# A Comparative Study on Penalty Recommendation and Sentencing of Criminal Offenses[1]

## Abstract

In May 2012, the Control Yuan proposed an amendment to the Ministry of Justice, which said the prosecutor's specific request for penalty would make people prejudice the case, and it also had greatly differences from the judge's sentencing. The judicial institution recognized the importance of sentencing appropriately, so the debate of death penalty cases in the Supreme Court was held in December 2012. Based on this, this research plan takes the relevant information on the sentencing factors, the degree of proof and the sentencing results of the foreign legal system on criminal cases as a refer, and conducts a complete literature review. And also conduct a comparative discussion with the sentencing information reference module that had currently established by the judicial institution.

The results of the research show that the quantitative statistical analysis found that the limited imprisonments from judge's sentencing are not as same as Japan, instead of 10% off from requested penalty by the prosecutor. As for the main factors that will affect the specific request penalty by prosecutor: "the indictment states whether the perpetrator is confessing whether or not the crime is committed", "the indictment states whether there is a remorse after the crime", and "the indictment states whether the perpetrator is an accomplice". These are the main factors affecting specific sentencing request by the prosecutor. In other words, if the accused has a confession and remorse, it will affect the length of the prosecutor's request for penalty, and they are more

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possible to accept a lighter sentence than no confession and remorse; and if the defendant plays the role of accomplice in the criminal facts, compared with other accomplices, it is more likely to accept heavier requested penalty. The main factors that will affect the judge's sentencing: "The judgment states whether there is surrender after the crime", "Judge considers other unfavorable sentencing factors to defendants", these are the main factor affecting the judge's sentencing. In other words, if the defendant surrender after the crime, it is more likely to accept a lighter penalty than the unconfessed person. Although Article 62 of the national criminal code is clearly stipulated that there is a requirement for mitigating the penalty, it is found from the statistical analysis that the length of the imprisonment of surrendered is less 42 months than people don’t surrender. And if the defendant is not reconciled, because other laws aggravate his sentence, kill the immediate blood relatives, and escape that are unfavorable to the defendant, he is more likely to accept heavier penalty.

Finally, at the concrete conclusions, the position of our research team agrees with the prosecutor should specifically ask for a sentence. However, it is still necessary to establish a basis for the prosecutor to specifically request penalty, and to make the prosecutor’s right of specific request penalty expressly stipulated. Sentencing factors in Article 57 of the Criminal Code are needed to be more explicit or more detailed for each factor, and it is considered that the Judiciary Proceedings should be strictly divided into a guilty plea and a sentencing procedure. Furthermore, in order to comply with the due process of law, prosecutor should prove the punishment factors used in the sentencing procedure to the judge.

As for the sentencing factor and the establishment of a consistent standard, the study concluded that "sentencing guidelines" which are too specific may infringe the judge's independent judgment. The recent goal should be that whether the prosecutor is in the process of requesting penalty or the judge is sentencing, they should aim at the

criminal causes, and then describe them in detail. After a long period of accumulation, we can establish a standard for sentencing that is suitable for Taiwan.

**Key words: sentencing request, sentencing, sentencing factors, reference module, sentencing debate**

# A Comparative Study on Penalty Recommendation and Sentencing of Criminal Offenses[2]

## A. Foreword

The Control Yuan issued a request for corrective action against the Ministry of Justice on the claim of penalty by prosecutors in May 2012, as such claim will give an impression to the public that judgment is made on the basis of presumed guilty. Furthermore, the sentencing of judges and the claim for penalty by prosecutors differed significantly, to the extent that the public will no long trust the judicial system. There is no written law specifying the claim for penalty, which will easily trigger social pressure and the pressure on the judges in legal proceedings. For a long time, the domain of sentencing of the judges has not attracted much attention.

The purpose of this study aims at clarifying the standard of sentencing under Article 57 of the Criminal Code of the Republic of China in the practice of sentencing and the effect of the database on hand in operation:

Literatures covering topics of the factors considered in the process of sentencing, the intensity of proof, and the result of sentencing under the legal systems of other countries were reviewed and compared with the reference modules of Taiwan established for the Judicial Yuan in sentencing for discussion.

