude. I would seriously consider a mitigated sentence for this. But obvious it must be done before trial.' Paying the fines in advance of the trials is a typical way to show good attitude. Judge 21 said that 'if the defendants fully paid the fines before the trials, I would say that they are trying to show good attitude. But an early payment of the fines will result in a mitigated sentence.'

Denying guilt, hiding the stolen items and refusing to compensate the victims were generally seen as bad attitude by the judges. Judge 26 said that 'normally bad attitude make non-custodial sentence impossible.' The suspension of the prison sentences is not available for an offender who is recognised to have bad attitude. Judge 61 said that 'if the defendants deny guilty or refuse to show remorse, it is unlikely that they are willing to reform. I would not consider giving them a chance. What's the point to suspend their prison sentences then?' However, Judge 29 had a different view. He stated:

If we are really under the presumption of innocent, we should not leave the defendants to decide whether to admit guilt or not. If we regard 'denying guilt' as bad attitude and link it to an aggravated sentence, it may put pressure on the defendants who are innocent.

- The circumstances of the offender

For what reason the offender chose to commit burglary are examined in China. Judge 68 said that 'why the offenders chose to commit burglaries may show their criminal intention'. Judge 25 stated that 'it may help us determine the seriousness of the offence.' Judge 19 explained that 'in Case 1 the burglar stole food from other people's house was to feed his family. I would say that this burglar is not so bad that he might be exempted from a criminal sentence.'

Indeed, the circumstances of the offender are taken into account by the judges. In the interviews, I asked the judges what information they needed to know about the circumstances of the offenders. More than half of the judges said that the circumstances they thought were relevant were the financial circumstances of the offenders, such as whether they were in the financial hardship and whether they had expensive medical treatment fees to pay which they could not afford, their employment situation, such as, whether they had been long time unemployed or they had well pay job, and the special circumstances in the offenders' families or their lives. Judge 56 stated:

We do consider the special circumstances of the offenders. If an offender, like the one in Case 1, is compelled to commit burglary by the extremely difficult financial hardship in his or her life, I would feel sympathy and mitigate the sentence.

In Case 4, a circumstance is that the burglar is a regular heroin taker. It seems that the circumstances like this would also be considered. Judge 19 stated that 'he took drugs, so he needed money. To get the money he commits burglary. It has logic here for me to look at this circumstance of the burglar.' Judge 57 said:

If a prison sentence is chosen, I would add six months to a drug taker offender. I believe it may be good for the drug takers to quit drugs in prison. At least they may be kept away from the drug dealers. I believe some of them may change their life style when they get out.

On the whole, the Chinese judges would consider the circumstances of defendants. They paid attention mainly on offenders' personal circumstances and financial circumstances for finding out, still, the seriousness of the offences and whether the offenders may possibly re-offend.

3. Information on victim

The interviews show that the information on the victim the judges looked at when dealing with burglary cases was mainly that relating the financial loss. The financial loss involved in a burglary case may help the judges determine the seriousness the case. Although there was other information on victim, it did not seem to be relevant to sentencing burglars according to the judges interviewed.

S. 4(3) of the SPCJISIALDTC 1998 states that stealing money for special purposes, such as pension, funding for distress relief, migration, and medical treatment, is a serious theft offence. The judges believed that stealing money for special purposes would result in very serious consequences. Judge 54 stated:

It is crucial that we know how the victims actually suffer from the loss. Stealing money from a rich man causes different harm from stealing the same amount of money from a poor person. If the money stolen is saved or borrowed emergent purposes such as for paying medical fees or something similar, the consequences of this burglary can be very serious. We need know that

Judge 22 said that ‘... some the victims sought suicide after the burglary. Obviously it shows how serious the burglary is. I cannot ignore the circumstances like this.’

Certain groups of the victims were relevant. The SPC judicial interpretation⁷⁸ indicates that vulnerable people include those disabled, old people or who have lost the ability to work. Stealing property from vulnerable groups is a ‘very serious’ circumstance. In practice, the judges saw stealing from vulnerable people as an aggravating sentencing factor. When indicating sentence to Case 2, Judge 26 said:

⁷⁸ *The SPCJISIALDTC 1998*

The burglar targeted the old couple. Perhaps he thought once being found, he could be able to escape or he was able to fight against the old victims. It is very dangerous. Although here the offender was not found when he was dwelling the house, the loss of property itself may harm the old couple badly.

Not all information on victim was seen to be relevant according to the judges interviewed. The majority of the judges said that they did not determine the seriousness of the burglary cases by looking at the mental harm caused to the victims, except for some very serious consequences such as the mental disorder or death of the victim. Judge 21 explained that 'it is common that every victim of burglary would have some mental harm, and it's normal for a victim to feel upset and angry.'

Under the current criminal law the victims of the theft offences have no chance to claim compensation for mental harm in either criminal court or civil courts⁷⁹.

Judge 61:

The law does not seem to encourage a claim for compensation for the mental harm from the victims of theft cases. In practice, we do not take this factor into consideration when we deal with burglars.

It did not mean that the judges will totally ignore the mental harm involved in the burglary cases they were dealing with. In fact, if the mental damage was so serious that it caused mental disorder or other serious mental problems to the victim, they would see it as an aggravating circumstance for sentencing. Judge 23 said that:

Normal mental harm caused to the victims, like that in Cases 3, 4 and 5, was irrelevant to sentencing. However, if the mental harm was so serious that it was identified by specialists as mental disorder or other

⁷⁹ The Supreme Court's Answer to Whether the People's Courts should try the Cases the Victims Brought to the Courts to Claim the Compensation from the Defendant for their Mental Damage Caused by the Crime 11th July 2002

serious mental damage, we must take it serious, because it reflects the seriousness of the offence.

With regard to the information on victim, the judges paid attention mainly on the financial loss of the victims, but if the mental harm caused was very serious and it resulted in mental disorder or death of the victims, the judges must take this circumstance into consideration.

3.3 Sentencing culture

The interview questions included inquiries on sentencing culture in order to make comparison with that of England and Wales. I asked the judges to express their views on nature of the harm associated with burglary, punitive elements in the sentences available and other influential cultural factors in sentencing.

Perception of the harm of burglary

The judges indicated that the nature of the harm associated with burglary included loss of property, potential violence, threatening people's sense of security, damaging other property and causing mental upset to the victims. There were judges who mentioned burglary might result in instability to the society or it might affect the development of the local economy. One judge said that the harm of burglary also included violation of people's privacy.

- The loss of property

Almost all judges interviewed said that the major harm of burglary was it caused loss of property. Judge 41 explained 'for this reason, we are required to determine the sentences based on the value of the stolen property.'

- Potential violence

Fifty nine judges believed that burglary involved potential violence. A normal burglary might change into other serious offence, such as robbery, criminal injury, murder or rape. Judge 20 stated that 'the potential death or injury of the victims is foreseeable in burglary cases. It's very dangerous when the house is occupied.' Judge 26 stated:

Burglary threatens victim's life. Once the burglars are found, anything can happen. That is why the law gives an additional definition to burglary which says that committing three times burglary in a year can be charge for theft even if the total value of property stolen is relatively low.

- Threatening sense of security

More than half of the judges believed that burglary could make victims lose sense of security. Judge 34 stated:

People's home should be the safest place for them. If the victims find that their house has been broken into, they won't feel safe anymore. A lot of victims of burglary cases told me that they became very suspicious afterwards, and it took time long time to recover.

- Damaging other property

In some burglary cases, the offenders forcefully broke into the house, so they might cause damage to other property in the victim's house. A few judges said that other damage should be considered. Not only the manner of the offender should be taken into account, but also the value of the damaged property should be calculated to determine the seriousness of the offence. Judge 19 stated that 'I think the damaged windows, doors, cabinets and things must be considered because they are troublesome for the victims.'

- Mental harm on victim

Although the judges did not consider the normal mental harm of the victims when sentencing burglary cases, 33% of the judges interviewed recognised that burglary had serious harmful impact on the victim's mental health. Judge 23 said that 'the victims feel awful after the burglary. A lawyer told me he stopped representing for the burglar defendants after his house was burgled.' Although the judges admitted that to different victims the mental harm caused could be different, they agreed that after all, burglary could cause harm to people's mental health.

- Causing instability in the society

Twenty two judges said that burglary harmed not only the victims but also the other people who heard about the offence. Those people might be worried that they could be the potential victims. Therefore, the high burglary rates might cause instability to the society.

- Affecting local economy

A few judges mentioned that high burglary rates might affect the development of the local economy. Judge 60 explained, 'the investors are not interested in where have high burglary rates. It is not good environment for investment.'

- Violating people's privacy

Judge 48 directly used the phrase 'violation of privacy' in his answer. He said that 'privacy is the basic right of people, and people's houses are very private places. Burglars seriously violate other people's right to privacy.'

How the judges percept of the harm of a particular offence or offences in general would influence how they judge the seriousness of a particular case. Due to cultural differences, the judges in different jurisdictions percept the harm of the offences differently. It may result in different sentencing outcomes.

In the interviews, the judges also provided their views on the punitive elements in different sentencing options.

Perception of the punitive elements in the sentences

The interviews show that custodial sentences and the fines were commonly applied for burglars. The judges believed that imprisonment was the most punitive sanction for burglary. The fines were effective if it could be enforced properly. In fact, there were different punitive elements in different types of sentences.

- Prison sentences

All judges said that the offenders would lose or be limited freedom if they were given prison sentences. The judges said that no doubt imprisonment was the most effective criminal sanction for burglars and offenders.

In China, the reform-through-labour policy is implemented in prison. The prisoners are required to carry on labour work when they serve their prison sentences, and in the mean time, they must take part in various learning programs. Judge 58 said that 'in prison, the prisoners have to work. The heavy labour work for some offenders can be very punitive.' Similarly Judge 23 believed that 'labour work makes some offenders feel physically and mentally uncomfortable.'

Prison rules are strict. Sentencing deduction would not be available for those who breach the rules. Judge 43 said that 'There are a lot of strict rules and restrictions in prison, so the environment is not pleasant at all.' Judge 37 said that 'while serving their prison sentences, the offenders are separated from their family, relatives and friends. Some offenders said that was unbearable.'

- Financial penalties

Financial penalties were punitive because 'the offenders commit burglary is normally for money. The fines made them lose rather than gain. The burglars may realise at the end that they could gain nothing' (Judge 49). This judge said 'it is a good lesson for the potential theft'. But the judges emphasised that without effective enforcement mechanisms for financial penalties, this type of sentence could not be effective.

- Other criminal sanctions

Generally speaking, all criminal sanctions have punitive elements. Any criminal punishment would cause shame and stigmatisation to offenders and their family. A Chinese proverb says that 'crime is an error made in a minute but a regret of the rest of one's life'. Traditionally in China committing crime would ruin the offender's future. Most people see criminals as evil. Judge 41 said that 'those who have been sentenced would be seen as bad people, and sometimes they cannot be trusted by other people even if they have changed. Normally the offenders sentenced would lose their job, and it is difficult for them to find jobs again.' Judge 59 stated that 'people sentenced would be excluded from certain occupation for some time. It's very painful for some of them.' Judge 39 believed that 'the criminal punishment may cause disgrace to the families of the offenders and their relatives and friends.' Judge 3 said in the remote areas, it was worse for the offenders.

Other cultural factors for sentencing burglars

The interviews show that there are other cultural factors which may influence the judges to make sentencing decisions for burglars.

- Sympathy

Just 41 said that 'as human beings the judges may sometimes pay sympathy to the victims or even offenders who have special circumstances.' In this study, one third of the judges interviewed showed their sympathy to the burglar in

Case 1. One judge said that the offender was 'forgivable'. Some judges paid sympathy to the victims in Case 2. For this reason Judge 22 said that 'it makes me feel that this case (Case 2) is very serious.'

- Personal background and experience of the judges

The interviews show that personal background of the judges was also influential. Judge 52 said:

I come from countryside. I know how important livestock are important to the peasants. I would see stealing them from a peasant's house as very serious offence. However those judges were brought up in the cities cannot understand this. Of course we would have quite different sentencing decisions for the same value of the livestock stolen.

Almost all judges said that their personal experience would influence them when they sentenced burglars. Judge 10 said that 'my parents are retired, who were the victims of a burglary offence a year ago. When I indicated sentence for Case 2, I thought about their terrible experience immediately. I believe that my feeling actually influenced my decision. You know we have certain discretion when determining sentences.' Judge 39 who was a president of a court participated in the research, gave an example, and said that 'in our court there is a judge who was burgled once. He said that he would automatically pay attention on all aggravating factors but not those mitigating circumstances. As only as he chose the sentences from the range of the available sentences for the value involved in the cases he dealt with, we cannot say he is wrong.' The judges thought that it might be one of the reasons why sentencing could not be so consistent in practice.

- Judicial experience

The judges said that their judicial experience played a significant role in sentencing. Judge 53 stated that 'I may have a sentencing decision in my mind

after I firstly read the case files. Strangely most time the first impression is very close to the final decision after the trials.’ Having worked as the sentencing judge for a long time, some judges had had their own styles of sentencing. Judge 56 said that ‘since I doubt about the enforcement of public surveillance, I do not apply it at all. For burglary cases, if it is not serious, I would stick on the fines or the suspended prison sentences.’ Judge 43 said that with many years experience, he had his own sentencing guidelines in mind. He said:

Sometimes the law was not sufficiently detailed, so we have to have something to keep sentencing consistent. At least I try to make sure I do not make sentencing decisions conflict with each other too much. I feel that you can do son only if you have enough judicial experience.

Judge 62 commented that ‘for the newly appointed judges it could be difficulty.’ Judge 36 was a new judge, who said that ‘due to lack of experience, I felt a bit confused when I just started. What I could do was to ask other judges, especially those senior judges. In China, the judges are encouraged to discuss the cases together. I have learned a lot through the group discussion.’

- Collective views

In China, the judges tend to discuss cases with each other. The judges would rely on collective opinion when they felt difficult to make decision for some cases. In fact, it was very rare that the judges who directly dealt with the cases stunk on their views and disregarded the collective opinion. All the judges interviewed said that the collective opinion was reliable, and they would like to discuss cases with other judges. They believed that it could be a way to keep consistency in sentencing.

SUMMARY

This chapter introduced the results and findings from my empirical study. It started with a brief introduction of the interviews with the judges in Jiangsu

Province of China, the sentences the judges indicated for each scenario and the findings of the fieldwork.

In the interviews, the judges provided their understanding of the definition of burglary, the sentences available for burglars, the sentencing factors including mitigation and aggravation, other case specific information which they normally looked at when dealing with burglary cases, and the cultural factors which might influence their sentencing decisions.

Burglary was not a separate offence in China, but in the interviews the judges said that they felt burglary was more serious than the normal theft.

Monetary value of the stolen property was essential in burglary cases for both conviction and sentencing. It determined the range of the available sentences. Committing burglaries three times or more within a year shall be charged for theft regardless of the total value of the stolen property. The judges said the repeated burglar was an aggravating factor.

Offender's previous conviction is crucial in sentencing offenders in China, and the judges must take into account this factor. However, the type of previous conviction did not seem to matter. The more serious the previous convictions were, the more this factor would influence sentencing decision making. What sentence the offender received in the past was also relevant to the sentencing decision making. Where a non-custodial sentence was available for the offender, it would not be considered for a Leifan offender and prison sentences could not be suspended for a recidivist. Leifan is a special type of recidivists and it results in statutory aggravation. The judges said that Leifan would be given harsh sentences, and mitigated sentences were not be available except in some special circumstances.

The judges confirmed that statutory mitigation and aggravation must be taken into consideration in sentencing. Leifan was the only statutory aggravation, and statutory mitigation in China includes voluntary confession and performing

meritorious actions. But statutory mitigation was not included in the interview questions.

Some case specific information was thought might help the judges determine the seriousness of the particular theft offences. The judges looked at the circumstances of the offender to judge not only the seriousness of the offences they were dealing with, but also the possibility whether the particular offenders would re-offend in the future. As to the information on victim, the judges considered only the loss of the property. Obviously it showed how serious the offences were.

When discussing information on offence, the judges thought it was essential whether the burglars knew the houses might be occupied or not before they took the actions. Because in some towns in China, the houses were occupied by the retired residents and the Children under the school ages, the majority of the judges interviewed said that daytime burglary was more serious than the burglary committed at night. According to the judges, in some areas, the day-time burglary rates were quite high, and there were campaigns launched to attack burglary cases committed during the day.

For information on victim the judges' focus was the financial loss of the victims. Not only the value of the loss, but also what the consequences the loss for the particular victim would be. If such information was available, the judges would look at it. A few judges argued that mental harm caused to the victim should also be considered because it showed how serious a burglar was. In practice, however, the mental harm caused to the victims of the burglary cases would not be considered unless it resulted in very serious mental disorder or the death of the victim. In China, the victim of the theft cases had no chance to claim compensation for the mental harm.

The factors discussed may help us understand the sentences indicated by the Chinese judges. In the meantime, it can help us make comparison with sentencing burglars in China and in England and Wales.

In terms of using sentences, the results show that custodial sentences and the fines were commonly applied for burglary cases. The length of prison sentences was calculated based on the value of the stolen property. The judges might adjust the sentences by looking at the sentencing factors.

By law fines should be given to all theft offenders regardless of their financial circumstances. The size of the fines was also determined based on the value of the stolen property, but the courts must give the fines within the range recommended in the SPC judicial interpretation. Some circumstances might be considered when the judges determined the amount of the fines. The judges would encourage the theft offenders to pay the provisional amount of the fines in advance of the trials. In practice where the offenders fully pre-paid the fines, the courts would consider the mitigated sentencing for them. In fact, if there were no very serious circumstances involved in the cases, the discount would almost be guaranteed. Paying the fines in advance might persuade the judges to suspend the prison sentences for the theft offenders or consider using non-custodial sentences.

Because public surveillance was poorly enforced in practice, the judges did not tend to apply public surveillance for the theft offenders who committed the less severe offences. Normally judges preferred to give suspended prison sentences instead.

In this chapter I also discussed the cultural features in sentencing in China. The issues included how the judges perceived the nature of the harm associated with burglary, how they perceived the punitive elements in sentences and other cultural factors which might influence the judges' sentencing decision making.

The judges interviewed commonly believed that the major harm of burglary was it caused loss of property and the potential bodily injury or death of the victims. Causing damage to other property in the house or to the house itself was another harm of burglary according to the judges. Nearly half of the judges interviewed believed that burglary might threaten the sense of security, and it

might even cause instability in the society. Not just a few judges pointed out that high burglary rates might affect the development of the local economy. Mental upset caused to the victims was one of the harms of burglary pointed by some judges.

As far as the punitive elements in the different sentencing options are concerned, the judges believed that all criminal sanctions had punitive element because they brought shame and disgrace not only to those sentenced but also to their family and relatives. Serving prison sentences the offenders would lose their freedom, they had to do labour work and they would not be able to stay with their family. The judges believed that the prison sentences were the most effective sentence for burglars. For the property offenders, the judges believed that the financial penalties would also be quite punitive because it taught the burglars that they could gain nothing from committing burglary. The judges mentioned that the financial penalties might deter the potential burglars in society but the enforcement of the financial penalties was fairly problematic.

Lastly I briefly introduced other cultural factors which were also relevant to sentencing decision making. The factors included judges' sympathy, personal background, judicial experience and collective opinion. Some of these factors were Chinese characteristics which could help explain the sentencing outcomes in China and why they were different from those in other jurisdictions.

In order to compare sentencing practice in China and in England and Wales, it is crucial to know the differences in the criminal justice systems, sentencing policies and procedures in the jurisdictions compared. Therefore, in Chapter Two I introduced the details about the background information – the history of Chinese sentencing law, current criminal justice system, policies and sentencing procedure in China. In this chapter, I focused on the sentencing practice in China. It shows that how the sentencing law and policies were interpreted and implemented by the judges in the sentencing practice.

The information included in Chapter Two and Chapter Three may help us know the sentencing system and framework and the features in sentencing practice in China. I believe that these two chapters may provide sufficient background information and the rich data for comparing sentencing practice and sentencing culture between China and England and Wales. In the following chapters I will make the comparison and explain the similarities and the differences.

CHAPTER FOUR

COMPARISON ON SENTENCING BURGLARS IN PRACTICE: THE JUDGES' VIEWS – IN CHINA AND IN ENGLAND AND WALES

4.1 Comparing the sentences indicated for the scenarios

Case 1

Case 2

Case 5

Case 3 and Case 4

4.2 Comparing the research results

4.3 Differences in judicial culture: Assumptions about burglary and other influence on sentencing decisions

The nature of the harm associated with burglary

Case-specific information

Objectives of sentencing in practice

The effectiveness and credibility of the options

Other influential Sentencing factors

Summary

INTRODUCTION

In this chapter I will use the comments from the Chinese judges to compare and contrast the similarities and differences in sentencing practice between China and England and Wales. For England and Wales I will rely on the fieldwork with the judges from the study conducted by Davies and Tyrer in 2003. I was allowed access to the original transcripts from their study and most of the quotes I have used have not been published previously. I will endeavour to identify variations that explain the differences in approaches to sentencing in these two jurisdictions. I will use some original comments from the judges in these studies for the purpose of comparison. It is notable that by the time when

the research was conducted in England and Wales the judges' views were based on the existing sentencing law based primarily on the CJA 1991.

4.1 Comparing the sentences indicated for the scenarios

Case 1

In Table 4.2, both Chinese and English judges identified Case 1 as the least serious amongst the five scenario burglary cases, and they would give non-custodial sentence to this offender. An English judge stated that '...on these facts as they stand I would be very ready to consider a non-custodial sentence despite all the things that have been said time after time about people who break in to other peoples house going to prison.' (Court L)

The judges in the two jurisdictions gave similar reasons for choosing non-custodial sentences for the offender in Case 1. The judges looked at the factors including no previous conviction, no pre-meditation, the stolen items, the financial hardship and a difficult family situation of the defendant.

In England and Wales, the judges commonly chose community sentences for Case 1. But some judges such as a judge from Court B also considered the effect the community sentence for this particular burglar. He said that 'being the sole provider for children and a terminally ill wife might make it very difficult, so I would be looking at possibly a probation order, but certainly not custody.'

In China, community sentences were not available. The available options of non-custodial sentences would be fines and public surveillance. 68% of the Chinese judges would consider giving the fines to Case 1, and there were 34% of the judges who imposed the public surveillance penalty for the burglar in this case. The judges mentioned that most theft offenders could not actually afford to pay the fines, and there was not an effective method to enforce the fines from those who could afford to pay but failed to pay. The judges thought that public surveillance lacked proper supervision in practice. Therefore one judge

preferred to give a suspended short term prison sentence instead of public surveillance to this burglar in Case 1. He said:

Obviously this burglar could not afford the fines. The public surveillance penalty would be a better choice but the enforcement is a problem. I would go for a suspended short term prison sentence for him. It means he would be still outside, but actually has been punished.

In England and Wales there were a few judges who chose a suspended prison sentence for the burglar in Case 1 as well. But the reason was slightly different from that of the Chinese judges who also indicated the suspended prison sentence to this case. A Court B judge said 'that (community sentences) might be a problem because of his commitments with his family if his wife was ill.' Another judge from Court D explained:

...he's somebody who has committed a serious offence, bottom serious but serious and it may very well be that if he's got a suspended sentence hanging over him, then it may very well deter him...you just don't know whether or not CSO would be appropriate because he's got to give up time to that, as opposed to dealing with his children.

Custodial sentences were chosen by some judges in both England and Wales and China. A judge from Court E chose a nine months' prison sentence for the offender in Case 1, and he explained that 'what I am saying is that I would not accept these facts and I would give him nine months because I would not believe him (just committed burglary once and just stole food).' None of the judges interviewed in China chose prison sentence for Case 1 except that one judge gave suspended prison sentence to this burglar. However, 14 Chinese judges indicated criminal detention. Judge 42 explained:

A criminal detention could be the most appropriate sentence for this burglary considering the seriousness of this case. To receive criminal

detention, this burglar can learn something. He must know that his financial hardship was not an excuse for him to steal from other people's house. Actually, since he was pre-detained, the actually time he serves his sentence cannot be long so he can soon come back and look after his family.

Criminal detention is not a sentencing option in England and Wales.

In China four judges believed that Case 1 was not so minor that the burglar could be exempted from criminal punishment. One judge said that 'considering the type and value of the item stolen and how it was consumed, I do not think this offender should be prosecuted and sentenced.' Similarly an English judge in Court J stated, 'I'm surprised that it's worth prosecuting him at all. The poor fellow seems absolutely wretched...' A Court H judge said that he would 'very seriously consider a conditional discharge', because Case 1 was 'simply a work in spontaneous offence and the children and the wife are not being adequately provided for and there is a genuine need for food'. In this aspect, some judges' views in the two jurisdictions were quite similar.

One English judge disagreed and he said 'a conditional discharge would send out the wrong message because it has to be a punitive sentence.' This is more or less similar to the views of the Chinese judges who thought criminal detention was appropriate for Case 1.

The judges in both England and Wales and China challenged the facts in the scenario Case 1. Typically an English judge said that 'the scenario is unrealistic. I've never met a twenty-four year old with no previous convictions does a burglary and just steals food...' (Court E) The Chinese judges questioned what type of food this burglar stole could be valued as RMB 1,000 or more. It was not realistic, and in practice if only food was stolen in a burglary case, the police might not bother to charge it.

Case 2

In both China and England and Wales, Case 2 was recognised as the most serious case of the five scenarios. All circumstances included were mentioned by the judges as aggravating factors except that the English judges emphasised that night time burglary was a particular serious factor, whilst the Chinese judges did not have the same response.

Given the seriousness of the burglary, the judges in both jurisdictions indicated that prison sentences would not be inevitable for this case. The average length of the prison sentences was given differently. In China, sentences given to the burglars in this case were significantly different for Leifan or non-Leifan offenders. In the interviews, the judges indicated sentences for both situations – assuming the offender was a Leifan and assuming he was not a Leifan. Comparison with the length of prison sentences in England and Wales was complicated, depending on whether the comparison was with a Chinese burglar who is a Leifan or not. In the result I have included the Chinese judges' response to both.

The English judges pointed out the impact of long-term imprisonment for the offender in Case 2. In England and Wales, a term of imprisonment of four years and over was commonly recognised as a long-term prison sentence. A judge explained that 'the man who only gets three years and half is going to serve a great deal less than the man who gets four years, because four means a long term prisoner...' (Court J). Similarly a judge in Court F said, '...the four year sentence would carry with it the fact that he could do two thirds rather than half. Four years being the cut off point...' Another judge from Court E stated:

I am aware there's a big difference between three years nine months and four years, because it has impact on release time', and 'four years converts the convicted defendant suddenly to a long term prisoner...'

Some English judges, such as a judge from Court B, did not believe that a long prison sentence was necessary for this offender, and he said that 'in fact the couple weren't disturbed...' Another judge said that 'I might be persuaded to

impose a month or two less than four years (to the offender in Case 2)...’ Some other judges thought that the offender in Case 2 deserved a four-year or longer term prison sentence, such as a Court K judge said that ‘I would give him four years I would think he is due to become a long term prisoner.’

There was no such threshold for distinguishing long term and short term prison sentences in China. It was commonly accepted that ten years or longer imprisonment was a long term sentence in terms of the length itself. There were no significantly different rules for early release for the short and long term sentence, however. Short or long imprisonment might effect the allocation of the offenders to prisons in different areas⁸⁰. The offenders who serve long term prison sentences may apply for sentencing deduction but the deduction is not guaranteed.

Due to different perception of severity of the same sentences and different sentence deduction rules, directly comparing sentencing outcomes, i.e. the lengths of the prison sentences did not seem to be meaningful.

In England and Wales, a guilty plea automatically results in a sentencing discount, whilst it is not the case in China. In Court B a judge in England and Wales stated that ‘the chap’s pleaded guilty so he’s entitled to a third off...which brings it to an effective sentence of two years.’ It showed that a plea of guilty was vital for the burglar who pled guilt especially at the early stage of sentencing. So, in this case the guilty plea was a significant mitigation for the burglar, and it was considered by the judges in their sentencing decisions. In China, to plead guilt or not did not have the same automatic consequences as in England and Wales.

Clearly in this case, the major factors on which the judges based to make sentencing decisions were not identical in the two jurisdictions. In China, the judges firstly looked at the value of the stolen property which made the judges to enable to determine the range of the available sentences. In England and

⁸⁰ The offenders serving long term prison sentences must be sent to the prisons with the best security facilities or the prisons in the remote areas.

Wales, the judges looked at all the circumstances recommended in the sentencing guidelines. Unlike in China the value of the stolen property did not seem to be the crucial factor for determining sentences for burglary in England and Wales. Sometimes, the factors which the English judges relied on for sentencing might be persuasive or influential factors for the Chinese judges.

An essential factor in Case 2 was the previous convictions of the burglar. In China, no doubt this was a very persuasive aggravating factor. Although only Leifan was the statutory aggravation, all the judges interviewed believed that all previous convictions were relevant as long as they were not committed very long time ago. Considering the circumstances described in the Scenario 2, the Chinese judges commented that most likely the offender in this case was a Leifan. But some conditions were not certain, so the judges indicated the sentences for both Leifan and non-Leifan. The results show that for the former the sentences indicated were much more severe than the latter, and the difference was 19 months in average. By the time when the research conducted in England and Wales, the judges based on the CJA 1991 when they sentenced offenders, under which the offenders' previous convictions were not as significant as in China, although some English judges said that they would take it into account according to the circumstances.

Night-time burglary was another factor, which at the time before the *McInerney* Case, was considered as a distinctive aggravating factor the judges in England and Wales, and this factor was regarded as a threshold of custodial sentences.⁸¹ A judge said that 'occupied dwelling house by night must merit custody' (Court D). Clearly the English judges believed that night time burglary was a very serious circumstance in a burglary case, and it must result in an aggravated sentence. A judge from Court F said:

...there is an aggravated feature, which is a serious aggravated feature as that as already been accepted...that it was at night. There is a feature which goes in favour of the defendant which the others

⁸¹ Subsequently changed following recommendations of SAP and Court of Appeal guideline cases – *McInerney* and *Keating* [2002] EWCA Crim. 3003 on 9 December 2002.

don't have and namely that he is of previous good character. I do think that the serious element far outweighs the no previous convictions and there had got to be a custodial sentence in this case for the reason I have already expressed. It is more serious because it was at night and the circumstances when the residents were there asleep...

In dramatic contrast, in China 86% of the judges interviewed recognised that day time burglary was particularly serious. I also discussed the reason which was during the day the house was most likely occupied by the retired people and children under school age. They could be the potential vulnerable victims of the burglary offences. It seemed that the burglary committed during the day or at night was not the point for the Chinese judges, but the point was that whether the burglar knew the houses could be occupied before they took the action. Additionally, according to the judges, breaking into other people's house to commit burglary showed that the burglar was desperate, and could be potentially dangerous.

Case 5

The sentences for the Case 5 were quite different between the two jurisdictions. Accordingly the same case was ranked differently in terms of the seriousness. In China Case 5 was the fourth serious offence among the five scenarios, whereas in England and Wales it was ranked as the second serious by the judges.

The judges in both England and Wales and China commonly indicate custodial sentences to this burglar. The English judges imposed average 17 months' prison sentences for this Case 5, which was relatively long compared with the prison sentences they gave to Case 3 and Case 4. A Court B judge stated:

I'm afraid there would be a custodial sentence. There is no doubt about that...but I had to give some sort of starting point, and for night-time domestic burglary three years is usually the sort of starting point.

In China, about 92% of the judges gave prison sentences to this offender and the average length was 19 months, which was shorter than the prison sentences they indicated to Case 3 and Case 4. In China, there was one judge who said that the prison sentence could be suspended if this burglary had good attitude. Four judges considered choosing criminal detention and one indicated public surveillance. Two judges gave the fines as the main sentences to this case. This is different from the judges in England and Wales who believed that given the nature of the case, the prison sentences would be the most appropriate.

Case 5 reflected the widest discrepancy in terms of sentence given by the two sets of judges. In this case, two pieces of information drew the judges' attention. One was that the offender had no previous conviction, so he was a first time offender. The other was that the burglary was committed at night. The first factor seemed to be very persuasive to the Chinese judges for which they mitigated the sentences significantly in order to give the offender a chance to reform. Judge 42 stated that '...the facts that he has no previous convictions and that it's his first sentence...Discounted by his character to bring the sentence down...' From the judges' view on how they dealt with the first time offenders, we might conclude that the rehabilitative sentencing was implemented in sentencing offenders in China. It was not like we initially felt that at sentencing stage rehabilitation was only the policy for certain special offenders groups, such as the youthful or disabled offenders.

A few English judges also noticed this factor, but according to their views it did not outweigh the seriousness of the offence facts. Previous offence record in this case seemed to be less influential than the perceived seriousness of the offence. An English judge said:

I repeat that any burglary at night on a residential property with the residents at home, whether great damage is done or not would in my case lead almost inevitably to imprisonment. Whether he has no

previous convictions or not I think it is such a serious offence. (Court F)

Like in Case 2 the fact that the offence was committed at night was essential to the judges in England and Wales when they indicated sentences for Case 5. An English judge explained:

You may look at the papers and think because it is an overnight burglary while people were in bed and nasty circumstances or whatever...it is likely to be imprisonment then you get in and find out all sorts of personal details which may turn you into a 'softy'.

The English judges saw night time burglary as very serious whilst the Chinese judges did not regard it in the same way. In China, the judges would look at the circumstances of the offence and the consequences of the case to determine whether a night time burglary was particularly serious. This is very different from the practice in England and Wales.

Case 3 and Case 4

The judges in both jurisdictions found that Case 3 and Case 4 were very similar. The Chinese judges said in practice the subtle differences between Case 3 and Case 4 might not be reflected in the sentencing decisions because the circumstances of the two cases were so similar. But they also said if the two cases were sentenced in the same time, they must look at the details and deal with them more carefully. An English judge said that '...when giving sentence to Case 3, I have been in fact influenced by a very similar case which is the next case – Case 4' (Court F)

Amongst the five scenarios, these two cases were regarded as medium seriousness by the judges in both jurisdictions. They were identified as typical or ordinary burglary cases in China, and the judges said both cases were burglary offences, but 'nothing was special'. In England and Wales a judge

said that it was 'in the middling range' or 'a standard burglary'. (Court B) In this aspect, the judges' views are quite similar.

As far as the sentences indicated are concerned, for Case 3 all Chinese judges chose custodial sentences. However, if the offender in this case could not be identified as a Leifan, three judges would give criminal detention, and one indicated public surveillance for him. In England and Wales, the judges argued whether the sentences for Case 3 should cross the custody threshold or not. Some English judges believed that prison sentences were the only choice for Case 3. Judge 2 in Court F said that 'I do not have sufficient information to make me think other than this an imprisonable offence'. A judge from Court C stated that '(Case 3) crosses the custody threshold, *prima facie* because it is burglary of a dwelling house, albeit in daylight...' In contrast, another judge stated:

...I would be going into court poised between the two. Custodial and a non-custodial, a sort of rehabilitation programme type thing and I would be listening to the plea of mitigation and I would be reading any reports and I would probably end up on the side of rehabilitation programme. (Court L)

As Case 4 was seen as very similar to Case 3 in China and if the burglary in Case 3 was not a Leifan, the sentences indicated by the judges to these two cases were very similar. The slight difference was that all 72 judges gave Case 4 prison sentences, and four judges said probably criminal detention could also be the option. In England and Wales, as in Case 3, the sentences chosen for this case varied, and both custodial and non-custodial sentences were included.

In China, Leifan was the most essential factor considered by the judges. For this circumstance, the judges chose the aggravated sentences for Case 3. Even when assuming the offender was not a Leifan, three convictions of this burglary were still very persuaded to use a relatively severe sentence. Again, it shows that the criminal history of the offenders was crucial in sentencing

decision making. Whether the burglar in Case 3 is a Leifan or not a Leifan affected the sentences given by the judges. Accordingly the Leifan status could result in a change to the order of Case 3 and Case 4 in terms of severity ranking in China.

In China, the offender's previous convictions were a key factor and the criminal history of the offender was looked at in great detail by the judges. The majority of the judges said that there was not much difference between one or two convictions, whilst in England and Wales the judges regarded a history of two previous convictions was more serious than that of one. The Chinese judges paid attention on the time lapse between the defendant's latest conviction and the current offence because it was one of the key conditions for a Leifan. In England and Wales, the gap in time between previous and current offending was also a factor, but in general, under the sentencing policies based on the 'just deserts' theory pertinent when the research was conducted - the previous convictions were less important to the English judges, although still of some relevance, as seen when the distinction between Case 3 and Case 4 shows.

In Case 4, the judges in both jurisdictions argued whether the fact that the offender was a heroin taker should be taken into consideration when sentencing this burglary offence. If the answer was 'yes', it was debated as to whether it should be seen as a mitigating or aggravating factor.

In both jurisdictions, there were judges who believed drug abuse had some connection with the property offences. The difference was that in China under current policies, any drug-related criminal offence must be attacked harshly. Therefore, most judges interviewed believed that no matter whether drug taking was the direct cause of this burglary or not, it should be considered as an aggravating factor. In England and Wales one third of the judges held a similar view. Typically a judge stated:

...the average person who commits this type of crime is not able to afford the money to support a heroin habit. Therefore they commit crime, and will continue committing crime whilst at liberty to support

that habit and that is the bald fact of life. You can't get round that proposition. And so it is an aggravating feature. (Court B)

With this view, some English judges indicated the aggravated sentences for the drug taker in this case. Judge 2 from Court F stated that '...he (Case 4) would go inside because I don't find it a mitigating factor at all...'

In England and Wales, more than half of the judges took part in the focus groups thought that drug addiction could be regarded as a mitigating feature for the drug taker burglars. One judge said that 'it may make it slightly less serious in my view that he's doing this out of an addiction and a craving rather than being committed just to being a pure burglar for the sheer hell of it.' (Court J) Another judge stated that 'the mere fact that he is a drug user is obviously not in itself a mitigating factor but I think if they have taken steps to tackle it. That can be a mitigating feature' (Court E). A judge in court F stated that 'often these cases, these people have been battling with drugs for years...ten or twenty years and...sometimes I am prepared to give a chance.' In Court F another judge said that 'it may be very counter productive putting regular drug users into prison...', and '...I can't make up my mind whether it was straight inside or some other community penalty.'

In both jurisdictions there were judges who believed that heroin abuse was neither a mitigating nor an aggravating factor in terms of sentencing a burglar. These judges took a strict view and focused on the seriousness of the offence rather than offender's motives. An English judge from Court I said that 'the fact that he's a regular heroin user by itself counts for nothing in terms of sentencing'. Another judge from Court G agreed, 'the mere fact that he is a regular heroin user is irrelevant.' A few Chinese judges had a similar view to this.

The English judges argued how to look at the fact that the burglar in Case 4 had successfully completed the community penalty. A judge said that '...this fellow (the offender in Case 4) has done community penalties successfully so he is possibly on the up...' (Court C). In contrast, another judge believed that

re-offending after a successful completion of previous sentences was a contra-indication which could persuade a more severe penalty this time. A judge from Court C stated that 'although the offender successfully completed the community sentence, he has changed nothing. Certainly the sentence has not deterred him' (Court C). Similarly, this was also argued by the Chinese judges, but most Chinese judges tended to regard this factor as irrelevant.

On the whole, the major similarities and differences in sentencing burglars may be summarised as the following key points:

1. The value of stolen property is the major factor when sentencing property offences, including burglary in China. In England and Wales, the judges looked at the circumstances recommended in the sentencing guidelines for the burglary cases. Professor Floyd Feeney explains the reason is that 'in England and Wales, burglary is, at least in part, a specialised form of the law of attempt. It does not require a completed theft. Historically it sought both to prevent thefts and to protect the habitation.'⁸²

2. A guilty plea would lead to an automatic sentencing discount in England and Wales, whilst in China the judges saw admitting guilt was a fact to show the offender's attitude and whether to take it into consideration depended on the individual judges' discretion. This difference is because the sentencing systems and framework differ in the two jurisdictions.

3. In both jurisdictions the judges would look at the offender's behaviour of committing the burglary offences because the judges believed that showed the seriousness of the offence. In China, the judges also believed it could show how dangerous the burglars were.

4. Night time burglary was seen as a very serious aspect of the offence in England and Wales. In China, committing burglary at night was not regarded

⁸² Floyd Feeney who works as a professor at University of California, Davis has been my research counsellor voluntarily since 2002. Professor Feeney stated this view when providing comments on the last draft of this paper in March 2005.

as a particularly serious sentencing factor. The judges would look at whether the burglars knew the houses would most likely be occupied before they took the action and the actual consequences of the case. In the day time the houses were occupied by the group of people who were vulnerable, so it looked that most judges in China regarded that day time burglary was more serious. The judges in some areas said day time burglary had high rates and it was targeted by the criminal justice agencies. In England and Wales this aggravating factor was changed by *McInerney case* of December 2002.

5. There were very different views on the sentence for Case 5. The Chinese judges focused on the offender's previous conviction, and the factor of 'first time offender' was crucial. In England and Wales, the judges based on just 'deserts philosophy' which was written down in the CJA 1991, and looked at only the seriousness of the offence rather than the past behaviour or motivation of the offenders. This was changed in the CJA 2003.

In addition to comparing the sentences indicated for the five scenarios by the judges from the two jurisdictions, I compared the judges' answers to further questions about sentencing. In the next section I will further explore the judicial culture of the Chinese judges and how it compares to the sentencing culture in England and Wales based on the responses of the 57 English judges.

4.2 Comparing the research results

Comparing issues between western and eastern jurisdictions can be extremely difficult given the completely different systems, histories, cultures and traditions. In terms of sentencing, the definitions of offence, terminology, ranges of the sentences, criminal procedures, rules of sentencing deduction and other aspects are all different, it is not surprising that the sentencing outcomes differ across jurisdictions. In order to identify and explain the similarities and differences, I will contrast the results from my field research carried out in China on how the judges sentenced the burglars in the five scenario cases and their explanations with the results from an earlier study conducted in England and Wales. By the time of the study carried out in

England and Wales, the sentencing policy was based, primarily but not exclusively, on a 'just deserts' philosophy. In other words, the judges were required to look at the seriousness of the offence, and secondly to take into account the offenders' previous convictions.

The following tables show the judges' views on the severity of the five scenario cases. There are similarities and differences between the views of the judges in China and in England and Wales.

Table 4.1: Five household burglaries: Severity ranking in China and England and Wales

a. If the offender in Case 3 was a Leifan in China

Rank order	Case 1	Case 2	Case 3	Case 4	Case 5
China	5	1	2	3	4
England and Wales	5	1	3	4	2

b. If the offender in Case 3 was not a Leifan in China

Rank order	Case 1	Case 2	Case 3	Case 4	Case 5
China	5	1	3	2	4
England and Wales	5	1	3	4	2

(Note: whether the burglar in Case 2 is a Leifan or not does not affect the severity ranking, and Case 2 in both situations it is the most serious case according to the Chinese judges.)

Table 4.1 shows that at the extremes, the ranking or severity of the sentences is the same according to the judges in both jurisdictions. Case 1 was seen as the least serious and Case 2 was the most serious amongst the five cases by the judges in the two jurisdictions. The main difference is the ranking of Case 5. In China it was ranked as the fourth serious case, but it was the second serious case in England and Wales. The reason is that at the time of the research conducted in England and Wales, the primary focus was on the

offence rather than previous convictions of the offender. However in China 'being a first time offender' was a crucial mitigating factor. This difference resulted in the different sentencing outcomes.

Table 4.2 presents the offence characteristics of each scenario case, the detailed information about the type of sentences and average length of prison sentence indicated by the judges and the rule of sentencing deduction in China and in England and Wales. This table helps us establish the similarities and disparities in the sentencing decisions made by the judges in the two jurisdictions. I will use the judges' own words to explain why the sentencing outcomes differ.

**Table 4.2: Five household burglaries:
offence characteristics with typical sentence**

Case Number	Variations	1	2	3	4	5
Offence characteristics	Day or night	Day	Night	Day	Day	Night
	Occupants present	No	Yes	No	No	Yes
	Damage and disorder	None	More than average	Average		
	Planning	No	Serious	-		
	Stolen items	Food	Jewels	TV		
	Value	£	<10	1000	300	
RMB		=>1000	13000	3900		
Offender characteristics	Previous convictions	0	3	2	1	0
	Previous sentence type	0	Prison	-	Not custodial sentence	0
	Other offender circumstances	Wife very ill, support children	-	-	Heroin user	-
England and Wales	Typical sentence	Various non-custodial sentence	44	18	17	24
	Typically Served	Probation order/ CSO	22	9	8.5	12
China	Typical sentence	Various non-custodial sentence	62, or 49 if non-Leifan	24, or 17 if non-Leifan	19	14
	Typically Served	No automatic sentencing deduction. Sentences can be deducted depending on the performance of the offenders in prison. There are special deductions rules for offenders who received the life sentence or suspension of the death penalty.				

Table 4.2 shows that the length of prison sentences indicated by the Chinese judges was considerably longer than those of the English judges. For Case 1 almost all the judges in both jurisdictions indicated the non-custodial

sentences. The judges commonly indicated the prison sentences for the offenders in Case 2-5. The biggest variation on sentence is on the offender in Case 5. In England and Wales, the average prison sentence the judges gave to this burglar was 24 months, and it was ranked as the second serious case among the five scenarios. In China, however, the average prison sentence for this offender was 14 months, and it was ranked the fourth serious. There were Chinese judges who considering suspending the prison sentence for this offender for this burglar was a first time offender. This was not the case in England and Wales. In contrast, night time burglary was seen as a serious circumstance warranting custodial sentences in the eyes of the English judges.

We cannot conclude that the prison sentences are longer or harsher as there are other factors which influenced the time served. An example can be given in Table 4.2. It shows that since there are different sentencing deduction rules in China and in England and Wales, the time the offender actually serves is different from the time sentenced. In England and Wales the burglars in the scenarios would serve in prison for only half of the time of the prison sentences imposed on them, whereas in China the sentencing deduction rules are very different. Sentencing deduction is available for the offenders who are given prison sentences, but whether the offenders could have time off depends on their performance in prison. Generally speaking, the time off cannot be as much as that under the English sentencing system.

Although we have obtained the figures relating to sentencing decisions so that we can compare the sentencing practice in jurisdictions, we must look at other system and cultural variations to help explain the significance of any differences between them.

4.3 Differences in judicial culture: Assumptions about burglary and other influences on sentencing decisions

In this study, I have explored the differences of judicial cultures between China and England and Wales by comparing the judges' views of sentencing offenders for dwelling house burglary. I will examine the background

assumptions the judges regarded as salient when sentencing burglary cases.

The nature of the harm associated with burglary

The nature of the harm associated with burglary was regarded differently in China and in England and Wales. According to the judges' responses, the English judges believed that burglary was a serious criminal offence and different from ordinary theft, which would result in a severe criminal sanction. In China, the judges said that burglary was a 'common' and 'normal' offence, and 'nothing is special' about burglary.

With regard to the nature of the harm associated with burglary offences, the judges in both China and England and Wales believed that burglary threatened people's sense of security. An English judge said that, 'It does create feelings of insecurity and anxiety which go beyond annoyance'. Another judge said that 'it destroys the individual's security in their own home' (Court K).

The judges on both jurisdictions recognised that violence might be a potential consequence of a burglary. This was a particularly serious aspect of burglary. For this reason, the English judges regarded night time burglary as a very serious offence for the residents would most likely be sleeping at home at night. In China the judges, however, believed that in the day time the vulnerable people were at home, and they could be the potential victims of the violence in burglary cases. So day time burglary was seen to be serious.

In China the judges determined the seriousness of a particular burglary case by mainly looking at the monetary value of the stolen property. The financial loss involved was regarded as the major harm of burglary by 53 of the Chinese judges interviewed. This factor was not even highlighted by the English judges. They, however, emphasised on invasion of victim's privacy in burglary cases. An English judge said that '...it is a violation of one's privacy. One's personal goods have been pored over by someone resulting in a feeling of contamination...' (Court L). In China only one judge applied the word 'privacy'. Other Chinese judges were concerned about the danger that burglary posed

for dwellers and the loss of a sense of security for the dwellers. These factors looked as part of what the English judges meant by 'Privacy'.

The judges in England and Wales paid attention on the psychological and emotional effects of burglary, but the Chinese judges had a different response to this category of effects. An English judge said:

It's a tremendous emotional distressing shock to think that, while you're asleep or indeed if you are not, some complete stranger has gone through your house and looked at all your possessions and taken some. (Court L)

The judges believed that the psychological effects were very harmful and it might have a long term effect. A Court D judge said '...later, they (the victims) are frightened every time they go home.' A judge from Court H also regarded the harm to be more serious '...it is going to remain with them for the rest of their lives and they have lost something that is very important to them.' Amongst the Chinese judges 33 mentioned the mental harm caused to the victims, but they did not have the feelings as strong as those English judges.

An English judge stated that '...loss of items of perhaps no great monetary value but enormous sentimental value. Quite often you will find that items of that nature are taken and they are casually thrown away...they are lost for good' (Court C). About one third of the Chinese judges commented on this factor. Although they had the similar view on this factor with the English judges, none of them would see loss of sentimental value should be considered in sentencing because 'the value was not measurable'.

The Chinese judges believed that the high rates of burglary might affect the local economy, whilst none of the judges in England and Wales mentioned this harm. Currently economic development is in the centre of the politics in China, so it is not surprising that the Chinese judges thought broadly about the effects of a criminal offence, and tried to meet political fashion of encouraging

economic growth and so were hostile to anything, such as burglary, that might threaten it.

Case-specific information

The case-specific information for burglary cases was responded to in different ways by the judges in China and in England and Wales.

Information on the offence

The judges commented on two aspects of the information about the offences, as described in the given scenarios, the time the burglary was committed and whether drug-taking mattered.

(1) Factors for determining the seriousness of the offence

Apparently the fact that 'the burglary was committed at night' was initially designed as a serious factor and let the judges decide whether they would employ this factor to judge the seriousness of the crime. In England and Wales, indeed the judges pointed out that night time dwelling house burglary was an aggravating factor in a burglary case. The reasons the judges gave was 'at night the houses are normally occupied and the residents would be sleeping.' The implication was that if the burglar disturbed the residents, then serious consequences might occur. A judge said that 'a night time burglary would normally result in a custodial sentence no matter whether the burglar is a first time offender or there are other mitigating circumstances'. However, in *McInerney and Keating [2002] EWCA Crim 2003* the position has changed so that the aggravating role of night time burglary now depends on whether someone is in the house, and the night time element has become a less significant factor than it was in the past, so that the aggravating factor depends on whether there was likely to be a resident at home at the time of the burglary.

In China with different social circumstances, night time burglary did not seem to be the focus in burglary cases. The judges were concerned whether the

burglar knew whether it was mostly likely that there was someone in the house before taking the action, and they also looked at the actual consequences. Daytime burglary had higher rates than night time burglary in some areas of Jiangsu Province. It endangered those who were at home during the day. The Chinese judges believed that day time burglars were most likely to be desperate and dangerous. Therefore, in the interviews the judges in China did not consider night time as a particularly serious factor. This might be a reason caused the severity of the sentences were different for the night time burglary scenarios in China and in England and Wales.

Clearly, the judges in different jurisdictions must look at the case-specific information but they would have different focus when they employ the information to determine the seriousness of a particular type of offence. This is one of the possibilities that sentencing policies and decisions can be different from jurisdiction to jurisdiction.

(2) Drug abuse

The offender in Case 4 was a heroin taker. Again, the judges responded differently to this fact. In China, the majority of the judges interviewed regarded drug abuse as an aggravating factor and they would take into account when they made sentencing decision for this drug taker burglar. The reasons are first of all historically drug taking was seen a bad thing in China, and people believed that it ruined the China in the whole Qing Dynasty. Secondly traditionally drug taking was not only bad behaviour but also an unlawful action since PRC was established. People think that drug abuse causes crime and harms the society. Thirdly in recent years, drug related crimes increase dramatically, and drug problems have become a serious social problem in some areas of China. Therefore, under the current policies, to attack drug trafficking and other drug related offences has become the focus of the Chinese criminal justice system. For these reasons, the judges would pay attention on this circumstance and take it into consideration, although it might not directly shows the seriousness of this burglary. But the judges believed

that there would be some logical link between drug taking and committing property offences.

Similarly in England and Wales, one judge said that 'the studies show that up to 80% of acquisitive crime is committed by drug addicts...' (Court D) But as based on the strict 'just deserts' philosophy by the time of the research, most English judges said that drug abuse was not relevant for sentencing this burglary cases. There were differences of opinion with some English judges who believed that drug abuse in the given burglary case might be a mitigating feature for which the sentences could be directed to include an element of a drug rehabilitation programme. It was the case in China.

Information on the offender

The five scenario cases provided information about the offenders. Clearly the judges in both jurisdictions were influenced by this information, but their emphasis was not the same. In England and Wales, the judges obtained information about the defendant from the case files, prosecution details, defence counsel's mitigation statement and pre-sentence reports (PSRs). In China, no pre-sentence reports were available, and the judges said that they could find the defendants' previous criminal records only from the police files or case files prepared by the prosecution.

(1) Previous convictions

Previous conviction was a significant sentencing factor in China, and almost every judge interviewed commented on this factor. For certain cases such as Case 2 and Case 5, whether the offenders had previous convictions seemed to be important. In China, first time offender was regarded as a mitigating factor and it might tip the balance to make a less severe sentence possible, such as for scenario Case 5.

In England and Wales, however, this factor did not carry so much weight in sentencing dwelling house burglars because the judges based their decisions

on the 'just deserts' framework at the time of the research and mainly looked at the current offence and the behaviour of the offender.⁸³ Under the CJA 1991, the judges were initially required not taking into the offenders' previous convictions into consideration when sentencing, but it was always argued whether the previous convictions were relevant. The reform was made in the CJA 1993, and the judges were again required to consider the previous convictions of the offenders by the sentencing guidelines. According to the judges' personal views from the focus groups, the criminal history of the offender still remained an influence on the judges when they making sentencing decisions. A judge said that '...it's very rare for a person without any previous convictions to be sent to prison for a long time for a first offence' (Court B).

It appears that the judges in the two jurisdictions gave slightly different emphasis to the role of past convictions when sentencing.

- Previous sentences

In England and Wales, it seemed that the judges would like to have the fairly detailed information on the offender's previous sentences. One judge believed that how the offenders served their previous sentences might also be relevant. In Court K, a judge stated:

...in his (burglar in Case 4) previous records that he had a community based sentence on which he had done quite well or alternatively which he has breached repeatedly and I think one might then be persuaded that perhaps you should know a little bit more about him...

In China, if offender had a previous sentence, this would be a factor for sentencing. But what type of sentence it was did not seem to be matter. In England and Wales, the judges would look at what type of sentences the

⁸³ CJA 1993 restored the ability of the judges to take into account the previous history and the frequency of offending.

offender received before when they determining the sentence for the current offence. A judge said:

Where the defendant has got a string of previous convictions for the same sort of thing you can see he has learnt nothing by a previous non-custodial sentence and he has to be sentenced for a burglary or string of burglaries where there are aggravated features...custody is inevitable in those circumstances. (Court C)

Another judge stated 'I know he's got two previous for burglary, but if it's his first taste of custody, I'm likely to pass a shorter sentence than if he'd been away each time before.' (Court F)

- Type and relevance of the previous offences

In China, the type of offences the burglar committed previously did not seem to be relevant. In other words, as long as the offenders had previous convictions, they would be dealt with differently from the first time offender. However, the general rule is that the more serious the previous offences are, the more influence they may have on the current sentencing.

In contrast in England and Wales the judges needed to know what offences the burglar had committed in the past. An English judge might totally disregard the previous conviction for an unrelated offence when sentencing. For example, a previous offence for a minor assault would be unlikely to influence a decision on sentencing an offender for burglary. Type of previous offence helped the judges decide the seriousness of the current offence if it was more serious than the previous offences. In Case 2 a judge said that 'he's moving up it would seem...from non-dwelling to dwelling houses. It's therefore a serious offence and merits a custodial sentence.' (Court G) Similarly, another judge said that 'they (the previous convictions) were non-dwelling burglaries so he his moving up tariff' (Court L).

- How recent was the previous conviction?