In this study, two forms of crimes that attracted most attention of society, namely, "drunk driving that caused crucial injuries or fatalities" and "homicides", were taken

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[2] This paper is an extract of the research program "A Comparative Study on Penalty Claim and Sentencing of Criminal Offenses" commissioned by the Academy of the Judiciary, Ministry of Justice, in 2019. The content of this paper does not constitute the stance of the Academy of the Judiciary and shall not be cited without the consent of the academy. Ma Yueh-Chung is responsible for the summary of this paper in Chinese and English, the Foreword, conclusion, and policy recommendation, as well as the overall proofreading. Hsu Chia-Yuan and Wu Kai-Yuan are responsible for the literatures review. Tai Shen-Feng is responsible for the quantitative and statistical analysis of the indictment and verdict as well as the questionnaire for the public. Hsu Hua Fu is responsible for the in-depth interview and analysis.

into account for comparing the difference between the “penalty claim” as stated in the indictment of the prosecutors and judgment made before and after the establishment of the sentence recommendation trend module. The causes for the changes in sentencing and the variation of sentencing were subject to statistical analysis.

The phenomenon of sentencing and causal analysis under the aforementioned observable penalty claim, the opinions of the scholars and experts, the judicial systems in foreign countries were put together for analysis and the findings on the penalty claim of the prosecutors and the criteria of sentencing of the judges and related factors will be served as policy recommendation for the amendment of laws or practice in the judicial system of Taiwan.

## B. Review of literatures

A comparative study on the legal systems of the Republic of China, Germany, Japan, the United Kingdom, the United States, Australia, and The Netherlands has been conducted and analyzed as follows:

### I. The law of Germany

1. Sentencing on a particular offense

There is no explicit requirement prescribed in Article 200 of the Criminal Procedure Law in Germany. Yet, prosecutors should put together all the evidence at the conclusion of the investigation and present a "closing speech" before the court issues the verdict (Paragraph 1 in Article 258 of the Criminal Procedure Law in Germany). First, prosecutors will present a conclusion on the basis of the investigation result and the evidence on hand, and give recommendation on the conviction and sentencing of the suspects. Second, the counsel of the victims and the defense attorney will present their statements, followed by the final statement of the defendants.

There is no explicit requirement prescribed in the Criminal Procedure Law of Germany and the prosecutors may claim for penalty on the suspects. Yet, the above rules indicated that it is the onus of the prosecutors to present the "closing speech" and give recommendation on sentencing. In practice, the recommendation or claim of the prosecutors on sentencing is usually construed as the maximum limit of penalty. The court may incline towards or adopt the recommendation of the prosecutors in sentencing. However, the court is not constrained by the penalty claim of the prosecutors.

Sentencing refers to the decision of the judges on imposing appropriate penalty within the scope permitted by law on particular cases. Basically, the sentencing is based on the principle of culpability. Further to the "principle of fitting punishment to crime",

the notion of "resocialization" of the convicts should also be taken into account (Lin Yu-Hsiung, 2016).

According to Paragraph 2 in Article 46 of the Criminal Code of Germany, causes of sentencing are: (1) The motive and purpose of crime; (2) the inclination toward law abiding and will of law violation exhibited by the perpetrator through the act of crime; (3) the intensity of defiance of liability; (4) the means and liable consequences; (5) the state of living of the perpetrator before committing crime, its interpersonal relation, and economic condition; (6) the behavior after the offense, particularly the effort made as compensation to the victims.

Article 46a of the Criminal Code of Germany specified the mitigation of penalty through the reconciliation between the perpetrator and the victim and related compensation for the damages. Article 46b of the same law specified the assistance or prevention of serious crimes as the basis for mitigation of punishment. Article 49 of the same law specified the cause of mitigation of punishment. Yet, we could not deny that these rules are generalized to certain extent and serve the purpose as guideline in the practice of sentence in most of the cases. This is indeed an issue dictated for further verification with empirical data. As for punishment under security measures, the principle of proportionality under Article 61 of the Criminal Code of Germany should be observed. In other words, punishment of this kind must be relevant with the seriousness of the offense, the action to be taken, and the degree of danger posed by the perpetrator. The Criminal Code of Germany does not provide details on this principle of proportionality in practice.