The time lapse between the previous convictions and the current offence was relevant to the judges in both jurisdictions. In China it might be particularly significant as it was one of the conditions for identifying a Leifan. An English judge said:

The piece of information that would guide me to an extent would be what his last custodial sentence, which is presumably his only previous custodial sentence, was because, if at the age of 24 it is likely he committed this offence fairly soon after release, he would have to get more this time than he got last time. (Court E)

It is notable that in England and Wales there is a statutory minimum prison sentence for the third time burglar. Previous convictions do matter when a burglar has had two previous burglary convictions, he or she will receive a minimum of three years' prison sentence for the current burglary.

In England and Wales, at the time of the research, the law required the judges to focus mainly on the seriousness of the offences they were dealing with.

(2) The motivation of the offender

In China, motivation was one of the factors for the judges to determine the seriousness of a burglary case. It was helpful to determine the individual dangerousness of a particular burglar. For example, when indicating sentences to Case 1, some judges agreed that the purpose of this burglar was to steal food to feed his family. Differently in Case 4, most likely the burglar committed the burglary was to pay for drugs.

Although the motivation was not the focus under the sentencing framework based on 'just deserts' theory, the judges did not totally set it aside when sentencing. For Case 1 an English judge said that 'I am surprised that it's worth prosecuting him at all. The poor fellow seems absolutely wretched...'

Another judge stated 'I would be heavily influenced by what the pre-sentence report said, which would shed some light on the chap's motivation' (Court E).

(3) Stereotypes and classification of burglars

Stereotype and classification formed an aspects of the process of sentencing by identifying the level of seriousness of the offence but it also provided a background assumption about the type of 'offender' that the courts were dealing with.

An English judge said 'when sentencing burglars I would ask 'what type of person I am dealing with.' In the research conducted in England and Wales by Davis, *et al* a judge classified burglary cases into different categories:

...professional burglars and entirely opportunistic burglars: there are your two principal classes of burglars. This is now, and it has very much increased, a class of drug-related burglars. (Court B)

In practice, the concept of 'professional burglar' seemed to be accepted by the English judges who took part in the focus groups. They defined the professional burglars as targeting certain types of victims, planning and premeditation, special techniques and skills, the way of disposal of stolen items, and frequency of commission. A judge said that 'the professional burglars might travel down to particular areas...Manchester burglars will make their way to the Prestbury and Wilmslow' (Court J). Professional burglary was seen as an aggravating factor because 'it doesn't matter what you do to him, it won't stop him doing it' (Court I). As far as the sentences for the professional burglars, a judge said 'usually they are going inside (Court G).⁸⁴

In China, the judges also classified the burglars, informally, when they dealt with the burglary cases. Nearly one third of the judges interviewed thought 'habitual theft' included 'habitual burglary'. 'Habitual theft' was aggravation in

⁸⁴ From the transcripts of the focus groups with the judges in England and Wales conducted by Davis, Pakala and Tyrer in 1996. The findings of their further research have been published in *Criminal Law Review* 2003.

the previous CCL 1979, and the concept was taken out in the current CCL 1997. But the judges kept using the term 'habitual theft' in practice to distinguish it from normally theft offences. They believed habitual theft should be sentenced differently.

There were some similarities and differences between 'habitual theft' in China and 'professional burglary' in England and Wales. But they had different focuses. 'Habitual theft' in China focused on the frequency of committing theft, whilst 'professional burglary' emphasised on the techniques, skills and organisation of the burglars. But in both jurisdictions the judges tended to classify the burglars/thieves in order to determine the seriousness of the offence and perhaps to find the most appropriate sentence for the particular offender.

(4) The attitude of the offender

The attitude of the offender was another factor considered by the judges in both jurisdictions. But the responses of the judges differed.

In China, the sentencing law required the judges to consider the attitude of the defendant. Good attitude may result in a mitigated sentence, whilst bad attitude, such as refusing to show remorse, may lead to an aggravated sentence. Since the law did not define 'the good attitude of the offender', in practice, the judges would examine or assure the offender's attitude from different aspects, such as, voluntarily confessing to the police, self-reporting the crime, returning the stolen items, or paying compensation to the victims, and other actions to show remorse. Fully paying the fines at an early stage of sentencing was another way to show 'good attitude'. The judges would take it into account the good attitude of the offender when choosing sentences. In contrast, bad attitude, such as failing to confess to the investigators, denying guilty or refusing to pay compensation or refusing to return stolen items to the victims would make a mitigated sentence impossible.

In England and Wales, the attitude of the offender could be also relevant at the sentencing stage, but the effects of this factor were lightly different from those in China. The English judges discerned the offender's attitude in a different way when compared to the Chinese judges, and where the offenders showed remorse, this might persuade the judges to consider a lower sentence.

In China, a few judges preferred to see defendants before the trials. A Chinese judge stated that it could help him to find out whether the offenders really felt sorrow or just saying that.

Information on victim

The differences in the judges' views about the usefulness of information on victim of burglary reflected the different attitudes in the two jurisdictions about the significance and role of the victim.

In China, the information on victim for burglary included only the loss and damaged caused to the victims. In England and Wales, the information on victim might be part of the evidence on the case. In both jurisdictions the judges argued whether it was necessary to consider the feelings of the victims. But in England and Wales most judges did not object to further information such as a victim impact statement being made available.

An English judge from Court F stated that 'I think dwelling house burglary is a case which is of the utmost importance to know what the victims feel, particularly if they are upset by them...' Another judge added, '...it is important I think to build up from what you're told in individual cases what the reaction is and the trauma suffered by the victims is, and that give you an overall picture' (Court E). Some other judges, however, did not agree with this view and they thought that traumatising was common in dwelling house burglary, and it was not necessary to be emphasized. A judge stated that 'in every dwelling-house burglary, the occupiers are left with a feeling of trauma of insecurity etc. I don't think you need a victim statement to indicate that.' (Court K)

However, a judge from Court G said:

Sentence shouldn't be dependant on the sensibility or spirits of the victim because when you sentence somebody to burglary, even though the victim in that case didn't mind, there is a general need to deter burglars because most victims do mind.

The majority of the Chinese judges had the same view with the latter judges, and they believed that it was not necessary to take into account the feelings of the victims in the burglary cases.

In both jurisdictions there were judges who were willing to give the mitigated sentences to burglars when the victims told the court that they forgave the offenders for some reasons. An English judge from Court F said that '...if the owners of the house aren't bothered neither should society be.' Very similarly a Chinese judge gave an example to say that he would be influenced and mitigate the sentence for a burglar where the victim said that he forgave the offender.

The judges in both jurisdictions commonly disagree with the active involvement of the victims of burglary at the sentencing stage. In China, the judges said that it was not necessary to let the victims become involved in the trail of burglary cases. In England and Wales the judges did not like the victims to be involved in sentence stage for burglary cases because they thought they might be misled by the overstatement of the effect on the victims.

Objectives of sentencing in practice

The criminal justice systems in China and in England and Wales share some common objectives in terms of sentencing, including retribution/punishment, rehabilitation/education and reform, deterrence and incapacitation/public protection, and denunciation. Although the terminologies and rules differ, the principles are similar. In England and Wales, a historic overview of the aims of

sentencing shows the way that the balance between these aims shifts in focus over time. A judge stated:

We'll find in a few months' time that sentencing policy changes, and then we shouldn't be locking so many people up because it's becoming too expensive for the government. Now that's what surreptitious...and it'll be explained away in some other way. (Court J)

In China the sentencing aims remain stable. Punishment is the dominant sentencing goal and education and reform of offenders is persistently emphasised.

In order to contrast the different objectives of sentencing between China and England and Wales, I must include some brief introduction of the traditional western sentencing aims and their current status before I compare them with the sentencing goals in China.

Deterrence

Traditionally, there are six sentencing theories - retribution, deterrence, incapacitation, rehabilitation, denounce and restitution in the common law jurisdictions. Deterrence, incapacitation and rehabilitation are typically catalogued as the utilitarian goals.

The aim of the deterrence is to reduce crime by the threat of punishment. The aim to deter the offenders from re-offending in the future is known as 'individual deterrence'. 'General deterrence' aims to deter the potential offenders in the society from committing an offence.

Deterrent sentencing used to be the focus in the judicial practice in England and Wales. However in recent years it has been down played as a major sentencing goal in sentencing. The White Paper in 1990 stated:

Deterrence is principle with much immediate appeal....but much crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment; their crimes are as impulsive as the rest of sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. Often they do not. (Home Office 1990: para. 2.8)

In the focus groups in England and Wales, a judge interpreted the deterrent sentence as: 'I am passing on you a sentence longer than the sentence you personally actually deserve', and, '...I'm doing it for the greater good that I will deter others' (Court D). Another judge stated that '...too few dwelling house burglars are actually caught and it is the catching as well as the sentencing that is likely to have a deterrent effect.' (Court C). It is obvious that under deterrent sentencing, the English judges were allowed to impose an aggravated sentence on a particular offender who commits a violent or sexual offence. In China it was not allowed. Deterrence in China was similar to prevention of crime, and 'general prevention' and 'individual prevention' in China had almost the same meaning as 'general deterrence' and 'individual deterrence' in England and Wales. However, prevention of crime seemed to be a political slogan in China, and there were no practical approaches to guide the judges to reflect this aim in sentencing. There were no judges interviewed who could explain how they could make sure the sentences they gave to the serious offenders were severe enough to deter them from re-offending or stop the potential offenders from committing the same crimes.

Incapacitation

Incapacitation is defined as 'the idea of simple restraint: rendering the convicted offender incapable, for a period of time, of offending again.' (von Hirsch, A. and Ashworth, A. 1992: 101) It aims to prevent crime and protect the public by simply removing the law breakers from the rest of society (normally putting them into prison). It is believed that 'if they (the offenders) are imprisoned rather than subject to community sentences, then they cannot

offend for the duration of their incarceration. (Richards, M. 1998: 72) In order to achieve this goal, incapacitative sentencing allows the courts to impose excessive sentences for those offenders who would most likely re-offend.

In Britain, a Model Sentencing Act (MSA) was proposed by the National Council on Crime and Delinquency in 1963. This Act provided a detailed definition to the dangerous offenders to guide the use of predictive sentences. The MSA 1963 has not had significant influence in the sentencing practice in England and Wales.

The English judges who took part in the focus groups commonly believed in incapacitative sentencing. A Court F judge said that 'surely the most important thing is incapacitation. While he is inside he can't do it to anybody else.' Another judge followed:

For example, in the dwelling house burglary cases incapacitation is at the forefront of my mind...We know from our own experience that it is recognition of crime and prison works, and works only in the sense that it keeps the dwelling house burglar out of circulation for a specific number of months or years. (Court G)

In China, public protection is the closest sentencing aim to incapacitation, more than half of the judges believed that in order to protect public, the serious offenders should be put into prison and have their freedom restricted. An English judge also used the word - 'prevention' - a more frequently used term instead of 'incapacitation'. He stated:

If you look at them and you take your twenty-four year old of good character and you automatically go through there, then what you call incapacitation, what I call prevention, is probably going to drop in your mind as a feature in this case... (Court B)

A view held in common was that in both jurisdictions only some offenders, i.e. violent and sexual offenders in England and Wales, and dangerous offenders in China, should be locked away for the protection of the community.

Rehabilitation

Rehabilitation aims to cure offenders. In rehabilitative theory, offenders are regarded as akin to sick people. In a medical model of rehabilitation the offenders are thought need diagnosis and treatment, and to be cured. It is believed that rehabilitation may help offenders change their value and attitude to life and live a law abiding life in the future. From rehabilitative sentencing the society will benefit from the prevention of recidivism, and this sentencing approach is commented as 'has enormous potential for humanising and civilising social reaction against crime' (Duff, A. and Garland, D. 1994: 284).

Rehabilitation was a preponderant sentencing approach in USA and England and Wales in 1960s and 1970s, and it resulted in the use of indeterminate sentencing schemes. Due to lack of evidence to demonstrate the effectiveness of those rehabilitative approaches, this theory has faded to become a secondary rather than a primary or exclusive aim. Von Hirsch comments:

Rehabilitation, however, cannot be the primary basis for deciding the sentence, nor can it be the rationale for supporting less harsh sanctions than we have today. (1992: 47)

In England and Wales, some judges believed that rehabilitative sentencing might be appropriate for certain types of offences. Several judges, however, said that rehabilitation was not relevant to sentencing dwelling house burglars. A judge from Court 1 stated that 'I don't think rehabilitation plays much part in dwelling house burglaries because you're not going to rehabilitate a burglary with a prison sentence but if it was a non-custodial case you might.'

Education and reform of offenders is one of the tasks of the whole criminal justice system in China. This sentencing goal has a similar meaning to

rehabilitation in England and Wales, but the practical approaches are not identical in the two jurisdictions. In China, the judges are required taking education and reform of offenders into consideration. As a result, the judges would give chances to the first time or occasional offenders. Perhaps taking into account the good attitude of the offender was also for achieving the education and reform goal. In China the judges also pointed out that only certain types of offenders could probably be reformed. For the normal adult offenders if they were recidivists, education and reform policies did not apply. The judges believed that rehabilitation was the major goal for the post sentencing stage - in prison where the reform-through-labour policy was dominant.

Both in China and in England and Wales, there were judges who doubted about the effectiveness of rehabilitation. Judge 52 in China said that she did not believe that rehabilitation worked. She insisted that prison made the bad people worse. An English judge stated:

The other avenue that would interest me would be more effective than rehabilitation because if you could have a reasonable guarantee that by probation or some other means it can prevent the person committing further burglaries then it seems to me it may be in the public interest to go down that avenue. (Court C)

The introduction of the CJA 2003 reflects New Labour's partial restoration of the rehabilitative principles back into the primary goals of sentencing in England and Wales.

Denunciation

It is stated that 'we will understand that the crime was wrong when it is sentenced.' (Walker, N. 1972:36) Denunciative sentencing would let the offenders and public be aware of how serious the offences sentenced are, and what would be the legal consequences of them. As not all criminal cases would

be introduced to the public, the effects of denunciation may not always be fully achieved.

An English judge stated that denunciation was for 'addressing the law-abiding citizen, saying this sort of things is unacceptable in our society' (Court D). It was believed that sentencing was 'to spell out that this sort of offence is offensive to society as a whole and then list the reason so you are really denouncing it as an activity...' (Court L) In China, the judges believed that offenders should be condemned officially through the criminal justice process. The purpose for denunciation was to tell the public what was right and what was wrong. Judge 61 stated:

Denunciation is important because it is a great opportunity for us to deliver the general legal knowledge to the public. In practice, we judges make use of any possible opportunity to condemn crimes.

Restitution

Restitution aims to compensate the victims of the offences, and it asks the offenders to 'pay back the society or the state for the harm done.' (Davies, Croall and Tyrer, 1995: 217) The offenders may be required to pay fines, and in England and Wales it is possible that the courts to give restitution orders and compensation order. In practice, however, this goal was not usually of much significance in burglary cases according to the research conducted in both England and Wales and China. An English judge said that 'restitution comes right at the bottom I would have thought, the way we have been sentencing people there is no restitution' (Court F). Another judge stated that 'restitution doesn't play a part. I don't think I've ever had the opportunity to use anything' (Court I). In China the situation for restitution was very similar to that in England and Wales. The theft offenders were encouraged to return the stolen item or pay compensation to the victims, but the courts would not order the defendants to do so.

Retribution

Retribution is an influential sentencing theory in England and Wales. Retribution aims to punish criminals. It requires the severity of the sentence to be proportionate with the seriousness of a particular offence. In other words, the offenders are thought should only pay for what they deserve but not anything excess. 'Just deserts' is the modern version of retribution, and the essence of this concept is that the severity of the punishment should be determined in accordance with the seriousness of the offences. Two concepts are essential in 'just deserts' – 'culpability' and 'proportionality'. Culpability refers to blameworthiness. Proportionality requires that criminals should suffer determinate punishment proportionate to the seriousness of their offences.

'Just deserts' theory was adopted in the Criminal Justice Act 1991 (the CJA 1991). It stated that '(a custodial sentence should be) commensurate with the seriousness of the offence'⁸⁵, and '(a fine must) reflect the seriousness of the offence'⁸⁶. In practice, it is commented that 'just deserts' approach could '...make the penalties mandatory or which confine courts narrowly succeed only in treating unequal cases equally' (Ashworth 1988: 216). A survey shows that the most popular aim of sentencing was to 'give the offender what he deserves' (Ashworth 1988: 216).

Based on a strict 'just deserts' approach, the CJA 1991 required that the courts should not take into consideration the previous convictions of the offenders unless there were given circumstances. It was strongly criticised that it was not reasonable to sentence a repeated offender as the same as a first time offender. Martin Wasik - the chairman of the Sentencing Advisory Panel (SAP) states that 'it is proper to take some account of previous convictions.' (1987: 222) The CJA 1993 altered the provisions of the limitation on considering previous convictions in the 1991 Act, and some restrictions were removed.

When the fieldwork of the research in England and Wales was conducted, the courts were implementing the CJA 1991. Therefore, the English judges who

⁸⁵ S2 of the CJA 1991

⁸⁶ S18 of the CJA 1991

took part in the focus groups looked at mainly the seriousness of the scenario cases when indicating the sentences to the burglars. Although 'just deserts' was the major sentencing goal at that time, the judges still comments on the other aims of sentencing as required. The reason why most English judges were familiar with the different sentencing aims was probably because these aims shifted the focus from time to time, and the judges had to know what they were able in order to follow the changes.

Recent policy development in England and Wales show the shifts in emphasis between sentencing theories. Currently the multiple sentencing aims become the tendency of sentencing. After the CJA 1991 and 1993 a lot of changes were made in the English sentencing system. In 2001 the effectiveness of utilitarian sentencing approaches was reviewed in the Halliday Report, but it stated: 'The solution offered is a single community punishment order, whose punitive weight would be proportionate to the gravity of the offence, taking account of previous convictions' (Home Office 2001: Recommendation 27). The Halliday Report recommended a shift in the rationale of punishment in order to prevent crime and improve public confidence in criminal justice system. 'Limiting retribution' was one of the theoretical underpinning of Halliday Report and it was described as 'seeks utilitarian goals within limits based on proportionate punishment...' (Home Office 2001: 163) In 2002, a White Paper – Justice for All was published, which included the recommendations in Lord Justice Auld's Review of Criminal Courts (2001) and the Halliday Report 2000. The White Paper 2002 made wide-ranging recommendation for changes on criminal justice framework, and many of its proposals were adopted in the Criminal Justice Act 2003 (the CJA 2003).

The current CJA 2003 'represents a landmark in the evolution of crime and punishment in England and Wales' (Gibson 2004: 164). Many radical changes are made in this Act, particularly to the way courts and police operate. In terms of the sentencing aims, the purposes of sentencing are stated as:

- a. punishment of offenders;
- b. reduction of crime (including its reduction by deterrence);

- c. reform and rehabilitation of offenders;
- d. protection of the public and,
- e. making of reparation by offenders to person affected by their offences.⁸⁷

The new aims of sentencing embody the concept of limited retribution introduced in the Halliday Report. The CJA 2003 incorporated aspects of the CJA 1991 which specified the seriousness of the particular offences. It states that community sentences should be imposed to the offences 'serious enough'⁸⁸ and the custodial sentences are for those 'so serious' offences⁸⁹. The offenders' previous convictions should also be taken into consideration, and it states that 'the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foresee ably have caused.'⁹⁰ Where an offender has previous convictions, each conviction is required to be treated as an aggravating factor if the court considers that is reasonable. As proposed in Halliday Report, the nature of the previous convictions must be relevant to the current offence, and, also, the elapsed time is relevant. In order to protect the public, dangerous offenders are emphasised in the new Act. For dangerous offenders, not only is the seriousness of the offences considered, but also the special and additional measures are allowed when determining sentences for certain dangerous offenders. For violent and sexual offenders, the extended sentences are available.

In China, the sentencing aims were described as a combination of retributive and utilitarian approaches by the legal scholars. Nevertheless, retribution has always been the major sentencing goal since the People's Republic of China was established. The law requires the courts to impose sentences on the offenders based on the harm done by them. Currently, in Jiangsu High Court Sentencing Guidelines the sentencing policy is stated in Article 2 that 'sentences imposed on the offenders shall commensurate with the harm done

⁸⁷ s. 142 of the CJA 2003

⁸⁸ s. 148 (1) of the CJA 2003

⁸⁹ s. 152 (2) of the CJA 2003

⁹⁰ s. 143 (1) of the CJA 2003

and the individual dangerousness of the offenders' (See Appendix 2). The latter is incapacitation with a focus on offender future behaviour. The concept of proportionality can be found in Article 6 of the same document. It states:

Sentencing the co-defendants, the facts of the offence, circumstance of the defendants and their respective culpability should be considered individually. The severity of their sentences should be different to ensure the balance of sentencing.

Article 7 deals with tariff. It says that 'sentencing should base on the harm done to the society by the offenders. The individual dangerousness of the offender should be taken into account.' (See Appendix 2)

It is fairly clear, in Chinese criminal law and the sentencing policies the retributive approaches are adopted. In practice, prison sentences were believed to be the most effective criminal sanction for the harm of the crime caused to the society in general and also for the purpose of social control. The judges indicated that the death penalty was the prevalence of the deterrence approach to sentencing although this did not apply to burglary.

In China, although retribution has firmly been the major aim of sentencing, education and reform of offenders are also emphasised. In addition, the courts are required sentencing criminals for the purpose of public protection, criminal prevention, social control and denunciation. In China, the sentencing policies could be amended flexibly with the change of the circumstances in the society, but sentencing goals remain consistent.

The effectiveness and credibility of the options

In English and Wales, the judges wanted to know about the effectiveness of sentencing. A judge stated:

...what I think needs to be done is to look at the results of sentencing in some detail and for the judges to be informed of the results their

sentences where you take a risk...you can ask for reports very occasionally in sexual matters which I have done to just to see whether they work but that's the angle that needs to be tackled in my view. Then we can get some idea what we need to concentrate on.
(Court G)

None of the Chinese judges interviewed talked about this matter. But in fact they had taken the effectiveness of the sentencing options into consideration. This is why the judges interviewed did not tend to indicate public surveillance for the burglars. They thought it might not be effective because public surveillance was not properly supervised in practice.

The judges in both jurisdictions would look at the effectiveness and credibility of the sentencing options. As far as the prison sentences are concerned, an English judge said that 'they play no part in rehabilitation' (Court D). Similarly, a Chinese judge stated that 'prison is like a big dye jigger with black colour, and it makes the bad person worse' (Court N).

In both jurisdictions the judges would wish to know more about the effectiveness of the sentencing options, and this would be considered relevant to issues of credibility. The statistics show that the prison populations in both jurisdictions have been rising in recent years. In China, the prison population rose to 1,549,000 in late 2003⁹¹, whilst in England and Wales there were 74,162 prisoners in 2003 with an increase of 2% on the number in 2002 (Home Office: 2003).

The judges' responses to prison population, however, were quite different. In England and Wales, the judges were concerned about the increasing prison population. A judge said for him 'whether tending to put burglars in prison depends on how full the prisons are.' Most English judges believed that community sentences might be an alternative to prison sentences. A judge commented that on the importance of a strict regime with community service

⁹¹ It was the figure shown on International Centre for Prison Studies 2003.

order; 'if you stick to it probably it is quite a punishment because a lot of these people have never lived...discipline, structured lives...' (Court F). The judges also suggested another two alternatives which might replace the traditional prison sentences. One option was the short term prison sentences. A judge said that '...there is a very good reason for marking it for a short sentence and not losing him all the benefits' (Court F). Another option was the weekend prisons which is introduced by the CJA 2003 as 'intermittent custody'. A Court J judge stated:

...instead of imposing a custodial sentence full-stop, which in many cases is disastrous for the fellow's job, for the fellow's family, I'm quite attracted to the concept and I think one would probably find quite a lot of support for this, imposing say: you will go into custody for 8 successive weekends or something like that. So he can keep his job but he still had that... that is an infringement of liberty.

Differently, although nearly half of the Chinese judges doubted about whether prison worked to reform the offender, the prison sentences would still be their major option. The judges were aware of the increasing prison population, but they said the courts had their own functions and the judges must impose sentences strictly according to the law regardless of the prison population and other similar problems.

It is clear that the way the judges felt about the effectiveness and credibility of the different sentencing options would have an impact on sentencing outcomes. When we make comparison on sentencing practice across jurisdiction, this is also a relevant factor to consider.

Other influential sentencing factors

When answering the further questions in the focus groups in England and Wales and the interviews in China, the judges discussed certain factors which could also have impact on their sentencing decision making in practice. Three factors were commonly regarded to be influential by the judges in both

jurisdictions: political influence, public opinion and inter-agency co-operation. The influences of these factors were not so obvious in individual cases, but were indirect in that they would have an impact on sentencing culture and the judges' views with regard to sentencing.

Political influence

To what extent is sentencing may be influenced by the governmental policies? In England and Wales, the judges discussed the influence of the changes of the political policies. An English judge stated that 'it is just politicians making cosmetic changes: (they are just saying) look how tough we are' (Court G), but this judge did not believe that such a provision could make any difference on sentencing in particular cases in practice.

In fact, the judiciary, by the effect of Parliamentary Government and the power of the Government of the day to determine legislation, cannot be immune to the political influence. When discussing tariff in murder cases, Padfield states:

An exploration of the issues shows that the justification for the mandatory life sentence for murder is simply political expediency. It seems likely that the courts will remain too modest to do anything about this. If so, only parliament can change the sentence for murder.
(2002: 192)

In England and Wales, it is typical that crime issues are focused upon by the politicians during election campaign. As part of the elective campaign one party might promises to introduce more effective sentences and crime strategies through changing the law if elected.

In China, political influence affects judicial system in a different way, and it seems more straightforward and wide-ranging. The judges pointed out the political party and its agencies are directly involved in sentencing policy making. The judges in China are civil servants and are therefore obliged to obey the political policies made by the Government. The courts had a duty to

organise weekly mandatory political studies for the judges, which were regarded as one of the key training programs for the judges (Guo 2002: [http://www. rednet.com](http://www.rednet.com)). Central and local government authorities also were able to interfere with the courts to exercise their judicial power because those authorities were the superior of the courts and they could control the courts' budget and material supplies. This is different in England and Wales with a parliamentary system of government, and the judges are required to implement the law and regulation made by parliament, but in individual cases the judges based on the principle called the separation of power should not respond to political pressures but regard themselves as independence of the executive branch of government. In this sense, they are more independent than the judges in China.

Public opinion

Could public opinion influence sentencing decision to certain extent according to the judges in both China and in England and Wales?

The English judges believed that public opinion did have an impact on judiciary. A Court F judge said that 'we have got to pay attention to public opinion, not slavishly of course.' Another judge criticised that public opinion might be misleading sometimes (Court E). A judge from Court D stated:

The worrying aspect that the British Crime Survey teased out is that we're always justifying our sentences on the basis of public opinion and...because we don't look past the public opinion which says: 'judges are out of touch, they don't sentence nearly long enough.' And because we hear this, sentences are going up and up and up and in fact the public approve of our sentences.

Another judge continued and said that '...the same section of public were asked how many, people convicted of rape do you believe are sent to prison. They came out with answers like 60%, 70% when the true figure is 99.5% and the rest are the hospital orders' (Court L).

In China, no doubt public opinion was an influential factor of sentencing, although the judges said that they would try not to be influenced too much by it.

In both jurisdictions, the judges commented that the mass media could be fairly powerful and influential with regard to sentencing. In China some judges criticised that sometimes media tended to put pressure on them, and it made them quite awkward when they were in the process of sentencing decision making. Judge 71 said that 'the judges should ignore the influence from the media because sometime they were misleading due to lack of sufficient case information.' For the same problem, an English judge said 'you can't be driven by the press' (Court I). This view was quite similar to those of the Chinese judges.

On the other hand, a few Chinese judges found the advantage of the media. A judge said that the local press could help with the general legal education, so it helped with the aim of denunciation. Similarly in England and Wales, a judge stated:

I think the local press...it is a particularly valuable tool...you're sentencing somebody, you're addressing him, you're also addressing the wider public but so often your works are getting lost in the air...(Court J)

Inter-agency co-operation

The field research showed that the inter-agency co-operation could be a sentencing factor which influenced sentencing decisions. In China, Judge 18 suggested that 'I think that all criminal justice agencies should work together as a whole system. We need sufficient information exchange between us.' The Chinese judges pointed out that currently such inter-agency co-operation was not sufficient, and particularly some essential information was not available for the courts or other relevant criminal justice agencies.

The research shows that in England and Wales it was a tradition that the courts worked closely with the probation service. The judges relied on the pre-sentence reports which could be very influential for the judges who dealt with the particular cases. In the CJA 2003, inter-agency co-operation and information exchange are emphasised, and there are new rules made on this aspect.

SUMMARY

This chapter compared the information on sentencing directly obtained from the interviews with the judges in China and the focus groups with the sentencers in England and Wales.

In the beginning of this chapter I made a comparison of the sentences indicated by the judges for the five scenario cases. I looked into the individual scenario cases one by one, and focused on the sentencing factors to find out how the judges in the two jurisdictions considered these factors when sentencing. Then I compared the sentencing results from my fieldwork in China and the research conducted in England and Wales by Davies *et al.*

In order to interpret the similarities and differences, I described the sentencing cultures in China and in England and Wales in terms of the perception of the nature of the harm associated with burglary, recognising the case-specific information, balancing the competing objectives of sentencing in practice and the effectiveness and credibility of the sentencing options available to the judges. I also discussed some further influential sentencing factors in both China and England and Wales.

The main findings turn out to be the following points:

1. Sentencing in China appeared to be tougher than in England and Wales. Custodial sentences were frequently chosen for the theft offenders by the Chinese judges. The reason probably was that sentencing in China

aimed to punish crimes. To protect public order and prevent crime was also the focus. Under the education and reform policies, rehabilitation played significant role, but the courts would balance the harm the offence caused to the society and the offender's personal circumstances. In England and Wales, the judges implemented the 'just deserts' philosophy at the time of the research, and they were guided by sentencing guidelines. In terms of custodial sentences in England and Wales, the prison term was shorter than the custodial sentences given to the burglars in China.

2. In China the value of the stolen property was the key factor for property offences including burglary. The judges must calculate the monetary value of the stolen property for every burglary case before they determined a sentence for the burglar. In other words, the seriousness of a burglary case in China was measured mainly based on the monetary value of the stolen property. In England and Wales, the seriousness of a particular burglary case was determined based on the circumstances of the case, and the guideline cases would guide the judges to make decisions.
3. Offender's previous convictions are crucial to sentencing current offence in China. Leifan is a special type of recidivists and constitutes statutory aggravation. Leifan would result in an aggravated sentence. With a totally different sentencing system, the concept of Leifan does not exist in England and Wales.
4. Being a first time offender was a mitigating factor in China. Based on the education and reform goal, the courts saw first time and occasional offending as a mitigating factor. In the interviews, the judges tended to give those burglars who had no previous conviction a chance for the purpose of rehabilitation. The consequence was that first time offenders were given less severe sentences than recidivists. In England and Wales it was different. At the time of the research, the courts were required to look primarily at the seriousness of the burglary and were

guided by sentencing guidelines. Other factors such as previous convictions and offender motivation played a lesser part when compared with decisions in China. Therefore, outcomes were not the same in the two jurisdictions.

5. Some case specific information was considered differently by the judges in the two jurisdictions. It might result from the different social circumstances. For example, in China most houses were occupied during the day, so the Chinese judges appeared to feel that burglary in the day light was more serious than it was thought by the English judges. In England and Wales the judges regarded 'night time' for burglary as a serious aggravating feature because they knew the houses were most likely to be occupied at night. For both sets of judges whether the house was occupied at the time of the burglary was the key factor.
6. Variety of factors relating to the offence and offender were looked at by the judges in the two jurisdictions. In China, the value of the stolen property was of particular importance. Other circumstances of the offence and offender were considered by the judges to adjust the sentencing decision made based on the value involved in the stolen property. In England and Wales the judges looked at these circumstances to help them determine the seriousness of the offence according to the sentencing guidelines.

I concluded that in China the aims of sentencing were a combination of retributive and utilitarian approaches, including education and reform of offenders, public prevention, and prevention and reduction of crimes. At the time of the fieldwork conducted in England and Wales, the sentencing framework was based primarily on 'just deserts' philosophy, so the judges were required to look at mainly the seriousness of the offence, and they were required to consider the guideline cases provided by the Court of Appeal.

In this chapter, I made direct comparison with regard to sentencing practice between China and England and Wales. Other issues discussed in this

chapter are thought may help me explain the differences in sentencing practice in the two jurisdictions. However, to simply compare the data gathered from the two sets of judges was not enough to explore the differences between the sentencing practice in China and in England and Wales. I realised that in order to make a comprehensive and meaningful comparison on sentencing across jurisdictions, further factors needs to be examined and applied to make sense of the sentencing outcomes. Therefore, I will focus on the wide-ranging sentencing related issues in the next chapter.

CHAPTER FIVE

COMPARATIVE RESEARCH ON SENTENCING: A WIDER ANALYSIS

5.1 Introducing a comparative analysis framework

5.2 Differences in sentencing systems

Definitions of burglary and sentence limitations

Pre-trial decisions

Range of sentences and their application

Sentencing deductions and enforcement

Sentencing law and guidelines

Status and experience of the judges

5.3 Criminal justice system interdependencies

Impact of law enforcement: front line definers of cases

Impact of diversion and case screening

Resources

Inter-agency trust, cooperation and information systems

5.4 Crime and its socio-cultural and political context

Risk, extent and fear of crime

Cultural and political significance of crime

Interdependencies within the system

Summary

INTRODUCTION

At the start of my research I set out to study sentencing practice in China. The next stage I compared my empirical findings with data from the research conducted in England and Wales by Davies *et al* in 2003. In the third and final stage I intend to consider some methodological issues of how to make sense

of the results when comparing aspects of criminal justice systems, criminal procedures and sentencing practice across jurisdictions.

To understand the sentencing practice of the judges I have explained in Chapter Two and three the similarities and differences in the penal systems and sentencing procedures in the jurisdictions compared. It soon became apparent through my analysis that judicial culture seemed to be a prominent focus of this cross-jurisdictional comparative study. I found from the results of the fieldwork in China and in England and Wales that the judges shared some common views on some sentencing issues. On the other hand, the differences in sentencing offenders in practice could be explained by the influence of the judicial culture. The judicial culture is significantly important that it needs to be explored by an analysis of the differences between the two jurisdictions, and then a comprehensive meaningful cross-jurisdictional comparison in sentencing may be possible. To do so, a wider framework needs to be employed, in which further factors, such as interdependence between the criminal justice agencies, and political, cultural and contextual factors, are examined.

5.1 Introducing a comparative analysis framework

How do we account for the differences between the two jurisdictions when comparing sentences given the basis of identical case factors? The answer I believe is that if we seek a meaningful methodology for cross-national studies it is necessary to have an approach that avoids overly simplistic accounts. To achieve this, I provided sufficient details so as to give an insight into the ways different judicial cultures respond to the same stimuli material in the previous chapters. However, that information does not seem to be able to explain the different features of sentencing in both China and England and Wales. An explanatory model is set out by Davies, M. *et al* in 2004 in the *British Journal of Criminology*⁹². The model is helpful with regard to comparative analysis

⁹² Davies, Takala and Tyrer, 2004, 'Sentencing burglars and explaining the differences between jurisdictions', in *British Journal of Criminology*, 44, 2004, p.741-758

because it goes beyond the immediate facts and principles of sentencing and judicial practice to incorporate a wider sociological context. The details are presented below.

Comparative Analysis – Key Sentencing Factors for Cross-national Comparative Research⁹³

Sentencing System

- Offence definitions and sentence limitations
- Range of penalties available and their usage
- Sentencing law and guidelines
- Sentencing and penal policy
- Sentence deductions and enhancements: the influence of pre-trial procedures and post trial decisions on sentencing
- Status and experience of the sentencing judges

Judicial Culture: The views of those who make sentencing decisions and the information they regard as salient

- Perceived harm of a specific crime or crime in general
- Balancing the competing objectives of sentencing in practice
- Case specific information on offence, offender and victim
- Perception of the effectiveness and credibility of the options

Criminal Justice System Interdependencies

Inter-agency impact: decisions affecting sentencing made by the non-sentencing agencies

- Impact of law enforcement: front line definers of cases
- Impact of diversion and case screening
- Resources
- Inter-agency trust, co-operation and information systems

Crime and its socio-cultural and political context

- Extent and fear of crime

⁹³ Davies *et al*, 2004, 'Sentencing burglars and explaining the differences between jurisdictions', in *British Journal of Criminology*, 44, 2004, pp.756

- Cultural and political significance of crime
- Interdependencies within the system of formal and informal social control

The above listed factors will shape and influence sentencing decision and help explain the differences between jurisdictions in sentencing practice. I will use this comparative framework and focus on the further sentencing-related matters to make sense of my research findings from my comparative study.

5.2 Differences in sentencing systems

The major legal, judicial, conceptual and contextual socio-political variations are summarised as follows.

Definition of burglary and sentence limitations

In England and Wales burglary is a separate offence. It is defined:

A person is guilty of burglary if he enters a building (or part of a building) as a trespasser with intent to steal, or to inflict grievous bodily harm, or to rape, or to do unlawful damage to the building or anything in it; or alternatively, if having entered the building (or part of a building) as a trespasser he does steal or inflicts grievous bodily harm, no matter what his intentions at the time of entry.⁹⁴

Clearly, to constitute a case of burglary there are two conditions. One is the intention at the time of entering the house but not necessarily completion and the other is completion but not necessarily the intention of entry.

In China, burglary is not a separate crime, but a theft offence with a circumstance of dwelling house. Shortly theft can be defined as 'stealing public or private property.' The definition of a theft offence is given by the legal academics, and it states:

⁹⁴ Section 9 (1) (a) of the Theft Act 1968

A person is guilty of theft if he secretly appropriates property of certain amount of monetary value belonging to another individual or the state with the intention of unlawfully possessing the property, or alternatively, if he secretly appropriates property belonging to another individual or the state many times. (Wang, Liren 1999: 104-106)

There are two distinct forms of theft - one requiring certain amount of monetary value of the stolen property but not necessarily the frequency of stealing and the other requiring the frequency of stealing but not necessarily the value of the stolen property. Both forms require the unlawful intention at the time of the action. Although burglary is not a separate offence in Chinese criminal law, some features of dwelling house theft distinguish it from other theft offences. It has been confirmed in the SPCJISIALDTC 1998. It states that committing three times or more dwelling house theft within a year can be charged for theft offence regardless the total value of the stolen property. It also lists several serious circumstances in theft offences,⁹⁵ in which burglary is included.

In England and Wales, the judges saw burglary as 'an extremely serious crime' (Court B). A judge from Court L stated: 'I regard it as rather a vicious offence...I put it very high up in the league of criminality because it takes determination, it takes nerves...' In China, the judges recognised that some features made burglary more serious than normal theft offences. But compared with other serious crimes, burglary did not seem to be particularly serious, and it regarded as a 'common and ordinary' criminal offence.

The age for criminal responsibility in England and Wales is much lower than that in China. In England and Wales, criminal responsibility starts from the age of ten. In China, no one under the age of 16 can be charged for theft offences including burglary. This might also be a factor relating to sentencing as it means the lower age for criminal responsibility, the more offenders will be charged for theft or any other offences. Of course one factor does not work on

⁹⁵ The provision states: (a) breaking into the building forcefully and causing damage to the private or public property; (b) stealing property from the disabled or old widows and widowers or those who have lost ability to work; (c) causing serious consequences or having serious circumstances

its own. Nonetheless it warns that factors like this should not be ignored when we study sentencing across jurisdictions. Judges in different jurisdictions will be sentencing different types of burglars and this might account for the different sentences given out by the courts.

In China the local basic courts deal with theft cases at the first instance except those involving very serious circumstances for which the offenders deserve the life sentence or death penalty. Burglary cases are normally heard in the local courts, because in the normal circumstances the life sentence is not frequently given for a single case of burglary. The jury system does not exist in China, and the judges decide both conviction and sentencing. In England and Wales, burglary cases are heard in either the magistrates' courts or Crown Court. The magistrates both look into the facts of the offence and make sentencing decision. In Crown Court, jurors decide the facts of the cases and make decisions on whether the defendant is guilty or not, whilst the judges are responsible for sentencing.

In China, the seriousness of the theft offences is determined mainly based on the value of the stolen property. There is a minimum chargeable value of the stolen property, which varies in different provinces. For burglary, the least severe sentence is the fines, and the maximum is the life sentence, which is for only the burglary offences with the extremely serious circumstances. In practice, it is very rare to give to burglars the life sentence.

In England and Wales burglary offences are separated into domestic and non-domestic burglary. Domestic burglary includes burglary and aggravated burglary. Each category has different features. No starting point or minimum sentence is available for burglary, whilst the maximum sentence for dwelling house burglary is 14 years' prison sentence. Current sentencing policies require a three-year mandatory minimum prison sentence for a third-time domestic burglar.⁹⁶ In the focus groups in England and Wales, the judges regarded a four-year prison sentence as a long-term prison sentence for

⁹⁶ S. 111 Powers of the Criminal Courts (Sentencing) Act 2000.

burglars. The reason was that the time of serving the prison sentence would be deducted automatically to half if the prison sentence imposed was not over four years, but for a prison sentence of four years or over, the serving time could only be deduced one third of the prison sentence imposed. In China a four-year prison sentence in China made no difference in terms of the sentencing deduction.

Pre-trial decisions

Judicial activities start prior to trials. Pre-trial decisions may have an impact on sentencing outcomes. Therefore, this factor needs to be looked at when making comparison on sentencing.

Pre-trial detention

In both jurisdictions some defendants of the criminal cases would be detained in custody awaiting the trials. In England and Wales, under Bail Act 1976 the accused, arrested or convicted people are entitled to apply for a release on bail. A Home Office survey shows that 'in 1991, 22% of offenders prosecuted were granted bail by the magistrates, 3% were remanded in custody and 75% were released with no conditions.' (Home Office 1993: 34) Where a bail application is rejected, the accused will be detained in the police custody to wait for the court appearance.

The statistics show that only a few accused are pre-detained in England and Wales. In China, the situation is different. Although the CCLP 1996 allows the defence lawyers to request bail for the accused at the early stage of the criminal justice process, in reality bail applications could hardly be approved for the purpose of public protection, so the majority of defendants would be kept in custody waiting for the trials. It is reported that 'in China, the vast majority of defendants were detained prior to trial (74%), and given a prison sentence upon conviction (84%)' (Lu and Miethe 2002: 272).

In the focus groups conducted in England and Wales the judges said that they would consider pre-trial detention as a sentencing factor for a burglar, for which they might mitigate the sentences. For example, a borderline custody case might result in a community penalty for the pre-trial detention. The reason was that the judges believed 'the time in prison awaiting trial had been sufficient for punitive purposes. When being asked 'a person had been in prison before trial, say, for five or six months, is equivalent to a sentence of 12 months. Do you take that into account', a judge answered 'it's easy to pass a non-custodial sentence if somebody's served his punishment already' (Court G). Another judge explained why the period on bail would be counted. He stated:

I might be able to say well this mans has been on bail but he's had a restriction on his liberty during that period. Suppose for 12 months that he's had a curfew...from lets say 8 o'clock until 7 o'clock, I would say that was a substantial infringement on your liberty over a period of 12 months. (Court I)

Other research on common law jurisdictions concludes that 'pre-trial detention decision has been found to have a major impact on case disposition in the west.' (Clarke and Kurtz: 1983: 476-518) Whilst in China, my research shows that pre-trial detention did not have the same effect on sentencing. Normally pre-trial detention was not considered as a sentencing factor except that the time the defendant was kept in custody could be taken from the custodial sentence he or she subsequently given.

In England and Wales, the time the defendant spent in pre-trial detention would also be automatically deducted from the time the offender would serve if he or she was subsequently given a prison sentence. This deduction also happened in China. But it was slightly different that where an offender was finally given public surveillance rather than a custodial sentence, two days would be reduced from the period of public surveillance for one day he or she spent in pre-trial detention.

Guilty plea

In England and Wales, a 'guilty plea' is particularly significant for offenders especially if they plead guilt at an early sentencing stage. An early guilty plea would result in an automatic sentencing discount. The Criminal Justice and Public Order Act (the CJPO 1994) formalised the plea discount. It states that when the defendants plead guilt the courts 'shall take into account the stage of the proceedings at which he indicated his intention of doing so, and the circumstances in which this indication was given.' In practice, the earlier the defendants plead guilty, the less severe sentences they would receive. A survey shows that 'plea did not appear to influence the decision whether to impose a custodial sentence', but 'it did affect the length of sentence, which was around a third less for those pleading guilty.' (Home Office 1998: 90) In another research, it is found that 'the average reduction where an offender pleaded guilty was 22%.' (Moxon 1988: 32) Walker says that plea 'can also reduce a fine or the hours of community service' (1999: 96). The Magistrates' Association's Sentencing Guidelines in 1997 recommended a one-third of the sentence for a 'timely' plea. The Court of Appeal guideline cases recommend the same discount for guilty plea.

'Guilty plea discounts' do not exist in China. There is no automatic sentencing discount available for a defendant who pleads guilt. If a defendant admits guilt at an early stage he would be recognised to have good attitude which might be considered as a mitigating factor. But whether to take into account in sentencing is under the discretion of the judges. In reality, the judges were willing to see this factor as a mitigating factor in order to encourage defendants to confess the offences they committed.

Different rules dealing with guilty plea leads to different sentencing outcomes in different jurisdictions. Clearly the consequences of a guilty plea directly affected the sentences indicated in the scenario Case 5, in which the offender pleaded guilty. Cross jurisdictional comparisons of sentencing outcomes will be made more difficult because of this difference on decision making in the courts.

Pre-sentence reports in England and Wales

In England and Wales, the pre-sentence reports can be crucial for the sentencing judges. Wasik comments that 'independent reports on offenders are often a vital factor in the sentencing decision. The most frequently encountered reports are pre-sentence reports (PSRs) and medical reports' (Wasik, M. 2001: 77). PSRs are required to be sent to the courts for sentencing purposes.

A pre-sentence report is defined as:

...a report in writing, which: (a) provides a view to assist the court in determining the most suitable method of dealing with an offender, is made or submitted by an appropriate officer, and (b) contains information as to such matters, presented in such as may be prescribed by the Secretary of State.⁹⁷

The PSRs contain detailed information on the defendant, and the judges are required to read the pre-sentence report before they impose a sentence on a particular offender. In the research in England and Wales, some judges said that the PSRs were extremely crucial when determining community sentences. The judges commonly agreed that pre-sentencing reports were very helpful, but they criticised that not every report was of good quality and some reports were not able to provide the sufficient information. As the PSRs are mainly about the circumstances of the offender, we probably may conclude that the judges are required to take into account information on the offender when they make sentencing decisions.

Pre-sentencing reports are not available in China. The judges interviewed believed that they would look at the information on the offender at sentencing stage. This type of information could be found in the case files. However, if it

⁹⁷ S, 162(1) of PCC(S)A 2000

was not available, under the current sentencing framework the judges were not required to find out the information on the offender themselves. In practice, the prosecution and defence representatives would provide relevant information on defendant from each other's point of view. Exceptionally, for theft offenders who were under 18 where the circumstances of an offender were not very clear, the courts might ask the prosecution or defence lawyer to add more details for some facts.

The fines paid prior to trial in China

In China, any defendant who commits a property offence may be encouraged to pay the provisional amount of the fines recommended by the court in advance of the trial. Where an offender has fully paid the provisional fines, the court would mitigate the sentence significantly. Pre-paying the fines is a commonly accepted approach in practice, although it does not exist in the framework. Paying the fines prior to trials seemed to become a guaranteed mitigating factor for the property offenders in China. In the courts of England and Wales, however, the fines are not decided before trials. Therefore, this pre-sentence decision is irrelevant in England and Wales. The enforcement of the fines is mainly a post-sentencing matter.

The sentencing cultural differences we discussed above may result in different sentencing outcomes.

Range of sentences and their application

In China, all sentences are available for burglary except the death penalty. Custodial sentences include criminal detention, fixed term prison sentences and the life sentence. Suspension of the prison sentences is also available, and in practice, it might be applied as an alternative to a non-custodial sentence. The length of the prison sentences in China is mainly based on the monetary value of the stolen property. Non-custodial sentences for burglary include fines and public surveillance. Community sentences are not included in the sentencing options in the Chinese sentencing system.

In England and Wales, all existing sentences are available for normal burglary cases except the life sentence. The CJA 2003 made radical changes on sentencing options. The current sentences for burglary include prison sentences, community sentences, fines, discharges and ancillary orders. A prison sentence may also be suspended.

Under the current sentencing policies in China, the fines should be given to all property offenders including burglars. The fines can be imposed in concurrent manner or independently as a main sentence. In England and Wales the judges chose sentences for burglars from either custodial sentences or community penalties or other sentencing options. Community sentences could have various requirement attached for one offender.

Custodial sentences

In China, the length of a custodial sentence for a theft case is mainly based on the monetary value of the stolen property. According to the law, custodial sentences are included in every available range group of the available sentences. In theory, any theft case sentenced may be given a custodial sentence. However, in practice, not every burglary case would result in a custodial sentence and the reason is that the circumstances of the case are also taken into account by the courts.

Custodial sentences in China include criminal detention and prison sentences. They are different in several aspects, such as the length of the sentence, venue and conditions of serving and the consequences of the sentence. If the value involved in a burglary case was not very high and there are no other serious circumstances in the case, the court may decide the criminal detention is the most appropriate sentence for the burglar. In terms of severity, this type of sentence is seen as between the prison sentences and public surveillance. In practice, criminal detention was used where the offender had no previous convictions and other criminal records, according to my fieldwork. In the case that an offender committed two or more imprisonable offences, a combination

prison sentence would be given by the judges. Consecutive custodial sentences are not available in China.

In England and Wales, monetary value of the stolen property did not seem to be particularly crucial for the judges when they determined sentences for burglars. They tend to make judgments on the seriousness of the burglary cases by looking at the circumstances, especially those recommended in the sentencing guidelines. In England and Wales, the courts were free to choose any sentence from custody sentences, community penalties, fines and discharges for a burglary offence depending on the seriousness of a particular case.

In both jurisdictions, the prison sentences can be suspended. But the conditions for suspension of the prison sentence differ. In China, the judges would suspend a prison sentence for an offender if the following conditions can be satisfied:

- (a) the proposed sentence for the current offender will be not more than a three years' prison sentence;
- (b) the defendant admits guilt and shows remorse
- (c) the circumstances are not serious;
- (d) the offender will not endanger to the public if his or her prison sentence is suspended.⁹⁸

There are other conditions, which ban the courts to suspend the prison sentences for certain offenders. For example, the prison sentence should not be suspended for a Leifan. In practice, first time offenders would have more chances to be suspended the prison sentences if their current offences were not very serious.

In England and Wales, a prison sentence may be possibly suspended where there are 'exceptional circumstances'⁹⁹ In the focus groups, the judges were

⁹⁸ S. 72 of the CCL1997.

⁹⁹ Criminal Justice Act 2003 has added a type of suspended sentences for the offender who is sentenced a prison

not positive with the effectiveness the suspended prison sentence for burglary cases. A Court L judge said that 'I have never understood the rationale of removing those presumably it was because they (suspended prison sentences) were breached so often that more and more people were going to prison.' In the focus groups the suspended prison sentences were not commonly indicated by the judges in England and Wales.

Community sentences and public surveillance

In England and Wales, community sentences are regarded as an intermediate sanction. In the focus groups the English judges said that 'community sentences were sufficiently punitive because they could limit the offenders' freedom.' The judges believed that the advantage of community sentences was that when serving community sentence the offender could still live in their normal life. In the meantime, they were restrained from some activities and that would be punishment for them. Several English judges mentioned that the imposition of community sentences was also a way to reduce the prison population.

Community sentences were not available in China, whilst public surveillance is a non-custodial sentence for offenders who commit minor offences, including minor theft and some burglary cases without serious circumstances. The offenders would stay in community when serving their public surveillance, but their freedom is limited and they are deprived of some political rights. However, the interviews in China show that public surveillance was not frequently applied in practice because the judges thought that it was not properly supervised. The judges criticised that the local police who are responsible for the supervision of public surveillance. Since this had been a problem for many years, in practice the judges tended to use the suspended prison sentences to replace public surveillance. It was arguable whether the offenders were given the most appropriate sentence in term of the seriousness of their offences if

sentence between six to twelve months.

doing so. The judges said that it seemed to be acceptable for the judges and the defendant, victim and public.

Fines and compensation order

In both jurisdictions the judges may order the burglars to pay fines. But the rules regulating the fines are quite different in China and in England and Wales. As to compensation order, it is not available in China, but in England and Wales the judges may impose compensation orders on burglary offenders.

In England and Wales, both magistrates and the Crown Court judges have power to impose the fines. To determine the fines for burglary cases the courts need to look at the seriousness of the offence and importantly, the offender's financial circumstances. In order to obtain information on the financial circumstances of a defendant, the court could make a 'financial circumstances order' and require the defendant providing the relevant information to court. Where an offender is proved not to be able to afford the fines or compensations, the courts do not consider the financial penalties. A Court K judge said 'I've never made one. Where's the money going to come from?' For a burglary case, it did not seem to be often to give the fines or compensation orders to the offenders because as an English judge said 'I have never come across a case where the burglar has had any means which are apparent, which I could attach by way of compensation or a serious sensible fine.' (Court F). Another judge also stated, 'I don't think I ever have made a compensation order in a domestic burglary case, I cannot remember ever doing so' (Court L). A Court F judge said that 'it must be a temptation in a lot of these people to go out and commit crimes to get the money to pay the fines.'

The approach is very different in China for fines cannot be avoided for an offender who commits a property offence. Under the Chinese sentencing framework, imposing the fines is based on the seriousness of the offence, and the size of the fines is calculated according to the monetary value of the stolen property involved regardless of the financial circumstances of the offenders. The judges determine the size of the fines for a particular offender within the

range recommended in the SPC judicial interpretation. Basically the minimum amount of the fines is RMB 1,000 to the double of the monetary value of the stolen property involved in the case. The maximum amount of the fines is RMB 10,000.¹⁰⁰ The judges interviewed said that they were required to impose the fines for all offenders committing property offences, but majority of the defendants would not pay the fines if they were given prison sentences. Some judges doubted about whether it was necessary to impose fines on burglars who could not afford them. But some other judges believed that to impose the fines was actually symbolic and it was for the purpose of denunciation.

Compensation orders are not available for theft offenders in China. Voluntarily paying compensation to the victim could be seen as a mitigating factor, and the judges might take it into consideration. The interviews show that it did play a significant role in sentencing burglary cases.

Other sentences

Deferment of sentence is one of the options in the sentencing system in England and Wales. In the focus groups, a judge said that he would apply deferment of sentence for the purpose of 'keeping an offender out of prison' (Court C). Judge 1 in Court K explained how to apply a deferred sentence:

You only use a deferred sentence if there's specific objective you can set the offender. If the reason for your inability to take a decision is outside his control, you quite clearly can't defer sentence.

In contrast, a Court L judge thought deferment of sentence was not possible for the dwelling house burglary. He said that it could be considered only where there were exceptional circumstances, because '...he is looking at imprisonment. Why defer it?' Deferment of sentence does not exist in China.

Sentencing deductions and enforcement

¹⁰⁰ S. 6 of the SPCJISIALDTC 1998

Sentencing deductions and enforcement may have impact on sentencing decisions for they affect the severity of the sentences. Obviously the judges are aware of the deduction rules and severity of the sentences they would impose when they determine sentences for burglars. Therefore, this factor should be considered when we look at the sentencing outcomes to know what a sentence imposed really means to the offender who receives it.

Sentencing discount and deductions

The rules of sentencing discount and deductions are very different in the two jurisdictions. In England and Wales, the general rule is that a plea of guilt allows the sentence to be reduced by up to 30%¹⁰¹. Sometimes, even half reduction can be possible.¹⁰² In the focus groups, the judges said that they would take into account in what stage of the proceedings the offender indicated an intention to plead guilt.

In China, plea discounts do not exist. Instead, voluntarily confessing to the investigators is a statutory mitigation and it will result a mitigated sentence for the offender, but the law does not make clear how much the discount would be and in practice it is under the judges' discretion.

The conditions meet 'voluntary confession' are quite strict. For example, the defendants must choose to do so before their offences have been discovered or before they have been arrested. In practice, once voluntary confession is confirmed, the court would consider mitigating the sentence for the offender. Normally if the offender is not too serious, the short term prison sentence may be suspended, or a criminal detention may be replaced by public surveillance. In England and Wales, surrendering to the investigators might well be considered as a mitigation factor as well. An English judge said:

¹⁰¹ S.144 of the CJA 2003

¹⁰² S.152 of the PCC(S)A 2000.