The judicial practice of Germany has developed an "operation theory" for coordinating the relation between sentence 1 in Paragraph 1 of Article 46 of the Criminal Code of Germany (criminal liability compensation) and sentence 2 in Paragraph 1 of Article 46 of the same law (special prevention). In practice, the judge

will determine the intensity of penalty fitting to the crime within the scope of allowable penalty, and shall consider "special prevention" under the discretion being granted in determining the penalty. Under this theory, a narrow scope of punishment is reconciled with a broader scope for fitting the punishment to specific crime thereby the judge may base on the need of prevention to determine the actual sentence fitting the crime within the narrow scope of punishment. In theory, this makes the sentence of the judge more justifiable. Yet, this theory is unclear and lacks substantive standard. The "operation theory" is just a simple repetition of the fundamental principle of sentencing under Article 46 of the Criminal Code of Germany and cannot provide meaningful help for the judges in giving actual sentence.

2. Sentence of several counts of crimes in concurrence

Sentencing refers to the decision of the judge on determining the severity of punishment on particular offense within the scope of legal system. Basically, sentencing is based on the principal of culpability. Further to the "fitting of punishment to crime", the principle of the "resocialization" of the convict should also be taken into account (Lin Yu-Hsiung, 2016).

Second, judges should pay attention to the "prohibition of double jeopardy" in sentencing. In other words, judges cannot reconsider the same punishment on the same condition of crime after sentencing. Likewise, judges shall pay attention to the "prohibition of double jeopardy" in the investigation of sentencing. It is explicitly stated in Paragraph 3 of Article 46 and Article 50 of the Criminal Code of Germany. According to sentence 3 in Paragraph 1, Article 54 of the Criminal Code of Germany, judges shall, at the time of sentencing, consider the two elements of "personality of the perpetrator" and the "relation among different crimes in the entire course of committing crimes" so as to determine the severity of sentence. Secondly, the factors for sentencing

are, “the relations among several crimes, and see if there is significant variation between the timing, space, and violation of legal interest of these crimes. If these crimes are unrelated, a more severe penalty should be given or even the maximum penalty should be considered. If the crimes committed by the perpetrator have significant means-end consequence relation, a less severe penalty should be considered.”

3. Prerequisite and method of sentencing

In Germany, the legal effect on the punishment of several counts of particular crime is prescribed in Article 52 to Article 55 of the Criminal Code of Germany. In Article 52, the competing legal effect is under consideration. In the sentence of imprisonment for punishment of several crimes punishable by imprisonment, Article 54 of the Criminal Code of Germany provides that, “if the final sentence is life imprisonment, the overall punishment shall end with life imprisonment. Under other circumstances, the overall punishment shall end with the maximum penalty. The same principle is applied to different forms of penalties. In addition, the personality of the perpetrator and respective crimes committed should be considered as a whole”. The prerequisite of sentence is specified as follows:

（1） Prerequisite

First of all, it must be crimes committed prior to the sentence, excluding the ruling of courts in foreign countries. According to Paragraph 1 in Article 53 of the Criminal Code of Germany, “if the same person committed several crimes and are under other legal jurisdiction for trial, the highest penalty of imprisonment or fine should be sentenced in combination as a whole.” This is the same as the law of the Republic of China: First, it is the same person who committed several crimes. Second, the crimes were committed prior to the sentence.