I know it never happens...but...if the chap had had gone to the police station and said, 'I'm terribly sorry I've just had an enormous pang of conscience. I broke into this house last night,' and that's how he was caught, then that would make a difference.

According to the deduction rules in England and Wales, a custodial sentence of four years or under will be automatically reduced to at least half. Sentence time served is not as the same as the time imposed. This sentencing deduction rule started from the CJA 1991. Basically, those who are sent on short term custodial sentences (under 12 months) would be automatically released at the 50% stage. It is known as 'automatic conditional release'. Those who are serving prison sentences from one to four years will serve 50% of the time, but after being released, they will be under supervision in the community for the three-quarters time of the prison sentences imposed. This is called automatic conditional release. The offenders sentenced to four years and over, may apply for release after 50% of sentence time. Whether the application can be approved is under the discretion of the Parole Board. Where the application is rejected, the offender will serve a normal prison time of not more than the two-thirds of the sentence imposed. No matter being release at 50% stage or serve normal prison time to two-third stage, the released offenders will have to be supervised in the community after release until the three-quarter stage. In the CJA 2003, the rules of deduction of prison sentences have been amended in accordance with the changes of the imposition of the custodial sentences. (See Appendix 4)

In China, time off is not automatic. Deduction may be given to the offenders who serve relatively long term prison sentences, but whether to deduct prisoners' sentences and how much the sentences to be reduced depend on the offenders' performance in prison and are recommended to the courts by the prison regime. The prison applies the detailed criteria to evaluate the performance of the prisoners. Performing meritorious acts is most influential in sentencing deduction. It is also crucial whether the prisoners obey the rules and how they work and study in prison. Sentencing reduction recommendations for the individual offenders are submitted to the intermediate

courts in the same jurisdiction of the prison. The courts make decisions based on the documentation. Repeatedly disobeying the prison rules or re-offending or being found the discovered crime would lose the opportunity of sentencing deduction. In addition, sentencing deduction is strict for certain types of sentences. For example, for a life sentence or a suspended death penalty, the time which offenders actually serve in prison must not be less than ten years.¹⁰³ In practice, short term, i.e. not more than two years, prison sentences are unlikely to be reduced in length.

As to the rules for parole in China, it says that prisoners who serve more than ten years' prison sentences may be released on parole, but parole is not automatic. An application for parole will not be approved unless the prisoner meets all the requirements and the judges must be satisfied that the offenders would not endanger the public if they are released under a parole. There are some time restrictions for parole and the parole applications can only be made when prisoners have served at least half of their original prison sentence. For offenders serving the life sentence, when applying for parole besides good performance in prison, they must have had been in prison for a minimum ten years. Leifan and those who committed murder, bombing, robbery, rape, kidnapping and other serious violent offences and are sentenced not less than ten years' prison sentences are not qualified a parole.¹⁰⁴

In fact, the sentencing deduction would have significant impact on sentencing outcomes.

Enforcement of sentences

How sentencing achieves its aims depends on the enforcement of the sentences. In both jurisdictions, the judges said that non-custodial sentences were difficult to enforce. In England and Wales, the judges commented that to enforce community sentences and the fines were quite problematic. In China,

¹⁰³ S.78 of the CCL 1997

¹⁰⁴ S.81 of the CCL 1997

public surveillance was regarded as poorly enforced. Collecting the fines was commented to be impossible for the burglars given a prison sentence.

In England and Wales, as far as enforcement of fines is concerned, the magistrates' courts can arrange for the automatic deduction of a fine from the offender's earnings, known as an 'attachment of earnings order' when imposing the fines or following a failure to pay. There are also other methods by which the fines can be enforced.¹⁰⁵ Even though, the surveys show that only '61.0% of fines were collected' and 'the average population of fine defaulters in prison in 1997 was 141' (*Home Office Statistical Bulletin*, 5/98: 6). The rate of collection of fines in all magistrates' courts in England and Wales was 63% in 2000-1 (*Home Office Statistical Bulletin*, 5/01: 5).

In order to enforce fines effectively, the CJA 2003 has made fundamental changes. Firstly the courts are given power to impose unpaid work or curfew requirements on the fine defaulters or may disqualify them from driving.¹⁰⁶ Secondly, the Act requires making sufficient information on the offenders' means available to the magistrates before they determine the size of the fines. Thirdly, there is a policy available in the CJA 2003 which encourages the offenders to pay their fines promptly.¹⁰⁷ The fines are allowed to be taken by the fine officers automatically from an offenders' pay and their other possible incomes.

The practical methods for enforcing fines are left blank in the Chinese criminal law. So collecting fines is extremely difficult, especially in theft cases in which the offenders tend to be in poor financial circumstances. On the other hand, in practice, the fines can be easily enforced from the offenders who choose to pay the fines prior to the trials. Those defendants would even borrow money to pay full amount of the fines to have their sentences mitigated. However, for

¹⁰⁵ The main methods include: attachment of earning, distress warrants, deduction of benefit and curfew with electronic monitoring. Most seriously a prison sentence could be the ultimate sanction for failure of paying the fines.

¹⁰⁶ S. 300 and 301 of the CJA 2003.

¹⁰⁷ It is stated that the discounts of up to 50% would be given to those who pay the fines promptly in the courts. The policy also allows aggravating the amount of the fines, and where the offenders fail to pay promptly their fines could be increased by up to 50%.

most theft offenders, the fines imposed are meaningless because they cannot afford to pay. Judge 23 said that 'most burglars have no income and no savings, how could they have money to pay the fines?' Admittedly, there are a few theft offenders who can afford to pay the fines but refuse to do so if they receive the prison sentences. Judge 49 said that 'where an offender is given a prison sentence, to collect the fines from him is almost impossible even if you know he can afford.' In China it is lack of a system to discover people's income and assets, the courts cannot enforce the fines if the offenders claim they have no money to pay. Some judges said that the fines for most theft offender were only the figures on the summary judgments and they could never be collected.

In England and Wales, it was not unusual that the offenders failed to comply with the community sentences, according to the judges took part in the focus groups. By law prison sentences are available for non-compliance with community sentences. In the CJA 2003, a new method is introduced to deal with failure to comply with the requirements ordered for the community sentences. It states that for the minor breaches a formal warning procedure is available, and for the further non-compliance with the requirements the cases would be brought back to the courts. The courts may either add more requirements to the community sentences or send the offenders into prison according to the circumstances of the breach.

In China, to enforce public surveillance has been a problem for many years. The interviews show that public surveillance was not frequently applied by the judges. The reason was due to 'poor enforcement' (Judge 59). Judge 24 stated:

Public surveillance is hardly applied. Since I started to work in this court from 1999, I have never applied it to a burglar. In the scenarios, public surveillance may be appropriate for the burglars in Case 1 and Case 5, but I would not choose it in reality because you know nobody is going to supervise them.

The reason I have discussed the enforcement of sentences is because it might

have an impact on sentencing. The judges may choose or may not choose certain types of sentences depending on whether they can be enforced in practice. Also the public may trust or lose their confidence with the criminal justice system by looking at whether the sentences imposed can be properly enforced. Their responses may have influence on the sentencers. Therefore, enforcement of sentences is relevant to sentencing.

Sentencing law and guidelines

The law defines offences and provides sentence options for the judges. It is, however, the individual judges who interpret the law and make the sentencing decisions in practice. To understand law and pass the most appropriate sentences to offenders the judges need some aids. In practice, the sentencing framework, policies and guidelines help them apply the law accurately and choose the justified sentences for offenders.

Pursuing consistency in sentencing is the task of the criminal justice systems of all civilised jurisdictions. In England and Wales, in order to promote consistent sentencing since the 1960s the Magistrates' Association has been working on the Magistrates' Courts Sentencing Guidelines which are voluntary sentencing guidelines for cases that are dealt with in magistrates' courts. Gradually, the starting points set in the magistrates' courts guidelines have been using in various offences. The guidelines have had several editions, in which the serious offences are included, such as burglary. The latest edition of the sentencing guidelines was issued in 2004, which covers all offence categories that fall in the magistrates' courts now, and it has been adopted by most magistrates' courts.

In England and Wales, the Court of Appeal issues sentencing guidelines on a wide range of offences. The Court of Appeal guidelines provide criteria for the judges to determine the seriousness of the cases, and they provide also guidance to assist the judges to determine sentences. However, the limitation of the Court of Appeal sentencing guidelines is that they are not available for all cases. The Court of Appeal sentencing guidelines are issued for only the

more serious offences, such as burglary, fraud, causing death by dangerous driving, and other serious cases set out by Parliament. Also the Court of Appeal issues guidelines only where it believes the guidelines to be necessary to the cases brought before it. The judges and magistrates are required to follow the Court of Appeal guidelines. If they choose not to follow the guidelines, the defence will appeal against the sentence. As to the existing the Court of Appeal sentencing guidelines, Ashworth comments:

(The guidelines) remain clustered around the serious offences that attract substantial prison sentences and do not address the high-volume offences, notably burglary, theft, deception, and handling stolen goods that constitute the courts' volume business. (2001: 101)

The difficulty with application of the guidelines is that even similar cases may have different circumstances, and they cannot be dealt with alike. The variations of the criminal cases make 'treat like cases alike' impossible, which is what the sentencing guidelines advocate to achieve.

The significance of the sentencing guidelines was affirmed in the Halliday Report, White Paper 2002 and the CJA 2003. Halliday Report states:

The guidelines would 'specify graded levels of seriousness of offence, presumptive 'entry points' of sentences severity in relation to each level of severity, how severity of sentence should increase in relation to numbers and types of prior conviction, and other possible grounds for aggravation and mitigation.' (Home Office 2001: vii)

Prior to the CJA 2003 it was the Sentencing Advisory Panel (SAP) that submitted its advice to the Court of Appeal who issue guidelines to the suitable case brought before it. The SAP's advice was influential, and in fact Court of Appeal had issued many of its guidelines based on the SAP's advice. For example, adopted SAP's advice, the Court issued sentencing guidelines in *Mashaollahi [2001] 1 Cr App R (S) 330* for importation and possession of Opium, in *Millberry and others [2003] 1 Cr App R (S) 396* for crime of rape and

in McInerney and Keating [2002] EWCA Crim 3003 on 9 for domestic burglary. Under the CJA 2003, Sentencing Guideline Council (SGC) came into effect in April 2004. SGC makes sentencing guidelines and SAP still exists, and its new role is to do research on sentencing and provide proposals of sentencing guidelines to SGC.

In the past, the sentencing guidelines were only recommendations to the courts. Wasik says that 'there is little or no research evidence of their (the sentencing guidelines') effectiveness in enhancing consistency' (Wasik 2001: 3). However, in the CJA 2003, the sentencing guidelines are expected to be an effective approach for establishing the factors to be covered as aggravating and mitigating and proportionality. It is believed that the guidelines help identify the relevant penal aims with respect to different types of crimes and offenders and promote consistency in sentencing.

In China, sentencing guidelines are new to the judges. In the pilot study in mid-2002, only 9% of the judges interviewed had heard of the sentencing guidelines in the USA, whilst in the main research, 58 out of 61 judges were able to comment on the sentencing guidelines. From mid-2003 to late 2004, several courts in Jiangsu Province started to draft their own sentencing guidelines, and it was encouraged by the Jiangsu High Court. In October 2004, Jiangsu High Court issued their sentencing guidelines to all courts in that province and the judges are required to sentence offenders following the guidelines. My research shows that pursuing consistency in sentencing became an issue of sentencing in China. Nonetheless it is notable that sentencing guidelines are still being discussed in China, and they are not identical with the sentencing guidelines in England and Wales in terms of formality, authority, details and the quality of drafting.

In the focus groups, the English judges commented on the sentencing guidelines. They commonly said that the guidelines were useful. A judge stated that 'the guideline cases are extremely helpful because they have gathered together a whole range of cases rather than dealing with each of them individually, which could result in inconsistency in sentencing' (Court C).

Another judge said that the sentencing guidelines would be very helpful for the newly appointed judges, and the part-time judges. He said ‘...sentencing guidelines were helpful when dealing with burglary cases, particularly where the part-timers i.e. recorder or assistant recorder are concerned. And this is the sort of cases which a part-timer might well be given...’ (Court D)

Two judges pointed out that the judges should not be bound by the guidelines for different reasons. A judge said that ‘...I certainly don’t want to be put in a straitjacket by the Court of Appeal guidelines’ (Court B). Another judge stated:

Sentencing is a discretionary art and, unless you’re able to meet the real merits of every case, then you get *ipso facto* injustice. You cannot be seen to be dealing with two people committing identical offences with such a huge discrepancy between them as you get when you get a fixed minimum’, and ‘sentencing generally is a matter is a matter of instinct, of experience and I don’t think guidelines, past that they’re instructive in the general sense, I don’t think they are particularly terribly helpful. I think they’re as advanced as we would want. (Court I)

A few judges in England and Wales were sceptical about the benefit of the sentencing guidelines. A Court D judge said that ‘I don’t think the guidelines are particularly helpful or necessary with burglary.’ A judge from Court H said that ‘one can remember them, but as to trying to fix tariffs I don’t think that would work...I don’t see how you could cram enough facts into a typical tariff to say it is in this band or that band...’

In China the judges expressed doubts about the possibility of making a version of all-use sentencing guidelines. A judge said that China was such a big country and different areas had different social and economic circumstances. Therefore, to make sentencing guidelines which could be applied everywhere in the country was not practical. Similarly, an English judge said that the regional differences might be a problem for making sentencing guidelines that were too strict. (Court H)

Status and experience of the judges

Sentencing law and policies are interpreted in practice to result in a sentencing disposal by the sentencing judges. How the judges interpret the law and policies varies from the judges in different countries and also from judge to judge in the same jurisdiction. With different educational background, methods of appointment, status, roles and professional disciplines, 'judges', as a concept, is not identical in different jurisdictions. Our research shows that the status and roles of the judges were quite different in China and in England and Wales.

Status of the judges

It is well known that the judges have high status in England and Wales. In Ashworth's view, English senior judges are influential, politically powerful and jealous of their prerogatives. He states that the past three decades have seen an increasingly powerful judicial presence in public debates over sentencing policy (Ashworth, A. 2001: 76). Tony also comments on the power of the judges in England and Wales:

No system of guidelines can succeed unless prevailing judicial sentiment is kindly disposed...If judges do not see guidelines as principled and sensible and a reasonable accommodation of competing values and goals, they will be seen as an illegitimate intrusion on judicial discretion and as a source of unjust outcomes. (2002: 100)

With common law tradition, all judges in England and Wales are chosen from senior practising lawyers, mainly from barristers. Stevens states that 'England today has a remarkably competent judiciary, marked by a bench the overwhelming majority of whose members are gracious, scholarly, imaginative, and fair compared with the 1950s' (2002:38). Although this comment is criticised as an 'over-generalisation' by David Fraser, it is commonly accepted that the English judges are selected from the successful lawyers who regard

being judges as the high point of their career. They are part of the elite of society and have a high status and reputation. Whitty, N. *et al* believe that the role of judges in a democracy has been a central element of jurisprudential and political concern (2001: 39). Common law tradition requires the judges to have certain distinctive skills, such as, theoretical background to understand the legal principles, research skills and practical judicial skills to work out precedent and sentence the current cases. This is quite different from the jurisdictions with the civil law tradition, such as China, where the candidates are trained to be the judges as a career.

The judges in China are professional career judges. According to the Judges' Law 1995 (the JL1995), the candidates must have both legal educational background and legal professional experience before they are qualified to become judges. The JL1995 all candidates must also pass the China National Judicial Examinations¹⁰⁸ and have worked in the courts for at least two years.¹⁰⁹ Those candidates who hold postgraduate degrees must have worked in the courts for at least one year before they are qualified to be judges.

Compared with the judges in England and Wales, Chinese judges are relatively young. Majority of the judges in China are at the ages between thirty and fifty. Due to historical reasons, the capabilities of the current Chinese judges vary. There are judges who have profound legal knowledge and very experienced, but a few judges who was not able to deal with cases properly.

The latest figure from the Supreme People's Court shows that 'there are 30,000 senior judges and 180,000 ordinary judges in the PRC currently' (Liu, Lan: 23 March 2002). The capacity of the existing judges improves but problems remain. It is reported:

In Shanxi Province, there were 2,108 judges who had Bachelor's degrees in all different subjects, which was 25% of the total existing

¹⁰⁸ It is now known as the China National Judicial Examination (the CNJE).

¹⁰⁹ Article 9 in The Judges Law 1995 (Amended in 2001)

judges in the province. Only 1,763 judges had Bachelor's degrees in law. There were 29 local basic courts where none of the existing judges who had a degree in law. (Yi, Tong: *Sanqin City Press*, 31 January 2002)

In Sichuan Province, there were 1,908 candidates from the courts took part in the China National Judicial Examination in 2002. Only 105 of them had passed the exam. Most of the candidates who passed the CNJE were from the courts in the economy developed areas (Zhang, Jiankui: *People's Court Press*, 11 January 2003).

In recent years the government has made a series of policies to encourage those incompetent personnel to leave the position as the active judges. One policy allows the judges who have worked in the courts for 20 years or more to retire earlier than the official age of retiring. After early retirement, those judges will be fully paid as the same amount as they would receive if they continued working as judges. They have the same welfare as the current judges as well. Commonly the retiring age is suggested as 55, and in some areas the recommended age is 50 or even under. In one area the judges are allowed to retire at 40. The judges who choose the early retirement may work as legal counsellors or provide other legal services. Two years after their retirement, the previous judges may work as qualified lawyers. In terms of financial benefit, they will be much better off than active judges. For this reason many judges have chosen to retire early, including some heads of criminal division, chief judges and other experienced judges. It is commented as 'wasteful' and 'regretful' by the legal academics.

As civil servants, Chinese judges must follow the CCP and political policies strictly, and they are required also to be politically sensitive. In this sense, the Chinese judges may not be as independent as the judges in England and Wales.

Experience of the judges

The research in these two jurisdictions shows that the experience of the sentencing judges played a significant role in sentencing. An English judge said that judicial experience was 'an extremely important factor in the way we approach sentencing' (Court E). Another judge in the same court stated that 'we have this twenty or thirty years, or whatever it is, of experience, we instinctively should know the range within which we were working so far as sentences are concerned.' A Chinese judge said:

After working as a judge for many years, a sentence might automatically come to my mind after firstly reading through the case files. Strangely the sentence came from the first impression would not be far from the real sentencing decision after the trials. (Judge 42)

An English judge described the similar experience as 'immediate stock reaction' (Court E).

In China, Judge 33 said that 'the law was not always sufficient detailed. Hence the judges' judicial experience is essential.' Another Chinese judge stated that 'not all the factors are necessary to be reflected in sentencing decisions. Your experience tells you what is relevant and what is not. We have rules in our mind' (Judge 34). An English judge stated the similar view:

...over a period of time subconsciously you have built up in your own mind a tariff as to what a particular set of circumstances will attract by way of sentence. I think we have built it up all our professional lives right from the start from the first day we did a criminal case and now we are passing sentences ourselves... (Court F)

The judges in both jurisdictions believed that group discussion was an excellent way for the judges to exchange their judicial experience and learn from others. The Chinese judges said that they exchanged their experience in training courses, weekly professional discussions and even most casual occasions. In England and Wales, the judges said that they discussed

sentencing issues in the judicial seminars and they exchanged the judicial experience also during coffee break and at lunch time.

From the issues discussed above I may conclude that there are system and cultural differences in the two different jurisdictions. However, the methodology I applied provided an empirical basis to compare issues of sentencing i.e. how the judges sentence burglars in China and England and Wales, but does not explain and provide an explanation of the research findings.

When discussing a cross-national study on civil law issues Dale says: ‘...it is also important that this study should answer the challenge, sometimes thrown down to compare like with like, and meet the challenge...’ (1977: preface) Dale warns that simplistic comparison should be avoided in research about criminal law which crosses national boundaries.

I have discussed the system and cultural differences in sentencing in the two jurisdictions, and I think that sentencing is influenced by many factors in the criminal justice systems and therefore a wide-ranging analysis of the socio-cultural and political context is inevitable when exploring different sentencing practice across jurisdictions. Dikötter states in his research on prison reform in China:

A comparative approach to the history of the prison highlights the extent to which common knowledge is appropriated and transformed by very distinct local styles of expression dependent on the political, economic, social and cultural variables of particular institutions and social inculturation, rather than acculturation, characterises a modernity that is inflected in a multiplicity of ways by different elites. (2002: 241)

In Dikötter’s view, local appropriation of global ideas is essential when transferring policies cross national boundaries. In the comparative research on the criminal justice or sentencing issues, it is also crucial to know the social and political circumstances of the jurisdictions compared.

It is obvious that the cross-national sentencing comparison should take into account of the differences in the sentencing systems and sentencing cultures. Besides, other factors in the process of dealing with offenders will also have impact on sentencing. These factors, as Davies *et al* suggested, include the influence of the police as the front line definers of cases, diversion and case screening systems, resources features and inter-agency trust, co-operation and information systems. Moreover, we cannot compare sentencing or the criminal justice systems in different jurisdictions without an understanding of their political, social and cultural context. Public and government concern about crime may be relevant by influencing the sentencers' judgment on the seriousness of an offence or offences in general. The social and political significance of crime and different mechanisms of social control are also influential for the same reason. There are, in fact, many factors should be looked at in order to make a meaningful comparison across jurisdictions.

5.3 Criminal justice system interdependencies

A law breaking action may be seen differently in different jurisdictions. An unlawful action may be regarded as a serious criminal offence in one society but it may not be seen to deserve a criminal sanction in another. Therefore, some unlawful actions will be charged and sentences in one jurisdiction but they could be filtered out in another one. The front line definers of crime play a crucial role in this sense.

Impact of law enforcement: front line definers of cases

The numbers of offences people report to the criminal justice agencies should be considered because they may have direct effects on the numbers of the offences charged by the police, prosecuted by the prosecution and sentenced by the courts. In a society for whichever reasons people choose report or not to report the small cases, there would be different numbers of the criminal cases which are brought to the courts. As a result, in a society people report criminal cases excluding those minor ones, the courts would deal with the

relatively serious criminal offences. It would appear that in that society sentencing tends to be harsh. It is an illustration of how a simplistic comparison may result from. Therefore, we should look at all relevant factors which may relate to sentencing.

There are different reasons which may influence the public to choose to report certain offences or not. The reason can be social, for example the public may think it is useless to report the crimes because they lack confidence with the criminal justice system. Or it can be traditional and cultural, i.e. one unlawfully action is a criminal offence in one society but not in another. British Crime Survey (BCS) shows:

A substantial proportion of crimes are not reported to the police, but amongst all crimes, burglary is relatively well reported. The 1998 BCS estimated that four-fifths of burglaries with entry and almost a half of attempts were reported to the police. (Home Office 1999: 29-30)

According to BCS 2001/2, 415,000 burglary cases were recorded, and the percentage of BCS crimes reported to the police is 51%. (Home Office 2002a: Appendix 1) In China the official statistics regarding the numbers of the criminal cases reported annually are not available. But it is well known in China people do not tend to report burglary cases if the monetary value of the stolen property is relatively low. The reason is that in China the seriousness of the property cases, including burglary, is considered based on the monetary value involved. People are aware of that where the value of stolen property is not high enough, the police would not be willing to deal with the case. Therefore, reporting the case becomes unnecessary.

Not only the numbers of the criminal case which are brought to the court may be estimated according to the numbers of the cases reported, but also how people perceive the seriousness of the crime and how confident they are with the law enforcement in the criminal justice system may also be found out from these numbers. 'Front line definers of cases' is not a sentencing factor, but it is

a factor relating to sentencing that it determines the cases that potentially go on to be sentenced.

Even if a law-breaking action has been reported, it is not always brought into the court to sentence. Other possibilities may filter out the cases before they are taken to the courts. Therefore, further we need look at how many reported law-breaking actions are officially recorded as criminal offences and how many offenders are actually prosecuted. This is what we mean diversion and case screening. We need to look at this factor because it may also stop some criminal cases being brought into the courts.

Impact of diversion and case screening

The first possibility of diverting cases is related to the police. The police may not identify an unlawful action as a criminal offence. If so the law breaker will not be brought in the criminal proceeding. The offenders may escape from the criminal proceeding also if the police fail to detect the offence or capture the offenders. The Detective Bureau of Justice of Public Security reports that only about 20% theft cases can be detected in China annually (Zhu, Haili 2001). Diversion and case screening may occur in prosecution. Cases may be discharged or exempted from prosecution because they are not seen as serious enough to deserve criminal sanctions.

Diversion and case screening which may affect the number and nature of the cases brought to the courts. The nature, i.e. seriousness, of the offence would have direct impact on sentencing decision. The number of the cases may affect the features of sentencing practice in a jurisdiction.

In England and Wales the purpose of case diversion is said to avoid putting certain types of defendants before the court. Under the current diversion system, case diversion is operated by the police and the CPS. The police have power of cautioning, after which the minor criminal offences may be terminated. The prosecution may discontinue the cases which are regarded as minor, and it filters out some cases to be 'public interest' which may otherwise be brought

into the courts. The youth offenders are the focus of the current diversion system.

In other common law jurisdictions, case screening and diverting seem also to draw people's attention. In some states of the US, such as Florida, early intervention is promoted in the processing of criminal cases in order to divert the offenders who are accused for minor crimes from an initial period of pre-trial detention and the later involvement in the criminal justice system.

In China, before a criminal case is brought to the court, it may be diverted and screened and then dropped. With regard to burglary cases, since the monetary value of the stolen property is the key factor for both conviction and sentencing, it is firstly examined by the criminal justice agencies. A burglary case may be diverted if it was reported with low minimum chargeable value of the stolen property. The police may terminate a case if they think it is minor. In China, prosecution may have right to exempt an unlawful action for it is not serious enough to be prosecuted.

Once a case has been diverted or screened out from the criminal procedure, it may be punished in different ways which are regulated in certain rules or disciplines. In China, the local police deal with the minor criminal offences and other law breaking actions diverted or screened out from the criminal proceedings. They impose the administrative sanctions to the law breakers.

It is clear that diversion and case screening will have impact on sentencing. When analysing the features of sentencing practice, how criminal cases are diverted and screened at the early stage of the criminal proceeding should be analysed.

Resources

Resources refer to the expenditure on public security and criminal justice. Broadly considering, they are relevant to sentencing because how much resources put on policing, staff training, criminal investigation and other

aspects of criminal justice system may affect the number of the offences. Again, they may influence sentencing outcome.

In England and Wales *Home Office Annual Report* shows that from 1992 to 1999 the expenditure on the main criminal justice institutions had been increasing. For example, in 1998-99, police authorities were able to spend £258 million more than in 1997-98. This represented a 3.7% increase in spending capacity for all police authorities (Home Office Annual Report 1998-1999). Increasing resources for the police was for an effective public order control in the society. It is thought may affect the number of the cases dealt with by the police and then the number of the cases brought to the courts for sentencing.

The resources for probation and criminal policy were £474 million in 1996-1997, £486 million in 1997-1998 and £495 million in 1998-1999 (<http://www.homeoffice.gov.uk/docs/hoar.html>). It is commented that the increasing budgets supported the improvement of the performance and quality of the probation service. Thinking broadly, good supervision and effective enforcement of sentences may encourage the judges to apply more community sentences in practice.

With the rise in the prison population, the total expenditure increased on prison service by 1.1% in 1996-97. During 1996-97 the prison service had made available to it additional funding of £34 million to complete implementation of security improvements and £86 million towards the additional costs of accommodating the rising prison population...(Home Office Annual Report 1998-1999) Increasing sources in prison service might enhance the operation of the prison service. Possibly, the improvement in prison service may persuade those judges who concern about prison population to continue using prison sentences.

As China is a developing country with large population, the resources the government put into the criminal justice system in ratio could not be as much as that of England and Wales. It is commented that with the limited resources,

it is common that the local police stations are short of staff. It then results in that public surveillance cannot be supervised properly.

The courts also have problems with the resources. In China the local government authorities control the budget plans for the courts. The courts cannot be completely independent because they do not have independence resources directly from the central government. All these resource-related problems may influence sentencing significantly.

Inter-agency trust, cooperation and information systems

The criminal justice system comprises the crime-related work of different criminal justice departments, agencies and services. In England and Wales the criminal justice agencies include police, Crown Prosecution Service, probation services, courts, publicly funded criminal defence services and prison service. In China, the governmental criminal justice agencies are police, prosecution institutions, courts, prisons and state owned defence services. All of these departments and agencies work together to create a justice system as a whole.

The focus groups conducted in England and Wales show that the case specific information was essential for the judges who dealt with a particular burglary offence. In some cases, information on the offender could be extremely influential. Therefore, the exchange information between different criminal justice agencies was crucial. On the other hand, in England and Wales, the adversarial system does not require the collaboration and cooperation between different criminal justice agencies. It is believed that the system is not designed to achieve common collaboration. Davies states:

Police-prosecution agencies have common goals and these agencies cooperate to achieve such goals. Criminal defence agencies (and the private criminal defence bar) and the courts do not cooperate to achieve common goals with the prosecution-police agencies, other

than to follow the procedures of the courts in the prosecution of criminal defendants. (Davies, M. 1993: 60-1)

To what extent the co-operation and exchange of information may go to depends on the circumstances in the individual cases.

In China the judges pointed out that there was not sufficient information exchange between different criminal justice agencies. Under the Chinese system, different criminal justice agencies are authorised by different central government departments. Each of these departments has separate information system, and between the departments, traditionally the information is not transferable.

With regard to co-operation between the criminal justice agencies in China, it did not seem to be a problem. The judges commented that in fact, the criminal justice system had already benefited from its agencies' cooperation. The example was the Yanda campaigns, in which all criminal justice agencies worked closely in order to attack the targeted offences harshly and quickly as required. The judges said that in Yanda the whole system worked sufficiently and effectively. According to a survey in 2001 and 2002, over 80% of the respondents said that the Yanda campaign had relatively good, good or very good effects. The details are showed on Table 5.1.

**Table 5.1 Public's comments on the effectiveness of Yanda campaign¹¹⁰
(2001-2002)**

Public's views	2001		2002	
	No.	%	No.	%
Very good effects	10424	10.3	9494	9.3
Good effects	43942	43.5	42261	41.4
Relatively good effects	28412	28.1	28882	28.3
No effects	3911	3.9	4052	4.0
Unknown	14396	14.2	17299	17.0

¹¹⁰ This information is from China Bureau of Statistics Report about National Survey on Public's Sense of Security in the Society, and the table is made by the writer.

The judges commonly agreed that if all agencies worked closely with each other, the system might be efficient. On the other hand, the judges criticised that the courts were too close to the prosecution. Sometimes it made the individual judges feel awkward because they exercised their judicial power in the meantime they had to maintain the relationship with the prosecutors.

Historically in China, the courts shared some functions with the prosecution. The judges were required to investigate the facts of the offences and help prove guilt of the defendants in trials. Although under the new system from 1996, the judges' role have been completely changed and made, some old ideas remain, and the close relationship between the courts and prosecution institutions is kept as usual. In China, it is common that the local courts and prosecution institutions are next to each other. In some small cities and town they may share the same buildings as offices. At a personal level, judges and prosecutors are familiar with each other. Both groups are civil servants, and both are required to pass the CNJE to be qualified. Therefore it is not unusual that some judges and prosecutors in the same cities knew each other from long time ago, and some of them keep good personal relationship. Under current trial mode, the coalition between the judges and prosecution is not necessary. But in reality, the judges still work closely with the prosecutors. In some areas it is reported that they try to help the prosecutors 'win' cases. Obviously this factor would have influence on sentencing.

5.4 Crime and its socio-cultural and political context

With different social circumstances and in different political environment, in different society the government responses to crime may not be identical. Neither may the public responses. This factor may influence the judges to perceive the seriousness of a particular crime and crime in general. Ultimately it results in different sentencing outcomes.

The relationship between the political and judicial system is a matter of inquiry. In some jurisdictions, the judges may be required to take into account the political policies of the government. More broadly, political influence may have

an impact on people's mind with regard to criminal issues. The broader political culture is also likely to influence individual judges' perceptions of the seriousness of offences. The political-judicial relationship will vary between jurisdictions. Hence, sentencing issues cannot be discussed without a consideration of the political and socio-cultural context of societies.

Risk, extent and fear of crime

We find that how the public are in fear of being a victim is worth discussing because the more people are in fear of a particular crime the more serious the offence is regarded to be. In the same society, the judiciary may sense of this, and respond it in sentencing activities. Therefore, public's responses to the crimes may have impact on sentencing outcomes.

In China, where a particular offence is frequently reported, it will draw the attention of the government. When it is getting serious, it will be the targeted offence in the Yanda campaign. As introduced previously, during the campaign, the criminal procedure would be simplified. Under the 'quickly and harshly attacking' policy of the campaign, the sentences must be aggravated for all offenders who commit the targeted offences. Practically the mitigating factors are normally ignored in Yanda campaign. Therefore, sentencing outcomes may be very different from normal.

The China Bureau of Statistics Survey (CBSS) asked respondents if they were worried about being burgled. 63.5% of the respondents said they were worried in 2001 and it was 60.5% in 2002. It was explained that the figure came down because an anti-burglary Yanda Campaign was launched in late 2001 and early 2002 across China after a decision was made in the 2001 the CNC Regarding the Public Security Issues. In that campaign burglary was targeted as one of the three serious offences which badly disturbed public security. (See Appendix 5)

In CBSS 2003, the respondents were asked how they felt about the situation of different types of the offences in the society. 16.34% of the respondents said

burglary was fairly serious in their area, 11.92% for robbery, 13.82% for youth offence, 16.46% for offence committed from between cities, 24.53% for gambling, 12.89% for making and trafficking indecent publications and prostitution and 15.49% for making and selling fake and bad quality products. The following Table 5.2 shows the details.

Table 5.2 How the public felt about the situation of various crimes in China¹¹¹

Offences	Not serious		Ok		Serious		Unknown	
	No.	%	No.	%	No.	%	No.	%
Burglary	43779	41.09	33284	31.24	17414	16.34	12080	11.34
Robbery	48073	45.11	27871	26.16	12703	11.92	17910	16.81
Youth offences	42883	40.24	29568	27.75	14729	13.82	19377	18.18
Offence committed by the offenders from other areas	35114	32.95	25691	24.11	17541	16.46	28211	26.48
Drug taking and trafficking	37431	35.13	16744	15.71	9867	9.26	42515	39.9
Hooligan and gang offences	36990	34.71	23242	21.81	11146	10.46	35179	33.01
Gambling	28730	26.96	36016	33.8	16134	24.53	15677	14.71
Making and trafficking indecent publications Prostitution and visiting prostitutes	33199	31.16	21700	20.36	13732	12.89	37926	35.59
Making and selling fake or bad quality products	33033	31.0	21782	20.44	16505	15.49	35237	33.07
Forcing to sell or buy, or bully others in the industry	42852	40.22	23915	22.44	7462	7.0	32328	30.34

In England and Wales, the British Crime Survey (BCS) statistics show that in 2001, 52% of the respondents said they were very worried or fairly worried about burglary, in contrast to 41% for mugging, 40% for physical attacking, 16% to racially motivated assault, 32% for being insulted or pestered in public

¹¹¹ Source: from the CBSS 2003, and table is made by the writer. (See Appendix 5)

place and 45% for rape. There were not many changes of the rates in 2002 (Simmons *et al* 2002 Table 9.03).

Table 5.3 How people worried about crime 2001-2002 in England and Wales¹¹²

Offences	Very worried (%)		Fairly worried (%)		Not very worried (%)		Not at all worried (%)	
	2001	2002	2001	2002	2001	2002	2001	2002
Burglary	16	15	36	36	37	38	11	11
Mugging	15	15	26	26	42	42	17	18
Physical attack	16	15	24	24	39	38	21	22
Racially motivated assault	7	7	9	9	29	29	55	55
Being insulted or pestered in public places	9	9	23	22	41	41	27	28
Rape (women only)	27	25	18	20	35	34	21	22
Theft of a car	18	17	34	34	35	36	13	14
Theft from a car	16	15	35	34	36	37	14	15

With regard to victim assessment of seriousness of various crimes, in another BCS survey the participants were asked to place the incident on a scale ranging from 0 to 20.0 presented the most minor offences, and '20' was marked to the most serious crime. In 2001-2002, burglary was marked as 8.1, which was the highest score within property offences. In the same year, common assault was marked as 6.3, wounding was 10.0, robbery was 9.1 and mugging was 8.7 (Simmons *et al* 2002: Table 2.03).

Although in China the comparable figures of victim assessment of seriousness of the crimes are not available. From the statistics from the two jurisdictions

¹¹² Source: Simmons, J. *et al* 2002 Table 9.03.

showed above, we may have a rough idea about the situations of crime in China and in England and Wales. They were not identical and the statistics show that burglary was a major concern in England and Wales. It was also the public's concern in China, but also other offences were focused upon. Obviously, the courts in the two jurisdictions may balance all crimes in the society and respond to this particular offence differently.

Not only does a particular crime influence the courts with regard to sentencing, but also the situation of crime in general may have an impact. CBSS 2003 shows 35.4% of the respondents said that they regarded criminal offences as serious, and 33.33% of them were worried about the situation of the public security. A survey in England and Wales in 2001/02 shows that 37% of the respondents commented that crime affected their quality of life in a moderate or great degree. (Simmons *et al* 2002: 88 - Table 9b) Obviously, where the judiciary feel the situation is serious, it is their duty to take actions to respond to this to achieve the aims of sentencing. Crime situations vary in different jurisdictions, sentencing may not be the same focuses accordingly.

Cultural and political significance of crime

The previous discussion has showed that with different social, cultural and political characteristics, the courts perceive the harm of a particular offence from different angles in different jurisdictions. Attitudes towards the prevalence and seriousness of particular crimes might be one influence on a local or national response, which would include sentencing matters.

The statistics show that crime is a major political concern in both China and England and Wales. It is reported that in China more than 2,000,000 theft cases are charged every year, which is about 70% out of all charged criminal cases (Zhu 2001). In CBSS 16.46% of the respondents thought that the situation of the offences committed by the offenders from outside their local areas was serious. People were very worried about being the victims of burglary (See Appendix 5). In response to this, the government launched

campaigns to attack this particular offence in certain areas and across the country.

Good public order and crime control are major government responsibilities. With different traditions and social and political circumstances to what extent it is concerned and which particular crime is the focus of the criminal justice systems vary in different jurisdictions. For example, gambling is a criminal offence in China. In 2003, the situation of gambling was commented to be very serious according to CBSS (See Appendix 5). Differently in England and Wales it is permitted although regulated by law. Similarly drinking-and-driving is a quite serious criminal offence in Britain, whilst in China it is only an infringement of traffic administration rules, as long as there is no personal injury or the death involved. Cultural and political significance of crime would have impact on sentencing outcomes.

Interdependencies within the system

Different jurisdictions have their own mechanism of social control, which can be formal and informal. There is interaction between formal and informal social control because where more anti-social behaviour is dealt with by the informal approaches of social control, less is likely to be brought to formal procedures, and vice versa. Informal social control is close to the front line filters therefore it is a sentencing related factor, whilst formal social control may involve diversion and case screening and it includes sentencing itself. Therefore it is relevant.

In order to discuss interdependencies within the system of formal and informal social control between the two jurisdictions, it is necessary to introduce the features of Chinese social control system as background.

Informal public security control in China

In China, informal public security control includes the work unit control and neighbourhood committee control. Work units play a significant role in social control for those who are employed. In China, the work unit is very important to

people. The state owned work units keep their employees' person files in their whole professional lives. People's personal files record any prize and punishment of the persons and their other personal circumstances. It is regarded as an effective way of informal social control in the Chinese society. Besides, the work units may perform part of the policing duties, and some state-owned work units have mediation committee and security defence committee which settles disputes between their staff and also functions to prevent crimes. The employed citizens tend to go to the mediation and public security defence committees to settle the small disputes or report minor criminal offences. If the disputes cannot be sorted out within the work units, they then will be brought to the formal legal procedures by the parties.

Neighbourhood Committee (NC) is seen as another effective informal social control in China. It is a semi-governmental and semi-voluntary system including the Street Committee and Residents' Committee. The Neighbourhood Committees are responsible for informal resident administration at the street level, and they conduct political mobilisation, basic legal education and sanitation condition checking. Their Mediation Committee and Security Defence Committee deal with public security violations informally. The traditional Chinese philosophy encourages 'harmony'. In China people prefer to settle their disputes through informal approaches rather than through formal legal channels. In practice, the Mediation and Security Defence Committees help settle numerous small disputes between neighbourhood citizens. They also deal with minor law breaking actions reported by the local citizens. In this sense, Neighbourhood Committees work in parallel with the local police for the purpose of public security defence and crime prevention.

In England and Wales, informal social control also plays important role in keeping public order. Johnson summarises the increased range of formal mechanisms that have increased with the instruments of the private sector and local government:

The diversity can be illustrated if we consider the range of 'alternative providers' which now exists at streets level in a growing number of British town and cities:

- (1) private security patrols of streets and residential properties;
- (2) private security companies contracted by municipal authorities to patrol streets and to protect council property;
- (3) municipal security organisations: bodies of unsworn, uniformed personnel who protect council property or – in the case of Sedgfield – undertake street patrol;
- (4) municipal constabularies: bodies of sworn constables who police parks and other public spaces;
- (5) 'activated' neighbourhood watch: the Home Office having recently authorised neighbourhood watch street patrols under controlled conditions;
- (6) vigilantism, either in the form of individual initiatives or group mobilisation;
- (7) the additional possibility (floated by several chief constables) that police organisations might, in the future, be permitted to set up their own security companies in order to compete at local level with the private sector. (1996: 63)

Informal social control exists in different forms in different societies, and they have different significance to the criminal justice systems in the jurisdictions they belong to.

Formal administrative security control in China

In China, the police have responsibility for the administration of the household register system. It is commented:

Such was the beginning of the contemporary household register system which by the mid-1950s extended into rural areas and, as the key to entry into the welfare state, was an effective method of control (in China). (Dutton 1992: 189)

Under household register system, it is required that in the urban areas each family with all household should register with the local police station. The household register police officers keep the files of every resident in their areas, and they are responsible for updating the personal information of the residents in the registration system. Criminal records or unlawful behaviour must be recorded clearly, and change of names, employment, home addresses and other essential person information also need to be kept up-to-dated. In recent years, it is criticised that to keep the urban household register system becomes more and more difficult, and its function of social control is not as effective as it was in the past.

Moreover, the local police stations have power to impose administrative sanctions except the re-education-through-labour penalty. Common administrative sanctions include criticism, individual warning and public warning. These sanctions are informal, and can be given by the local police and the law breakers' work units. Formal administrative sanctions are laid out in the Security Administration Punishment Act 1957 (SAPA1957), and they are police warning, administrative fines, administrative detention and re-education-through-labour. An administrative detention is given from one day up to 15 days. The re-education-through-labour penalty can be from six months to two years. The wrong doers are kept in re-education-through-labour institutions to serve their penalties. To serve the re-education-through-labour penalty the wrong doers need to work as well as study. Zhang, Shaoyan comments that 'the re-education-through-labour penalty is a combination of administrative sanction and a way of forcing education and reform' (1999: 33).

The wrong doing actions are called misdemeanours in China. In recent years, the common misdemeanours include violating traffic regulations, prostitution, gambling, drug taking and other minor offences. They would result in formal administrative sanctions if the circumstances are relatively serious.

All formal administrative sanctions must be recorded by the police, and this information might be used by other criminal justice agencies, i.e. prosecution to show the offenders' general behaviour and personal dangerousness.

With a huge population of more than 14 billion people in China, it is not sufficient that public order and security rely only on the formal social control. Informal social control, in fact, plays a significant role in practice. The individual citizens may also be a part of the informal social control system. In CBSS, a question asked respondents 'when being the victims of a criminal offence whether they believed that some one would come to help.' In 2002, 25.27% of the respondents said that they believed that they would be helped, and 69.9% said that they might be. (See Appendix 5)

To discuss formal and informal social control social control in a society is because they would have impact on crime and criminal justice. With regard to sentencing, this factor affects the number of offences brought to the courts to sentence, and clearly not all crimes do end up in the courts.

All aspects discussed above do not initially appear to be relevant to sentencing burglars. Nevertheless further analysis shows they all have impact on sentencing. As part of the context of sentencing, they cannot be set aside when we conduct the comparative analysis in criminal justice and sentencing across jurisdictions.

SUMMARY

In this chapter I compared the sentencing systems and cultural differences between China and England and Wales. Some issues were not included in the pre-designed research questions but the relevant information was provided by the judges in the field research. In order to avoid over-simplistic explanations of the sentencing differences in China and in England and Wales, I employed a framework of contextual factors designed by Davies and his colleagues in this chapter. This framework identifies factors to be taken into consideration in the

cross-national comparative study in the legal field in order to make sense of the findings about sentencing practice in different jurisdictions.

In using this framework I discussed the criminal justice system interdependencies and its socio-cultural and political context. These factors were not sentencing factors directly taken into account by the judges when sentencing offenders, but were factors relating to sentencing and could have impact on sentencing outcomes.

In detail, the differences in the systems and cultural differences I explored in this chapter included the following aspects.

1. Definition of crime could not be identical in different jurisdictions. As far as burglary is concerned, in England and Wales burglary is an independent offence, but in China, burglary is a type of theft offence with dwelling house circumstances. Definition of crime may reflect how a society perceives the seriousness of a particular crime. The research shows that in England and Wales, the judges regarded burglary as a serious criminal offence. In China, this type of offence was not seen as particularly serious compared it with other offences.
2. Different rules and policies in the systems in different jurisdictions would result different sentencing outcomes. For example, in England and Wales, an early guilty plea would result in an automatic sentencing discount for a burglar. But it was different in China. Automatic guilty plea discount does not exist in China, but admitting guilt was recognised as 'good attitude' of the offender. 'Good attitude' could be a mitigating factor, but whether to take it into consideration was under the sentencing judges' discretion.
3. In both jurisdictions the time the defendant spent in pre-trial detention would be automatically deducted from the time the offender would serve if he or she was subsequently given a prison sentence. In England and Wales pre-detention could be a mitigating factor because the judges

thought that the defendants had been punished somehow when they were in custody awaiting the trials, whilst in China it was not considered as a mitigating factor as the defendants were supposed to be kept in custody before the trials.

4. Paying the provisional amount of the fines prior to the trial was a mitigating factor in China. In practice it would result in a less severe sentence. In England and Wales, the imposition of a fine was done after conviction at the sentencing stage. It does not seem that in England and Wales to pay fines or not would affect sentencing decision.
5. In England and Wales, both custodial sentences and community penalties were frequently applied to burglary cases, whilst in China, custodial sentences, including prison sentences and criminal detentions, seemed to be the major sentencing options for burglars. In China fines were given to all offenders who committed property offences regardless of their financial circumstances. Unlike England and Wales, compensation order was not available in China, but voluntarily paying compensation to the victims might be considered as a mitigating factor and it would result in a less severe sentence.
6. In England and Wales, for offenders who were given a sentence of four years or less the serving time would be automatically reduced to a half. For a prison sentence of four years or over, the serving time would be reduced by one third from the original sentence time. In China, the sentencing deduction rules were different. Time off in China is not automatic. Whether an offender could be reduced some serving time would depend on his or her performance in prison. For an offender who received the life sentence or a suspension of the death penalty, the serving time must not be less than ten years.
7. In both jurisdictions, enforcement of non-custodial sentences seemed to be problematic. In England and Wales, there were some practical methods to deal with the offenders who failed to complete their

non-custodial sentences, but the problems remained. In China, due to lack of supervision, public surveillance was not commonly applied in practice. The judges commented that the fines were impossible to be collected from the offenders who were given prison sentences. Most theft offenders could not afford the fines.

8. In England and Wales, both the Magistrates' Association's Sentencing Guidelines and the Court of Appeal Guidelines are available for the magistrates and judges. The Court of Appeal guidelines included only limited serious cases at the time of the research. In the CJA 2003, the significance of the sentencing guidelines has been emphasised. In order to promote consistency in sentencing, Sentencing Guideline Council was established. Pursuing consistency in sentencing was the tendency of sentencing in England and Wales. In China, the sentencing guidelines were new to the judges. But it has become an issue in sentencing. In Jiangsu Province, a version of the sentencing guidelines was issued to the courts in that province in October 2004. The judges were required to follow the guidelines when sentencing offenders.
9. The judges have different status and roles in China and in England and Wales. English judges have a high social status and are seen as the elite professional group. In China, people are selected and trained to be career judges and they have a status as civil servants.
10. Between China and England and Wales, the valuation of judicial independence is different due to different judicial history and traditions. In England and Wales, the courts exercise their sentencing power without interferences. In China, there were internal and external interferences which could influence the judges to make sentencing decisions. In recent years, the Chinese government has paid attention to the idea of the independence of judiciary, although the pace is slow.

Sentencing system and sentencing culture are important aspects that should be discussed when comparing sentencing practice across jurisdictions. To

make a comprehensive and meaningful comparison, all cultural, traditional, and socio-political factors should be looked at. Then we may probably avoid falling into the trap of simplistic comparison but achieve real and meaningful comparative findings. To have a wider analysis, I discussed criminal justice system interdependencies and the topic of crime and its socio-cultural and political context.

All these factors I talked about do not appear to be the sentencing factors themselves, but they all have impact on sentencing. For example, the front line definers of cases through diversion and case screening and informal social control might filter the minor criminal offences out of the formal criminal justice proceedings. Resources and risk, extent and fear of crime could affect the number of the cases which are brought into the courts for sentence. Cultural and political significance of crime may have influence on the judges when they determine the seriousness of a particular offence and offences in general. They would directly result in sentencing decision. In this sense, obviously inter-agency trust, cooperation and information systems may also be the factors relevant to sentencing.

Fairbank compared aspects of sentencing between China and the western jurisdictions, and he paid great attention to certain Chinese characteristics. He stated:

Against the various upheavals of the past 50 years, holds the key to understanding China, its longevity in terms of language, its ancient and precocious scientific traditions and advances, its utterly distinctive approach to health and medicine, its traditions of a remote and cloistered elite leadership – these are a few of the ‘Chinese characteristics’ which provide impressive constants, in spite of the many abrupt turns and twists within the Chinese social system. (1987: 37)

These Chinese political, traditional, historical, cultural and social characteristics may help us make sense of my findings from the interviews with

the Chinese judges and they have helped me make sense of the results I found when comparing sentencing differences between China and England and Wales.

CONCLUSION

This thesis has been about a comparison of judges' views in China and England and Wales on matters of sentencing - with a specific focus on burglary - and an attempt to explain the differences found in my fieldwork and to explore the implications of this for comparative studies in the field of criminal justice. My fieldwork in China sought to replicate a study of judges in England and Wales, and like that study was a pioneering adventure in terms of getting a reluctant judiciary to agree to talk about themselves as judges and how they go about the practice of sentencing.

Lucy Zedner describes the process of the comparative criminal justice research in the following terms:

...the research process entails developing a general theoretical (but distant) understanding at home-base, punctuated by a series of forays (often of increasing duration) into the terrain of study. This itinerary is matched by an intellectual journey which takes one from the perspective of global structures to the minutiae of local detail and back and forth over the course of the research in 'a sort of intellectual perpetual motion' (Geertz 1983: 235)¹¹³. While periods of fieldwork provide for immersion in local culture (the court, the prison the police station), the journeys between make possible an intellectual distancing. Once more library-bound, the researcher can engage in the detached reflections and distanced evaluation, which are the very stuff of comparison. (1995: 19)

This study does not aim to seek to reveal novel, polemical or exotic features in sentencing in these two jurisdictions but to describe the routine and everyday business in sentencing. Either it does not attempt to identify in which jurisdiction the approach to sentencing is better or worse. I have set out to

¹¹³ Geertz, C. 1983, 'Local knowledge: fact and law in comparative perspective', in Geertz (ed.) *Local Knowledge: Further Essays in Interpretive Anthropology*, Now York: Basic Books, 229045

describe, as honestly as I can, what happens in China and in England and Wales in terms of how sentencing works.

Different countries have different cultures and traditions in their criminal justice systems. Penal philosophies and social settings relate to how societies organise their own sentencing system in practice and how justice and public protection is then achieved.

Under the current reform and agenda, China is seeking to understand and where compatible to transplant modern ideas and new techniques from the developed western countries and other parts of the world. A current example is that the courts in China are learning about, developing and applying sentencing guidelines from the western jurisdictions in order to promote consistency in sentencing. However, with a different social and political context and other factors, the transplantation cannot be so straightforward and sometimes it may even not be practical.

I am not able to offer recommendations on sentencing in China from this study. Nevertheless I believe that I am able to highlight how local circumstances and political and cognitive conceptions interact with the new ideas and concepts from the foreign jurisdictions with shifting social, economic and political contexts. I think this is one of the key points of this comparative study.

In the past, comparative research in criminal justice or sentencing relied heavily upon findings from the European or English-speaking countries. With the development of comparative research methods, sentencing research is not restrictive to western jurisdictions anymore. The reform agenda in China means that it has started to follow the trend of sentencing in the world, and therefore, provides a focus of interest for criminal justice researchers from different countries. When doing comparative research on legal representation in China, Lu and Miethe concluded:

Across a variety of social and political domains, China has made a concerted effort to comply with these international standards to be

fully reintegrated into the international community. There is no exception in the area of law and the legal system. (2002: 277)

Comparative sentencing research in China has gradually become a part of the world of international scholarship. It is believed that more research in criminal justice and sentencing will be conducted in China in the future. But I have discovered that comparative analysis is not as easy as Pakes concludes, 'we must conclude that comparing like with like is not without obstacles' (2004: 95). To compare the systems and cultures in different jurisdictions need to consider wide-ranging factors. To carefully exam the internal logic in a jurisdiction's own context would be the first step.

For this reason, I firstly described the details of traditional sentencing law and penal philosophy in China, the Chinese criminal justice system, penal objectives of criminal justice, current sentencing law and policies, and sentencing options and procedure in practice. The purpose was to provide sufficient background information to help understand the findings from my empirical study and the views of the Chinese judges.

Based on the findings from the interviews with judges in China, I draw a brief summary of my conclusions. First of all, I have had a clear idea that in China the criminal justice aims to punish, and prevent and reduce crimes. To educate and reform offenders is also emphasised. Secondly, the Chinese judicial system has undergone much self-examination in the last decade, and while issues of human rights and fair trials have been debated in much detail there has been less emphasis on sentencing other than the question about the death penalty. The legal reforms in mainland of China started from the late 1980s, and the current modernising task of the criminal justice system is to professionalise the judiciaries. In terms of human rights and fair trials, China has made considerable progress. Thirdly, in recent years, Chinese academics and scholars have started to look into matters of sentencing, especially with regard to articulating the rationale of punishment, making process of sentencing more transparent and achieving consistency in sentencing in practice.

The findings from my interviews with the judges in Jiangsu Province of China show the features of the sentencing system and culture in that part of China. Compared with the results from the earlier research on the same question in England and Wales, there are many fundamental differences to be found between the two jurisdictions.

In the sentencing systems, for example, offence definitions are not identical. In England and Wales burglary is a separate offence, whilst in China it is regarded as a theft with dwelling house circumstances. Secondly, the ranges of sentences and their usage are different. In England and Wales, the judges would impose either custodial sentences or community penalties on burglars, whilst in China prison sentences were commonly applied to burglars, and fines were given to all property offenders regardless of their financial circumstances. Distinctively, in China the theft offenders were encouraged to pay the fines in advance of trial for the recommended amount, and if a defendant chose to do so, the court would mitigate the sentence. Public surveillance, as a main non-custodial sentence was not frequently applied due to the poor enforcement, and the judges replaced them with the suspended prison sentences. Thirdly, in England and Wales, the maximum sentence for burglars was 14 years' prison sentence. There was a minimum three years' prison sentence available for a burglar who had three previous convictions for burglary. In China, the most severe sentence for burglary was the life sentence. The least severe sentence for burglars is the fines. Fourthly, two factors influenced sentencing in reality that there were different prison time deduction rules, and in England and Wales an early guilty plea would result in 30% sentencing discount. In China, there was neither an automatic deduction from time served in prison nor is there a sentence discount for a guilty plea. At the post trial stage, in England and Wales a less than four years' prison sentence would automatically be reduced to half. The serving time for a not less than four years' prison sentence was two third of the original sentence time. In China, time off was not automatic. Whether time served could be reduced or not depended on the performance of the offender in prison.

Sentencing cultures have a direct impact on sentencing outcomes, and they vary significantly from one jurisdiction to another. The major cultural differences in sentencing may be summarised in the following aspects.

Firstly, the harm of a particular offence or crime in general was not perceived in the same way. In this study, the perceived natural harm of burglary offences differed between the Chinese judges and the judges in England and Wales. In China, the seriousness of the burglary cases was determined based on mainly the monetary value of the stolen property, whilst in England and Wales, the judges looked at the circumstances of the burglary offences and they concluded the seriousness of a particular offence based on the sentencing guidelines.

Secondly, at the time of the research, the CJA 1991 provided the primary legislative framework for sentencing in England and Wales. Based on the 'just deserts' philosophy the English judges looked at the seriousness of the offence when sentencing burglars in practice. In contrast, the Chinese judges would always pay a great attention on the criminal records of the offenders. A first time offender might persuade a mitigated sentence, i.e. a short term prison sentence might possibly be suspended, whilst the judges in England and Wales took a less lenient view on this in burglary cases.

The third point is with regard to burglary cases. The English judges believed that night time burglary was an aggravating factor because the house might be occupied at night and the residents likely to be sleeping. Indicating a different perspective on this, the Chinese judges regarded the day time burglary as a serious offence because during the day the vulnerable group of people were at home. Day time burglary was serious because the burglars tended to choose committing burglary during the day in some areas and it had resulted in serious consequences. Also the judges believed that the burglars chose to commit burglary during the day showed that they were desperate, and their criminal intention was strong.

Fourthly, the judges perceived the severity of the sentences differently between jurisdictions. In England and Wales both custodial sentences and community penalties were seen to be severe enough for burglars. In China, the judges believed that only the custodial sentences were sufficient for theft offenders including burglars. They commented that community sentences would not be acceptable in China due to the different social circumstances in China and in England and Wales.

Fifthly, pre-trial detention was considered as a sentencing factor by the judges in England and Wales, and they were willing to mitigate the sentences for the defendants who had been detained awaiting the trials. In China, the judges did not regard this factor to be relevant to sentencing. However, good attitude of the offender were emphasised. Normally good attitude of an offender could support a proposal for a less severe sentence. In England and Wales, 'attitude' might be considered but it was not weighted the same as it was in China.

The status and role of the judges is also likely to be relevant to sentencing practice and culture. Because of history and tradition, the importance and significance of judicial independence is different between China and England and Wales. In Britain, judicial independence is highly valued compared with that in China. Despite the reform era political intervention into judicial matters seems to be apparent in China. In the UK judges would not accept such intervention and this is to do with the political and legal culture whereby judges are of a relatively high status and expect to act independently of the Government of the day. The principle of separations of power is real in England and Wales. China is now starting to promote the independence of the judges. In the interviews the Chinese judges commonly said that after the judicial reform they were more independent than in the past. An example of the changes taking place in China is that in this study I have been able to talk with 72 judges in a relatively free environment. The tradition of deference towards higher status officials and to political authority is very strong but the study suggests that a new openness is appearing.

The above findings from my empirical study in China provides a comparison of the judges' comments about sentencing burglars and the different assumptions and experiences between the two sets of judges. The advantage of this type of comparative research is that it helps criminologists and legal practitioners to gain a deeper understanding of the various features existing in the criminal justice and sentencing systems in different jurisdictions. But if relying exclusively on features of the sentencing systems we may not be able to explain why the jurisdictions differ.

There are limitations to the methodology I applied in this study, and they should be pointed out before I try to draw a conclusion for this comparative empirical study of sentencing.

The first warning is that the empirical studies applied in this research were based on a small number of participants and involved only a limited number of scenarios for one particular offence. Therefore, the sentencing results may not be necessarily a reflection of the practice in one jurisdiction and another. Especially in China, the interviews were conducted in only one province of China. It is not certain whether the views of the judges interviewed could represent the views of all Chinese judges and whether the results may show the whole picture of sentencing practice in China. In fact, it is likely that in a place as big as China that any generalisation is likely to be tenuous. Similarly the same problem with generalisation might also involve in the research carried out in England and Wales.

Secondly, another point to be aware of is that the terminology used to describe sentencing in the two different jurisdictions might not be precisely equivalent. Since there is no a global standard translation of the terminology in sentencing, concepts may not always been found equivalent terms to their original meanings when they are translated from one language to another. For example, the word 'judges' has different significance in China and in England and Wales due to the different status, roles, way of appointment, promotion, rules and disciplines of the judges in the two jurisdictions. Misleading concepts may result in meaningless comparison. Although I tried to display the data

within their context in its original form by quoting the judges' own words wherever they were necessary, the problems with the use of terms may still remain unsolved.

Thirdly, as sentencing is not an isolated activity, it is influenced by so many direct and indirect factors. I have realised that in order to avoid a simplistic comparison on sentencing across jurisdictions, a wide-ranging analysis of political, social and cultural context is essential. I have discussed most of the influential factors but not all. To what extent we should look into these factors is another issue.

When it comes to the conclusions of my study, several issues come into focus. The first conclusion concerns the purpose of sentencing and the question of 'why we sentence'. The judges in this research provided part of the answers. The judges in both jurisdictions pointed out the nature of the harm associated with burglary and why burglars deserved certain sentences. Also the judges provided comments on the penal philosophy and current objectives of sentencing.

The second conclusion concerns consistency of approaches, goals, procedures and outcomes in sentencing practice. Sentencing may probably never be consistent because the judges interpret law and policies differently, circumstances of cases vary, the views of the seriousness of offence are different and the same sentence may be perceived to have different severity. On the other hand, pursuing consistency in sentencing is the tendency of most civilised jurisdictions, including China and England and Wales. The judiciary are trying different possible approaches to avoid arbitrary sentencing and promote sentencing consistency.

A further outcome of this research is that it illustrates how China has tried to amalgamate the modern western ideas on criminal justice with its own ideas and how it deals with the conflicts between its traditional approaches and the global trend in theories, ideas and approaches in criminal justice, sentencing and other political and social matters. It is hoped that the transplantations are

not the simple delivery of formalities. The most important task for China is to make sure that the modern western ideas can be suitable for the Chinese characteristics. Dikötter warns:

The inequity and inequality of relationships between China and the West has often been emphasized by historians who point out the role of imperialism in shaping modern history. However, the arrival of 'the West' not only caused new 'problems' such as extraterritoriality, allegedly forcing China to 'westernise' in order to obtain its abolition, but also created opportunities by offering a radically new set of conceptual tools and technological innovations. Modernising elites did not merely respond to a western impact, they actively appropriated globally circulating ideas and technologies from within their own moral and cognitive traditions. (2002: 242)

My last conclusion is to do with cross-national comparative research methodology, and by the end of this research it became the key issue of this study. The conclusion is to explain the differences we have found via the cross-national comparison on sentencing. I conclude that along with an understanding of the details of sentencing practice and the interdependencies of the criminal justice system we need to look at the wider social context. Pakes commented:

...public discourse, fear of crime, perceived seriousness of offences, and agreed severity of punishment combine to give shape to sentencing practices. These practices do vary significantly across countries, not only in actual practice but also with regard to the philosophies that underlie these practices. (2004: 139)

In this study, to make sense of the findings from my comparative analysis, I employed the comparative framework from Davies *et al* to discuss the further issues relating to sentencing practice. The further relevant topics included the criminal justice system interdependencies and crime and its socio-cultural and political context. To talk about these issues it is necessary to identify and

understand the role of the front line definers of cases, diversion and case screening, resources, risk, extent and fear of crime, cultural and political significance of crime and their relation with sentencing. It is also helpful to understand the interdependencies between society and the criminal justice system in terms of the relative role played in maintaining social order of the formal and informal mechanisms of social control. I believe that they are also relevant to sentencing and other criminal justice issues. On the whole, all these issues are of importance to sentencing, but the further discussion of them would be beyond the scope of my study.

As I cannot solve the methodological problems that exist, I am not meant to provide an insight of conclusion on comparative sentencing practice of China and England and Wales. But I would like to quote a positive statement from Pakes to justify the significance of this comparative research:

In the area of comparative criminal justice, perfectionism is less important than a balanced assessment of the advantages and weakness of any method, so that any findings can be evaluated according to their merits. (2004: 25)

In fact, I have achieved the aims of this study. What I have done is to provide an account of sentencing practice in China and in England and Wales. I have learned through the empirical study and the comparative analysis that sentencing is a fairly sophisticated process in England and Wales, whilst in China, sentencing research is at a primary stage, but the country is learning to move towards the direction of modern and rational sentencing. I might be able to safely reach the conclusion that the ultimate goal of all criminal justice is to serve justice. But the achievement of this goal is shaped by the realities of jurisdictions with their own legal and criminological characteristics, social and political circumstances and distinctive histories.

APPENDIX

Appendix 1.1:

Age Group and Gender of the Chinese Judges Interviewed and Their Origin

(Conducted in July, 2002 and August, 2003)

Courts	Gender		Age groups				Judges' origin	
	F	M	25-29	30-39	40-49	50-60	Urban	Town or country
A	2	2	1	1	1	1	-	4
B	1	1	-	1	1	-	2	-
C	2	-	-	1	1	-	2	-
D	1	2	-	-	2	1	3	-
E	1	1	-	1	1	-	2	-
F	1	4	-	1	3	1	-	5
G	-	3	-	-	2	1	-	3
H	2	1	-	-	1	2	3	-
I	1	2	1	2	-	-	-	3
J	1	3	-	1	2	1	-	4
K	2	6	-	3	5	-	-	8
L	-	2	1	-	1	-	2	-
M	3	4	-	2	5	-	-	7
N	2	4	-	1	5	-	-	6
O	2	4	-	3	2	1	-	6
P	3	4	-	5	2		7	-
Q	2	3	1	1	2	1	5	-
Total	26	46	4	23	34	9	26	46

Appendix 1.2:

Education Background of the Chinese Judges Interviewed

(Conducted in July, 2002 and August, 2003)

Courts	MA Degree	BA in Law	BA in other subjects	Law HE certificates	Law school certificates
A	-	1	1	1	1
B	-	-	-	2	-
C	-	1	-	1	-
D	-	-	1	1	1
E	-	-	-	2	-
F	-	2	-	3	-
G	-	-	-	1	2
H	-	3	-	-	-
I	-	3	-	-	-
J	1	2	-	1	-
K	-	3	1	4	-
L	-	1	-	-	1
M	-	2	-	3	2
N	-	1	1	1	3
O	-	1	-	3	2
P	1	4	1	1	-
Q	2	1	1	1	-
Total	4	25	6	25	12

Appendix 1.3:

The Burglary Scenarios and Questions Applied in 2003/04 Study in Jiangsu Province, China¹¹⁴

Questions for discussion with judges:

Question 1:

1. What type of sentence, in general would you give to the burglars in the five following scenarios?
2. What other information would you need to give a more specific sentence give to the burglars in the five scenarios?

Burglary scenarios (to be presented to judges)

All defendants are male aged 24.

Case 1

Offence

This is a burglary of a residential property during hours of day light, when the residents were at work. Access was unlawfully but easily gained through an open window, with no damage to property. The offence was unplanned and the items stolen were food for the defendant's family. The defendant admitted guilt to police when first questioned and admitted guilty in court at the first opportunity.

Offender

Defendant has no previous criminal records, and works part time. He is the sole provider for his children and his terminally ill wife.

Victim

A working couple in their mid-20s who did not realise initially that they had been victims of a burglary

Case 2

Offence

This is a burglary of a residential property at 2am (at night), when residents were asleep upstairs. An associate of the defendant had visited the house previously to assess possibility of entry and belongings, posing as salesman. Entry was gained by forcing an outer door, causing some damage. An untidy search was carried out by the

¹¹⁴ These burglary scenarios were based on the questions used by Davies, Takala and Tyrer and colleagues in the studies in England and Wales, Finland and Norway in 2000-2002.

defendant though the residents were not disturbed. Jewellery worth RMB 13,000 and of sentimental value taken and not recovered

Offender

Defendant has three previous criminal records for burglary, the latest being for dwelling house burglary for which he served a custodial sentence.

Victim

A retired couple who were in their late-70s. The wife was semi-invalid.

Case 3

Offence

A burglary of a residential property in day light whilst it was unoccupied as the occupiers were at work. a TV was stolen of RMB 3,900 value.

Offender

The defendant has two previous criminal records for non-dwelling burglary in the last two years.

Victim

A professional couple who were both in their mid-40s. They are annoyed at the intrusion in their home at night and the subsequent claiming under insurance for the loss of the TV.

Case 4

Offence

A burglary of residential property in day light whilst it was unoccupied as the occupiers were at work. A TV was stolen of RMB 3, 900 value. (Same as Case 3)

Offender

The defendant has one previous criminal record for non-dwelling burglary in the last two years. He received sentence of public surveillance for the previous offence, which he successfully completed. He is a regular heroin user.

Victim

A professional couple who were both in their mid-40s. They felt annoyed about the intrusion into their home at night and the subsequent inconvenience claiming under insurance for the loss of the TV.

Case 5

Offence

A burglary of a residential property at night when the residents were asleep. The lock was forced but there was no other damage, the occupiers were not disturbed, and a TV set valued at RMB 3,900 was stolen.

Offender

The defendant has no previous records.

Victim

A professional couple who were both in their mid-40s. They felt annoyed about the intrusion into their home at night and at the subsequent inconvenience of claiming under insurance for the loss of the TV.

Question 2:

1. Are the current sentencing law and policies sufficiently detailed and comprehensive when sentencing for dwelling house burglary?
2. Are there in your view any offence, offender or victim characteristics/circumstances in cases of dwelling house burglary that almost always would result in a custodial sentence?
3. What is the nature of the harm associated with a residential burglary?

Question 3:

Would you see any benefit in having more information about the effects of the crime on the victim?

Question 4:

1. To your understanding, what are the sentencing objectives according to Chinese criminal law and relevant policies? Which one or ones have priority in your mind when sentencing in dwelling house?
2. What is it that constitutes the punitive element in the range of sentences available for dwelling house burglary?

Question 5:

1. What have been the most significant changes since 1996 for sentencing practice?
2. What changes do you expect to see in the near future? What changes would you like to see in the near future?

Appendix 2:

Sentencing Guidelines

Jiangsu High Court

October 2004

1. General principle

Article 1 Sentencing shall follow the sentencing principles stipulated in the general provisions and substantive provisions in the CCL. The courts should also look at these guidelines to determine sentences for the offenders.

Article 2 The sentences shall commensurate with the harm done by the offenders to society by the crime and the individual dangerousness of the offender.

Article 3 When sentencing, it is necessary to look at the criminal justice policies and legal effect and social effects. Individualisation of sentencing shall be taken into consideration, and the offenders should be sentenced differently. Offenders who seriously endanger the order of the society with serious circumstances shall be imposed for aggravated sentences. Those who commit relatively minor offences may be given mitigated sentences according to the law.

Article 4 Sentencing should be consistent in certain regions and certain period of time. Similar offences with similar circumstances should be given similar sentences.

Article 5 Sentencing outcomes should be consistent with those of the previous cases which are published by the Supreme Court and this court.

Article 6 Sentencing the co-defendants, the facts of the offence, circumstance of the defendants and their respective culpability should be considered individually. The severity of their sentences should be different to ensure the balance of sentencing.

Article 7 Sentencing should base on the harm done to the society by the offenders. The individual dangerousness of the offender should be taken into account.

Article 8 It is necessary to ascertain all the facts when convicting and sentencing. The courts should measure the seriousness of the offence appropriately.

Article 9 It is crucial to find the sentence from the range of available sentences according to the harm done. Statutory aggravation and mitigation must be reflected in sentencing decisions. Other sentencing factors may be considered by the courts depending on the circumstances of the case.

2. Criteria for sentencing

Article 10 In order to avoid inconsistent sentencing, it is necessary to set up a tariff for each offence. A basic sentence can be given based on the basic fact of the case and the tariff without considering the statutory aggravation and mitigation and other sentencing factors.

Article 11 the methods for choosing the basic sentences:

- (1) For offences in general, the sentence in the middle of a range of the available sentences is the basic sentence. Where there is a single sentence available, the half of the severity of that sentence is the basic sentence. For example, the range of available sentences is prison sentences from three to seven years, a five years' imprisonment is the basic sentence.
- (2) For property offences, the basic sentences are based on the value of the property involved in the cases. For example, for a property offence involving value from RMB 50,000 to 100,000, the range of available sentence is from five years up to 15 years' prison sentence. Therefore, for the value of RMB 75,000 the basic sentence is a ten years imprisonment.
- (3) For the offences which the seriousness is based on the circumstances of the case, the starting point of the range of the available sentences is the basic sentence.
- (4) For murder, the death penalty or life sentence is the basic sentence.

3. Sentencing factors

Article 12 Sentencing factors refer to the factors which are essential for the courts to make sentencing decisions. The courts should base on the basic sentences and consider the sentencing factors when sentencing offenders.

Article 13 Sentencing factors include statutory factors and factors which the courts may consider when sentencing. The latter factors are not included in the current criminal law, but gained from the criminal justice policies and the judicial experience. These factors should be considered according to the circumstances of the case. Statutory and other sentencing factors can be divided into two categories: factors of endangering the society and factors of showing the individual dangerousness of the offender.

Article 14 The following circumstances are the factors of endangering the society:

- (1) Accessory offenders, coerced accomplices, and the abettors;
- (2) Attempted crime, discontinuation of crime and crime preparation;
- (3) Imperfect self-defence and excess necessity;
- (4) Special offenders and victims; (i.e. former governmental officials commit offence of prosecuting false charges shall be imposed for an

- aggravated sentences; raped one who is under the age of 14 shall be given an aggravated sentence);
- (5) The following circumstances show the dangerousness of the offence.
- a. How much violence involved in a violent offence. For example the means of the rape and robbery cases. It can be measured by the consequences caused to the victims.
 - b. The number offences committed;
 - c. The value of property involved in the property offences;
 - d. The number of the victims;
 - e. The consequences of the offences.

Article 15 The following circumstances are the factors of showing the individual dangerousness of the offender:

- (1) Leifan and recidivists of drug-related offences;
- (2) Voluntary confession;
- (3) Performance of meritorious acts.

(1) is statutory aggravation. (2) and (3) are statutory mitigation.

Article 16 The factors showing dangerousness to society for discretion include:

- (1) the offender
- (2) the means applied in the offence
- (3) the time and venue of the crime

Article 17 The factors showing individual dangerousness of the offender include:

- (1) the motivation and cause of the offence;
- (2) the attitude of the offender.

4. Sentencing rules

Article 18 For the relatively wide range of the sentences, it is necessary to sub-grade the sentences. For example, if prison sentences are the sentencing options, the courts can set every two years as a grade.

Article 19 When considering mitigating or aggravating factors, normally for every factor the sentence can only be up or down one grade. For two factors or more, the sentences can be moved up or down for two grades.

Article 20 The weight of each sentencing factor should be considered carefully. The significant sentencing factors much be reflected in the sentencing decisions.

Article 21 The following factors can help to measure the significance of the factors to sentencing:

- (1) The statutory mitigation and aggravation are more important than other sentencing factors;
- (2) The factors worded as 'should consider' are more important than those worded as 'may consider';
- (3) Multi-function factors are more important than single-function factors.

Article 22 The sentencing factors in the same catalogue have the same significance. The more aggravating factors in an offence, the more severe sentence should be given to the offender. Similarly the more mitigating factors the more lenient sentence would be imposed. Mitigating and aggravating factors may offset in a case.

Article 23 The same type of sentencing factors refer to the factors identified as either factors of endangering the society or factors of showing the individual dangerousness of the offender.

Multi-function mitigating factors refer to factors with which may result in mitigated sentences, less severe sentence or exemption of the sentences. Multi-function aggravating factors refer to factors with which may result in aggravated sentences or more severe sentence.

Article 24 To reflect the sentencing factors in sentencing decisions, the courts should look at Article 21 and 25 and consider all the sentencing factors.

Article 25 The use of multi-mitigating factors

Using the multi-mitigating factors for which the sentence may be mitigated, less severe or exempted, the courts may choose one of the following methods. If the method conflicts with each other, the courts should follow Article 28 of these guidelines.

Article 26 When applying multi-mitigating factors to determine sentences, it is crucial to consider the seriousness of the offences and look at the offences as a whole. It is important to avoid unduly applying sentencing factors and cause imbalance between the offences and sentences imposed on them. (simplified)

Article 27 The rules for dealing with multi-mitigating factors (simplified)

Article 28 The rules for cases with several mitigating and aggravating factors (including in Article 24 to 27, when one method has been chosen for the cases with several mitigation but there is also aggravation)

Article 29 When using mitigated sentence, a less severe sentence should be chosen from the range of the available sentences. The mitigated sentence should not be more lenient than the starting point of the relevant range. Similarly, when using aggravated sentence, a more severe sentence should be chosen from the range of the available sentences. The aggravated sentence should not be more severe than the maximum sentence of the relevant range.

5. The principles on the application of Individualisation

Article 30 The death penalty should only be imposed on offenders who commit very serious criminal offences. The use of the death penalty must be strictly limited. Cases with the following circumstances, the death penalty can be suspended for two years.

- (1) The offender should be imposed the death penalty for the offence committed, but the offender voluntarily confessed or performed meritorious acts after offending;
- (2) The offender should be imposed the death penalty for the offence committed, but the offence did not cause actual harm or the offender compensated the loss or damage after offending;
- (3) The offender should be imposed the death penalty for the offence committed, but the offender was not the principal person who played the main role in a joint offence;
- (4) The offender should be imposed the death penalty for the offence committed, but the offence was a result of the fault of the victim;
- (5) The offender should be imposed the death penalty for the offence committed, but the offence was a result of a civil dispute between the offender and victim, to which the relevant authorities did not handle properly, and it led to radical conflict.
- (6) The offender should be imposed the death penalty for the offence committed, but the offender was in mental disorder or other circumstances for which he or she should not bear the full criminal responsibility;
- (7) The offender should be imposed a death penalty for the offence committed, but there are some facts not very certain or certain evidence may not be assured;
- (8) In property offences the value involved might be qualified the death penalty, but the circumstances of the case, such as the motivation and means of the crime, are not very serious.

Article 31 Where under s. 72 of the CCL the courts may suspend the prison sentences for the offenders, the following aspects should be strictly considered.

For the offenders who are expected to be given less than three years' imprisonment, if the suspended sentences are considered, all of the following requirements should be satisfied:

- (1) There are more mitigating factors than aggravating factors in the case;
- (2) The offender is first time or occasional offender and he or she is recognised to have good attitude;
- (3) Voluntarily return the stolen property, compensate the victim and fully pay the fines;
- (4) Proper supervision is available.

The offenders who are expected to be give three years or more years' prison sentences should not have their sentences suspended. But their sentences may be suspended if the courts may find one of the following circumstances:

- (1) Imperfect self-defence and excess necessity;
- (2) Coerced accomplices;
- (3) First time or occasional offenders who are younger than the age of 16;
- (4) Where a suspended prison sentence is good for offender reform. But this circumstance should be strictly controlled.

Article 32 Where an offence has one of the following circumstances, the court should not suspend the sentences for the offender who:

- (1) commits intentional homicide or intentional injury causes serious disability or death to the victim, robbery, rape, poisoning, bombing, arson, drug-trafficking, kidnapping and other serious offences against public security;
- (2) is Leifan and recidivist;
- (3) commits more than one offence;
- (4) commits the offence with evil motivation and has very serious circumstances or uses the money gained to conduct other unlawful actions or commit other offences;
- (5) has general bad behaviour before the offences and has been sentenced or given many times administrative sanctions;
- (6) has not showed good attitude, does not return the stolen items or does not compensate the victim or does not show remorse to the victim;
- (7) commits an offence which causes very serious consequences or serious loss of the state or privacy property;
- (8) is the principal offender in a joint offence, or one committed more than one offence;
- (9) steals money or material for special purposes, such as, the funding or facilities allotted by the state for emergency or disaster rescue, flood control, pension for the dead or injured service people's families and distress relief. The offence has serious circumstances;
- (10) proper supervision is not available.

Article 33 Under certain circumstances stipulated in the general provision section of the CCL where the courts may mitigate, impose less severe sentence or have the sentence suspended for the offender, the nature of the offence and circumstances of the case must be looked at. The circumstances are:

- (1) The circumstances are not particularly serious. The maximum sentence is expected to be three years' prison sentence;
- (2) The case has no aggravating factors, or the mitigating factors are much more than aggravating factors in the case, and the latter can be ignored;
- (3) The offence is not serious enough and it is obvious that a criminal sanction might not be necessary;

- (4) The offender has good attitude, the offence has no serious consequences caused or the victim has been compensated.

Article 34 When determining the fines for an offender the courts should base on the CCL and 'the SPC Rules on Applying Financial Sentences'. The amount of the fines should commensurate with the harm done by the offender and the main sentence which is expected to impose. The severer the main sentences are, the more fines the offenders would be ordered to pay. Where a defendant voluntarily pays the fines, returns the stolen property or compensates to the victim, the main sentence may be mitigated.

Article 35 The courts may apply the following methods to determine the amount of the fines:

- (1) Where the amount of the fines is stipulated in the CCL, the fines should be given according to the law;
- (2) Where the amount of the fines is not stipulated in the CCL, the fines should be given according to the severity of the main sentence. The minimum amount of the fines is RMB 1,000;
- (3) Where there is monetary value involved in the case, the amount of the fine should be 50% or double of the value of the property;
- (4) Where the nature of the offence is very serious, or the aggravating factors are much more than mitigating factors in the case if property is involved, the fine should be one time more than the monetary value involved; if no monetary value involved, the fines should be determined within the range stipulated in the law which is not less than one but not more than five times more than the statutory minimum amount of the fines.
- (5) Where the offender cannot afford the fines, the amount can be reduce;
- (6) Where more than one sentence of the fines for an offender, the amount of the fines should be cumulated.

Article 36 When considering the deprivation of political right penalty, the courts should look at both aggravating and mitigating factors.

6. The mechanism for balancing sentencing

Article 37 The courts should be familiar with the sentencing policies and rules. The courts should look at the sentencing factors of the base and guides but the tariff and the sentencing rules to give the most appropriated sentences to the offenders.

The Collegiate Panel (Heyiting) and Adjudicative Committee of the Court (the ACC) should pay great attention on sentencing research and try to avoid arbitrary sentencing. When making sentencing decision, the courts should base on the facts of the case, law and the guidelines.

Article 38 The judges should exercise their discretion appropriately under the guidelines.

Article 39 The second instance courts should strictly apply the sentencing criteria. Where the sentencing decisions are different between the first and second instance court, if one of the following circumstances involved, the second instance court should amend the decision made by the first instance court:

- (1) The sentence imposed is more severe than the maximum sentence available;
- (2) Although the sentence imposed for a case falls in the range of the available sentences, the sentencing factors are weighted too much and it results in an inappropriate sentence;
- (3) The first instance courts did not reflect certain significant sentencing factors whilst the second instance courts believe these factors should be taken into account otherwise it may result in an inappropriate sentence;
- (4) The second instance courts find new particularly influential sentencing factors;
- (5) The second instance courts change the facts of the case and accordingly they may change the sentences;
- (6) Sentencing is clear breach of the sentencing guidelines;
- (7) Sentencing has deviated from the sentencing guidelines without sufficient reasons.

Article 40 The courts shall see the previous cases as references for sentencing. The intermediate courts shall emphasise the guidance of using the previous cases and pay attention on editing the existing cases.

Article 41 The courts should see the sentencing guidelines as the important part of the judicial training and make progress in sentencing.

Article 42 The courts should insist independent sentencing. The judges should be objective and play the neutral role when sentencing. They should ignore the various interferences and properly deal with the mass media, and they should not be bound by the public opinion. The courts should sentence offenders strictly according to the law.

Appendix 3:

Sentencing Burglars in China

(1) Sentencing options chosen by the judges for Case 1

Should not charge for burglary	Exception from criminal sanctions	The fines	Public surveillance	Criminal detention	Short-term prison sentence (suspended)
1	4	49	23	14	1

(2) Sentencing options chosen by the judges for Case 2-5

Type of sentences	Case 2	Case 3		Case 4	Case 5
		Leifan	Non-Leifan		
Prison sentences	72	72	69	72	66
Prison sentences (suspended)	-	-	-	-	1
Criminal detention	-	-	3	4	4
Public surveillance	-	-	1	-	1
The fines	-	-	-	-	2

Appendix 4:

Sentencing Options in England and Wales and the Reform in the CJA 2003

The sentencing options based on the CJA 1991

Both custodial and non-custodial sentences are available for the criminal judges in England and Wales. The judges may also impose discharges to the offenders who committed less serious offences.

1. Custodial sentences

Custodial sentences in England and Wales include different lengths of custodial sentences and the life sentence. Prison sentences may be suspended under certain conditions.

- Custodial and the suspended prison sentences

S1 of the CJA 1991 states that an immediate sentence of imprisonment may impose to 'either the offender(s) is/are so serious that only a custodial sentence is justifiable, or the offence is one of sex or violence and only a custodial sentence is adequate to protect the public from serious harm from the defendant, or the offender refuses to consent to a community sentence where consent is required.'

In the CJA 2003, significant changes have been made to custodial sentences, and the new concepts and approaches are introduced to the sentencing system. First of all, the CJA 2003 gives the magistrates power to imprisonment of up to 12 months for a single offence,¹¹⁵ and maximum of 65 weeks is for offences in aggregation.

Secondly, the CJA 2003 creates the imposition for the short term custodial sentences of less than 12 months. In the CJA 2003, if a court intends to impose a custodial sentence of less than 12 months, the custodial sentence must not be less than 28 weeks. This is the first time that a minimum sentence has been given in criminal statute in England and Wales. All short term custodial sentences of up to 12 months can be either custody plus or intermittent custody, and both are newly created concepts in the CJA 2003.

In the custody plus approach, a prison sentence is divided into two - a 'custodial period' of between 2 to 13 weeks and a following 'licence period' of at least 26 weeks. In the custodial period, the offenders must be confined in custody, and during licence period they are under post-release supervision in the community. The court may impose specific requirements for the offenders to serve during the licence period, and it is similar to imposing a community penalty.

¹¹⁵ Prior to CJA 2003, the maximum imprisonment for the magistrates' courts was six months for a single offence. The magistrates may, therefore, make full use of the custodial sentences, especially custody plus.

The intermittent custody approach allows offenders to serve their custodial period in block of a few days. Also intermittent custody includes a custodial period, which is from 14 to 90 days at a time, and a following licence period which is from 28 to 51 weeks. During the licence period, offenders serve their sentences in the community, and there are also added 'community order' requirements in relation to licence period for the offenders to serve when they are out of prison. The offenders will still be under supervision when they are released on licence.

The maximum lengths of imprisonment for certain types of offences are available for the Crown Court. For example, the maximum imprisonment for burglary is 14 years. For a third time burglar, three years' imprisonment is the minimum sentence. Where the offender who committed more than two imprisonable offences, technically two sentences may be imposed consecutively, but there are rules relating to this that suggest that they should normally be given concurrently.

As one focus in the CJA 2003 is public protection, serious offences are targeted. In the CJA 2003, serious offences are specified and they would result in the life sentence or the sentences of an indeterminate period of imprisonment for the purpose of public protection.

In order to protect public, the extended sentences of imprisonment are allowed to be given to the specified violent or sexual offenders. It means the dangerous violent and sexual offenders may be given extended sentences of imprisonment for the purpose of the protection of the public rather than to be sentenced for what they have done under 'just deserts'. Both the period of imprisonment and the licence period in extended sentences may be extended to at least 12 months. The extended period must not be more than five years for specified violent offenders and eight years for the specified sexual offences.

In the CJA 2003, the offenders who serve custodial sentences over 12 months will still be released automatically at the half-way of their prison sentences. The change is that they will remain on licence until the sentences have been served completely.

The custodial sentences can be suspended in the sentencing system in England and Wales. Suspended prison sentences were introduced in the CJA 1967, which aimed to deter the offenders from re-offending, show the seriousness of the offences, and reduce prison population. Under the current sentencing framework, in order to have their prison sentences suspended, offenders must firstly satisfy the criteria for imprisonment, but they may not have to serve the sentences of imprisonment in prison due to the 'exceptional circumstances'. If the offender re-offended during the period of suspension, the remaining time of the original prison sentence will be served as a result.

The CJA 2003 has completely changed the imposition of the suspended sentences, and now suspended custodial sentence is called 'custodial minus'. Under the CJA 2003, prison sentences which are at least 28 weeks but not more than 51 weeks can be suspended no matter they are of custodial plus or

intermittent custody. The offenders must comply with one or more 'community orders' requirements during the period of their suspended sentences. If they re-offend or if they fail to comply with the requirements during the suspension period, their prison sentences may become active.

- The life sentence

The life sentence is the most severe sentence available in England and Wales. It is the mandatory sentence for the offenders who are guilty of murder. For other serious offences, such as manslaughter, rape, robbery, aggravated burglary or any other serious offences, the judges may apply the life sentence under their discretion. In the CJA 2003, for the purpose of public protection, the offenders who committed specified serious offences could be imposed the life sentence, e.g. aggravated burglary.

- Ancillary sentences

Ancillary sentences may be imposed in a supplementary way with custodial sentences. They are three types of ancillary sentences available: Forfeiture, Destruction Order and Confiscation. Forfeiture is an order of forfeiting the property in the defendant's possession under certain circumstances. Under a destruction order, the offender's property is ordered to be destroyed. Confiscation is an order available for the Crown Court. The court may order to confiscate the proceeds of a crime which are over £ 10,000. Deportation is also an ancillary sentence which is applied in the criminal cases involving offenders from foreign countries.

2. Non-custodial sentences

Non-custodial sentences include community sentences and financial penalties.

(1) Community orders

Community sentences are seen as intermediate sentences which are applied to replace custodial sentences to some offenders. The CJA 2003 has made widespread changes to the sentencing powers available to the courts.

In the CJA 2003, community orders are renamed as 'generic community sentences'. The generic community sentence is a single community sentence, but the 2003 Act increases the range of requirements that can be included in community orders available to the court when passing a community sentence on an offender. In fact, the judges would have more options for choosing community sentences according to the different circumstances of the offenders. The judges are believed to be flexible with community sentences. For example, a community punishment order in the CJA 2003 consists of a community order and an unpaid work requirement. The requirements can be multiple with different conditions to meet the needs of the offenders. The main requirements include: activity requirement, programme requirement, prohibited activity requirement, curfew requirement, exclusion requirement, mental health treatment requirement, drug rehabilitation alcohol treatment requirement,

supervision requirement, attendance centre requirements, and electronic monitoring requirement. These requirements are seen as 'menu' may be added to an existing community rehabilitation order. (Gibson, B. 2004: 165)

The CJA 2003 came into force in late 2004. From then, the courts have the following requirements available for any offender aged 16 or over:

- Unpaid work

Unpaid work is re-named in the CJA 2003. Currently it is called a community punishment order, and in the past it was known as community service order. This type of requirement orders the offenders to make reparation to the community by undertaking useful work for the community.¹¹⁶ An unpaid work requirement may be applied as an alternative to a custodial sentence, and it is available for an offender at age of 16, or over. In the CJA 2003, in normal circumstances, the unpaid work requirement is between 40 and 300 hours, and it has to be completed within 12 months. The unpaid work may be added to an existing community rehabilitation order to form a generic community sentence.

- Activity

Activity is a new requirement in the CJA 2003, which orders the offender to carry out specified activities for not more than 60 days. Activities may include reparation to the victim where appropriate. The courts determine whether an activity requirement is suitable for an offender by looking at the PSR.

- Programme participation and supervision requirement

Programme participation previously was the probation and rehabilitation orders, and it orders the offender to take part in an accredited programme for maximum three years. Supervision requirement is from the current community rehabilitation order. The supervision requirement is available for a child or young person who committed an offence. A supervision requirement orders the offender to attend appointments with a responsible officer for a period of maximum of three years in a normal circumstance, and this can include attendance at an attendance centre when the offender is under 25. Both requirements are rehabilitation based, and in CJA 2003 both aim to promote rehabilitation of the offenders, protect public and prevent re-offending.

- Prohibited activity

Prohibited activity orders the offenders to refrain from specified activities on a particular day or days or over a specified period. This is also new in the CJA 2003.

- Curfew

¹¹⁶ The National Standards for the Supervision of Offenders in the Community (Home Office, 1995)

Curfew orders require offenders to remain in a specified place of residence for a period of not less than two hours and not more than 12 hours per day for up to six months. The court must, in addition, order electronic monitoring of the curfew order where appropriate.

- Exclusion

In the CJA 2003, the offenders can be prohibited from entering a specified place for a specified period, and exclusion requirement can be ordered for up to 2 years.

- Drug rehabilitation and mental health or alcohol treatment requirements

A drug rehabilitation requirement orders the offender to submit to drug treatment, and under an alcohol treatment requirement the offenders are order to submit to treatment for alcohol dependency. The minimum period of drug rehabilitation and alcohol treatment requirement is six months. During the period, the offender should have treatment for drug or alcohol misusing. The purpose is to help the offender to reduce or eliminate the offender's drug and alcohol addiction. A mental health treatment requirement orders the offenders to submit to treatment for mental health.

- Attendance centre

An attendance centre requirement is available for young offenders under 25. Under this requirement, the young offenders must attend a centre for 12-36 hours a day. Initially it aimed to deprive delinquents of their leisure time, and now it is given to the imprisonable young offenders in the case of an adult.

- Residence

A residence requirement orders the offender to live in a specified place, and when imposing a residence requirement order the judges would look at the home surroundings, and the PSR is crucial.

The CJA 2003 also gives the court the power to give a community sentence to a persistent offender aged 16 or over, if that person has been convicted and fined on three or more previous occasions and the fourth offence would not otherwise have been serious enough to attract a community sentence.

(2) Financial penalties

- Fines

Fines are commonly imposed especially by the magistrates in England and Wales. 80% of all sentences are fines. Fines are suitable for criminal offences in cases which are not serious enough to warrant a community penalty, nor so serious that a custodial sentence must be considered. Fines may be imposed for almost any offence other than murder. Offences tried in the magistrates' court carry a set maximum, depending on the offence and the highest fine is

£5,000. There is no maximum in the Crown Court, so in the Crown Court, the fines can be very high given the offenders' means.

A fine used as a punishment does not have an equal impact on rich or poor in England and Wales. Therefore, before fixing the size of the fines, the courts will enquire into the offenders' financial circumstances. Under current sentencing policy, the courts must ensure that the amount of the fine reflects the seriousness of the offence, and also takes account of the offender's means, reducing or increasing it as a result. In the CJA 2003, the same principle is laid out for the imposition of the fines.¹¹⁷

Failure to pay the fines in England and Wales may result in short-term prison sentence although it is not applied frequently in practice. It is stated that 'fines have always been seen as effective since there is a lower number of re-convictions than with other disposals. This face-value analysis has been doubted.' (Bottoms, A. 1973: 543)

Thresholds for fines, community sentences and custody are provided in the CJA 2003, and there are criteria available for the use of fines.

- Compensation Orders

In cases involving loss or damage, compensation orders are available. The offenders may be ordered to pay compensation. Compensation orders may be imposed as a sentence solely or in addition to another sentence. The magistrates' power of compensation is £5,000 maximum. To decide the amount of compensation, sufficient evidence is needed to prove the loss of damage caused.

(3) Other non-custodial sentences

- Discharges

Discharges can be two types – absolute or conditional. An absolute discharge is the least severe sentence for minor offences. It is used where the court does not consider any other penalties would be appropriate due to the triviality of the offence. Absolute discharges have no affect left to the offenders. A conditional discharge is also a less severe sentence will have no direct affect on an offender. Conditional period would be less than three years. During the period of discharge, if the offenders re-offended, the subsequent courts may impose sentences to their original offences. The offenders are not automatically brought back to the courts for breach of the conditional charges.

- Binding over orders

Under the Justice of the Peace Act 1361, any person (whether charge with an offence or not) can be bound over to keep peace. (Uglow, S. 195: 264) Binding over can only be done with the consent of the person to be bound for a certain

¹¹⁷ s. 167 of the CJA 2003.

amount of money to be of good behaviour. The money will be forfeited for a breach of the order. The refusal of a binding sentence may result in a sentence of imprisonment.

- Deferment of sentence

The courts may order to defer a sentence, and the power to defer sentencing is up to six months. During the period of deferment, changes of circumstances of the offenders, such as making reparation, or starting a new life style, may persuade the criminal courts to choose non-custodial sentences. Written documents from the judges about their expectations as to the offenders' conduct over the period of deferment are required.

The courts decide sentences following two steps. Firstly, the judges calculate the initial tariff sentences, and secondly, they consider the secondary tariff principles. In practice, the judges will determine the tariff sentences which are generally thought appropriate for the particular offences. Then they would take into account the secondary tariff principles, including all relevant mitigating and aggravating factors, which are the reasons why the defendant should be punished less or more severely than the facts of the case might suggest. In England and Wales, the sentencing framework is the most influential factor to the judges.

The reform in the CJA 2003

Types of sentences

Both custodial and non-custodial sentences are available for the criminal judges in England and Wales. The judges may also impose discharges to the offenders who committed less serious offences.

1. Custodial sentences

Custodial sentences in England and Wales include different lengths of custodial sentences and the life sentence. Prison sentences may be suspended under certain conditions.

- Custodial and the suspended prison sentences

S1 of the CJA 1991 states that an immediate sentence of imprisonment may impose to 'either the offender(s) is/are so serious that only a custodial sentence is justifiable, or the offence is one of sex or violence and only a custodial sentence is adequate to protect the public from serious harm from the defendant, or the offender refuses to consent to a community sentence where consent is required.'

In the CJA 2003, significant changes have been made to custodial sentences, and the new concepts and approaches are introduced to the sentencing system. First of all, the CJA 2003 gives the magistrates power to imprisonment

of up to 12 months for a single offence,¹¹⁸ and maximum of 65 weeks is for offences in aggregation.

Secondly, the CJA 2003 creates the imposition for the short term custodial sentences of less than 12 months. In the CJA 2003, if a court intends to impose a custodial sentence of less than 12 months, the custodial sentence must not be less than 28 weeks. This is the first time that a minimum sentence has been given in criminal statute in England and Wales. All short term custodial sentences of up to 12 months can be either custody plus or intermittent custody, and both are newly created concepts in the CJA 2003.

In the custody plus approach, a prison sentence is divided into two - a 'custodial period' of between 2 to 13 weeks and a following 'licence period' of at least 26 weeks. In the custodial period, the offenders must be confined in custody, and during licence period they are under post-release supervision in the community. The court may impose specific requirements for the offenders to serve during the licence period, and it is similar to imposing a community penalty.

The intermittent custody approach allows offenders to serve their custodial period in block of a few days. Also intermittent custody includes a custodial period, which is from 14 to 90 days at a time, and a following licence period which is from 28 to 51 weeks. During the licence period, offenders serve their sentences in the community, and there are also added 'community order' requirements in relation to licence period for the offenders to serve when they are out of prison. The offenders will still be under supervision when they are released on licence.

The maximum lengths of imprisonment for certain types of offences are available for the Crown Court. For example, the maximum imprisonment for burglary is 14 years. For a third time burglar, three years' imprisonment is the minimum sentence. Where the offender who committed more than two imprisonable offences, technically two sentences may be imposed consecutively, but there are rules relating to this that suggest that they should normally be given concurrently.

As one focus in the CJA 2003 is public protection, serious offences are targeted. In the CJA 2003, serious offences are specified and they would result in the life sentence or the sentences of an indeterminate period of imprisonment for the purpose of public protection.

In order to protect public, the extended sentences of imprisonment are allowed to be given to the specified violent or sexual offenders. It means the dangerous violent and sexual offenders may be given extended sentences of imprisonment for the purpose of the protection of the public rather than to be sentenced for what they have done under 'just deserts'. Both the period of imprisonment and the licence period in extended sentences may be extended

¹¹⁸ Prior to CJA 2003, the maximum imprisonment for the magistrates' courts was six months for a single offence. The magistrates may, therefore, make full use of the custodial sentences, especially custody plus.

to at least 12 month. The extended period must not be more than five years for specified violent offenders and eight years for the specified sexual offences.

In the CJA 2003, the offenders who serve custodial sentences over 12 months will still be released automatically at the half-way of their prison sentences. The change is that they will remain on licence until the sentences have been served completely.

The custodial sentences can be suspended in the sentencing system in England and Wales. Suspended prison sentences were introduced in the CJA 1967, which aimed to deter the offenders from re-offending, show the seriousness of the offences, and reduce prison population. Under the current sentencing framework, in order to have their prison sentences suspended, offenders must firstly satisfy the criteria for imprisonment, but they may not have to serve the sentences of imprisonment in prison due to the 'exceptional circumstances'. If the offender re-offended during the period of suspension, the remaining time of the original prison sentence will be served as a result.

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- Activity

Activity is a new requirement in the CJA 2003, which orders the offender to carry out specified activities for not more than 60 days. Activities may include reparation to the victim where appropriate. The courts determine whether activity requirement is suitable for an offender by looking at the PSR.

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- Programme participation and supervision requirement

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- Prohibited activity

Prohibited activity orders the offenders to refrain from specified activities on a particular day or days or over a specified period. This is also new in the CJA 2003.

- Curfew

Curfew orders require offenders to remain in a specified place of residence for a period of not less than two hours and not more than 12 hours per day for up to six months. The court must, in addition, order electronic monitoring of the curfew order where appropriate.

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In the CJA 2003, the offenders can be prohibited from entering a specified place for a specified period, and exclusion requirement can be ordered for up to 2 years.

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The CJA 2003 also gives the court the power to give a community sentence to a persistent offender aged 16 or over, if that person has been convicted and fined on three or more previous occasions and the fourth offence would not otherwise have been serious enough to attract a community sentence.

(2) Financial penalties

- Fines

Fines are commonly imposed especially by the magistrates in England and Wales. 80% of all sentences are fines. Fines are suitable for criminal offences in cases which are not serious enough to warrant a community penalty, nor so serious that a custodial sentence must be considered. Fines may be imposed for almost any offence other than murder. Offences tried in the magistrates' court carry a set maximum, depending on the offence and the highest fine is £5,000. There is no maximum in the Crown Court, so in the Crown Court, the fines can be very high given the offenders' means.

A fine used as a punishment does not have an equal impact on rich or poor in England and Wales. Therefore, before fixing the size of the fines, the courts will enquire into the offenders' financial circumstances. Under current sentencing policy, the courts must ensure that the amount of the fine reflects the seriousness of the offence, and also takes account of the offender's means, reducing or increasing it as a result. In the CJA 2003, the same principle is laid out for the imposition of the fines.¹²⁰

Failure to pay fines in England and Wales may result in short-term imprisonment despite it is not applied frequently in practice. It is stated that 'fines have always been seen as effective since there is a lower number of re-convictions than with other disposals. This face-value analysis has been doubted.' (Bottoms, A. 1973: 543)

Thresholds for fines, community sentences and custody are provided in the CJA 2003, and there are criteria available for the use of fines.

- Compensation Orders

In cases involving loss or damage, compensation orders are available. The offenders may be ordered to pay compensation. Compensation orders may be imposed as a sentence solely or in addition to another sentence. The magistrates' power of compensation is £5,000 maximum. To decide the

¹²⁰ s. 167 of the CJA 2003.

amount of compensation, sufficient evidence is needed to prove the loss or damage caused.

(3) Other non-custodial sentences

- Discharges

Discharges can be two types – absolute or conditional. An absolute discharge is the least severe sentence for minor offences. It is used where the court does not consider any other penalties would be appropriate due to the triviality of the offence. Absolute discharges have no affect left to the offenders. A conditional discharge is also a less severe sentence will have no direct affect on an offender. Conditional period would be less than three years. During the period of discharge, if the offenders re-offended, the subsequent courts may impose sentences to their original offences. The offenders are not automatically brought back to the courts for breach of the conditional charges.

- Binding over orders

Under the Justice of the Peace Act 1361, any person (whether charge with an offence or not) can be bound over to keep peace. (Uglow, S. 195: 264) Binding over can only be done with the consent of the person to be bound for a certain amount of money to be of good behaviour. The money will be forfeited for a breach of the order. The refusal of a binding sentence may result in a sentence of imprisonment.

- Deferment of sentence

The courts may order to defer a sentence, and the power to defer sentencing is up to six months. During the period of deferment, changes of circumstances of the offenders, such as making reparation, or starting a new life style, may persuade the criminal courts to choose non-custodial sentences. Written documents from the judges about their expectations as to the offenders' conduct over the period of deferment are required.

The courts decide sentences following two steps. Firstly, the judges calculate the initial tariff sentences, and secondly, they consider the secondary tariff principles. In practice, the judges will determine the tariff sentences which are generally thought appropriate for the particular offences. Then they would take into account the secondary tariff principles, including all relevant mitigating and aggravating factors, which are the reasons why the defendant should be punished less or more severely than the facts of the case might suggest. In England and Wales, the sentencing framework is the most influential factor to the judges.

Appendix 5:

**China Bureau of Statistics Report -
National Public Survey on Public's Sense of Security in Society
(2001-2003)**

1. General information on the participants of this survey

		2001		2002		2003	
Number of provinces, and etc.		31		31		31	
Number of participants	Total	101058		101988		106557	
		No.	%	No.	%	No.	%
Agenda	M	59281	58.7	59760	58.6	61111	57.35
	F	41777	41.39	42228	41.4	45446	42.65
Age groups	16-17			2192	2.1	16-29	
	18-25			10396	10.2	21837	20.49
	26-34			23674	23.2	30-49	
	35-49			38407	37.7	54986	51.60
	50-59			13694	13.4	15082	14.15
	Over 60			13625	13.4	14652	13.75
Area	Cities	25460	25.2	27426	26.9	49460	
	Urban	5623	5.6	5084	5.0		
	Towns	12963	12.5	12320	12.1	57097	
	Villages	57282	56.7	57158	56.0	53.58	
Education status	Middle school or lower					35385	33.21
	Middle school or higher					60946	57.19
	HE level					10226	9.6

2. General feeling about current state of public's sense of public security and safety in China

Question 1: under current circumstances of public security and safety in the society, do you feel safe?

Answers	2001		2002		2003	
	No.	%	No.	%	No.	%
Very safe	6271	6.2	7034	6.9		
Safe	31953	31.6	36254	35.6	34956	32.8
Basically safe	44068	43.6	42473	41.6	62214	58.39
Not very safe	14599	14.5	12615	12.4		
Not safe	4167	4.1	3612	3.5	9387	8.81

Question 2: which type of public security and safety problem do you think would most affect your sense of secure?

Answers	2001		2002		2003	
	No.	%	No.	%	No.	%
Criminal offences	30817	30.5	28201	27.7	37720	35.4
Unstable public order	25876	25.6	26044	25.5	35517	33.33
Traffic accident	20181	20.0	21900	21.5	26142	24.5
Fire accident	3986	3.9	4384	4.3	7178	6.74
Nothing	18215	18.0	19806	19.4	-	-
Others	1983	2.0	1653	1.6	-	-

Question 3: Do you dare to go out and walk alone at night in the area where your house located?

Answers	2001		2002	
	No.	%	No.	%
Yes, I do	71340	70.6	72470	71.1
No, I do not	29718	29.4	29518	28.9

Question 4: If you and all your family members are not at home, will you worry about your property in the house are burgled?

Answers	2001		2002	
	No.	%	No.	%
Do not worry	36871	36.5	40253	39.5
Worry	64187	63.5	61735	60.5

Question 5: which place do you most worry about being a victim?

Answers	2001		2002	
	No.	%	No.	%
Crowded streets	5679	5.6	6000	5.9
Department store/ market	15986	15.8	16597	16.3
On buses / Coaches	21672	21.4	21840	21.4
Around resident areas	18700	18.5	17844	17.5
Road far outside towns /cities	19149	19.0	18679	18.3
Entertainment places	5852	5.8	5972	5.8
Nowhere	13149	13	14243	14
Other places	871	0.9	813	0.8

Question 6: If you are being a victim of a criminal offence, do you think other members of the public will provide assistance?

Answers	2001		2002	
	No.	%	No.	%
Will	25427	25.2	26157	25.7
Might	67944	67.2	68253	66.9
Won't	7687	7.6	7578	7.4

3. Public general comments on the state of public security and safety in China

Question 7: How do you feel about the public security and safety state in your district or county in this year?

Answers	2001		2002		2003	
	No.	%	No.	%	No.	%
Very good	7781	7.7	8970	8.8		
Relatively good	33285	32.99	35177	34.5	32047	30.41
Ok	51186	50.7	50013	49.0	66543	62.45
Bad	7005	6.9	6292	6.2	7607	7.14
Very bad	1801	1.8	1536	1.5		

Question 8: How do you compare public security and safety state in your district or county in this year than in last year?

Answers	2001		2002		2003	
	No.	%	No.	%	No.	%
Significant Change	11563	11.4	10425	10.2	42459	39.88
Better	49266	48.8	47465	46.5		
Same	31750	31.4	37479	36.8	56101	52.65
Worse	6637	6.6	5246	5.1	7961	7.47
Much worse	1842	1.8	1373	1.4		

Question 9: Do you feel positive about the public security and safety state during following two years?

Answers	2001		2002	
	No.	%	No.	%
Very positive	9207	9.1	9777	9.6
Positive	36931	36.5	37714	37.0
Relatively Positive	38881	38.5	40379	39.6
Not very positive	13813	13.7	12214	12.0
No	2226	2.2	1904	1.8

Question 10: How do you feel about the outcome of recent Yanda campaign in your area?

Answers	2001		2002	
	No.	%	No.	%
Big achievement	10424	10.3	9494	9.3
Good	43942	43.5	42261	41.4
Not very much achievement	28412	28.1	28882	28.3
No achievement	3911	3.9	4052	4.0
Unknown	14369	14.2	17299	17.0

Further questions in survey 2003

Question 5: How serious do you rank the following offences?

Offences	Not serious		Ok		Relatively serious		unknown	
	No.	%	No.	%	No.	%	No.	%
Burglary	43779	41.09	33284	31.24	17414	16.34	12080	11.34
Robbery	48073	45.11	27871	26.16	12703	11.92	17910	16.81
Youth offences	42883	40.24	29568	27.75	14729	13.82	19377	18.18
Offence committed by the offenders from other areas	35114	32.95	25691	24.11	17541	16.46	28211	26.48
Drug taking and trafficking	37431	35.13	16744	15.71	9867	9.26	42515	39.9
Hooligan and gang offences	36990	34.71	23242	21.81	11146	10.46	35179	33.01
Gambling	28730	26.96	36016	33.8	16134	24.53	15677	14.71
Making and trafficking indecent publications Prostitution and visiting prostitutes	33199	31.16	21700	20.36	13732	12.89	37926	35.59
Making and selling fake or bad quality products	33033	31.0	21782	20.44	16505	15.49	35237	33.07
Forcing to sell or buy, or bully others in the industry	42852	40.22	23915	22.44	7462	7.0	32328	30.34

Question 6: How do you feel about the public security and safety in the following places?

Places	Ranking	Statistics		Places	Ranking	Statistics	
		No.	%			No.	%
Around schools	Good	44782	42.03	Railway/coach station and harbour	Good	17065	16.01
	Ok	45050	42.28		Ok	41078	38.55
	Bad	7517	7.05		Bad	12391	11.63
	Do not known	9208	8.64		Do not known	36023	33.81
Around big enterprises	Good	16084	15.09	Public places	Good	20087	18.85
	Ok	30827	28.93		Ok	47021	44.13
	Bad	5188	4.87		Bad	10796	10.13
	Do not known	54458	51.11		Do not known	28653	26.89

Question 7: Do you have security offices or security teams in your residential area?

Security offices	Have		Do not have		security teams	Have		Do not have	
	No.	%	No.	%		No.	%	No.	%
	31905	29.94	74652	70.76		50548	47.44	56009	52.56

4. The social issues which the public are mostly concerned

Question 8: Which social problems are you mostly concerned about?

Problems	No.	%	Problems	No.	%	Problems	No.	%
Current tendencies in society	21489	20.17	Employment problems	18401	17.27	Corruption	16959	15.92
Education	14631	13.73	Salary and welfare	7338	6.89	Public security and safety	16649	15.62
Housing	4262	4.00	Requisition of land relating problems	2003	2.0	Pollution	4625	4.34

Question 9: If you have dispute in your family, where will you go first to seek help?

Where	No.	%	Where	No.	%
Community mediation organisations	68847	64.64	Political or legal institutions	12937	12.14
Governmental component departments	12951	12.15	Others	11795	11.07

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