（2） Method

According to Article 54 of the Criminal Code of Germany, “if the final sentence is life imprisonment, the overall punishment shall end with life imprisonment. Under other circumstances, the overall punishment shall end with the maximum penalty. The same principle is applied to different forms of penalties. In addition, the personality of the perpetrator and respective crimes committed should be considered as a whole.” As such, (1) “punishment of different crimes must be determined” first, which means the kinds of crimes and the severity of punishment thereof in the sentence. (2) determine “which penalty is the severest among other penalties” in relation to the sentences of punishment on different crimes, and the severest punishment shall be “final penalty”. For example, the punishment of imprisonment is more severe than a fine, and prison term of 2 years is more severe than a prison term of 1 year. (3) “Adjustment of penalty for sentence”. At this stage, the judge should consider the personality trait of the perpetrator, the history of criminal activities, and the relation of the crimes. Special attention is required at this point, as stage 3 also contains 2 steps: <u>Step 1: all penalties shall be in compliance with applicable laws.</u> This is relevant with Article 51 of the Criminal Code of the Republic of China. <u>Step 2: the discretion of the judge in sentencing</u> (: the judge should consider the personality trait of the perpetrator, the history of criminal activities, and relation of the crimes. This step is further subdivided into 2 stages: First, the “relation of separate acts” of the overall behavior of the perpetrator, at this point, the judge must consider if “the acts of crimes are independent of one another or subordinated to one another”, “the frequency of repetitions” and the “homogeneity and heterogeneity of legal interest and crimes”. There is one thing that worth our attention. The separate acts of sexual abuses will not be considered for mitigation of punishment. The last stage is “<u>the relation between penalties and sentences related to the perpetrator</u>”: including the interpersonal and economic relation,

the behaviors of the perpetrator before and after committing the crimes, the purpose of penalty, and the influence on the daily life of the perpetrator in the future. At the same time, the judge should also consider the "response to damage" and the interest of the victim.

4. Penalty after sentencing

According to Paragraph 1 in Article 55 of the Criminal Code of Germany, "Article 53 and Article 54 of the Criminal Code shall be applicable to situations where an offender is being sentenced and has committed another crime and was tried prior to the aforementioned sentence, and on proof of guilt of the aforementioned crime and before the completion of serving the sentence and end of prescription, or before release. The aforementioned sentence as referred to shall be the judgment based on the evidence in the aforementioned proceedings that deemed final." However, the Criminal Code of the Republic of China does not provide any upper limit of penalty on several offenses in combination beyond "several offenses prior to judgment". As such, if any of the offenses committed by the perpetrator has been proven, among other crimes committed and substantiated, it is possible that punishment will be imposed ex post facto. But it is not a matter of concern under the legal system of Germany at the time of sentencing under *Realkonkurrenz*.

According to Paragraph 1 in Article 53 of the Criminal Code of Germany, the legal effect of *Realkonkurrenz* has the limitation of severing. As such, it would be difficult to image that in Case No. 1, that it takes time to make decision in the crimes (even the pronounced sentence has started or even completed), and sentence was given in the afterward with additional imposition of penalty after one another.

## II. The law of Japan

The Second World War was the watershed of the criminal procedure law of Japan. German law was the foundation of the criminal procedure of Japan prior to the outbreak of the war, which was colored with the inquisitorial system. Under the military occupation of the USA after the war, Japan started to completely reform her constitution. Accordingly, the criminal procedure law gradually developed towards the adversarial system. As such, the penalty recommendation of the prosecutors prior to the war is similar to the current practice of the Republic of China, which could be presented prior to the prosecution or at the cross-examination stage. Under the "principle of indictment" after the war, prosecutors may claim for penalty only at the "cross-examination" stage to avoid the preoccupation of the judge in giving judgment. In other words, public prosecutors may claim for "penalty" when presenting the statement on the charges after court activities --- particularly after presenting the evidence from the investigation to support the claim for penalty in accordance with Paragraph 1 in Article 293 of the criminal procedure law of Japan in the aspect of "presentation of opinions on applicable facts or laws".

The judges are fully discreet in making judgment within the scope of penalty permitted by law before and after the war. The recommendation of penalty by the prosecutors is just a matter of reference. At the initial stage of the institution of the new criminal code, Japan has discussed to adopt the German model, which is the factor considered for sentencing similar to those prescribed in Article 57 of the Criminal Code of the Republic of China. This helps to clarify the content basing on which the judge will prescribe the penalty. Yet, it was not passed in the legislative process. Yet, the high court has already adopted such measure through sentencing. In other words, the cause of sentencing includes the personality trait, age, encounter, motive and purpose of crime of the perpetrator. Japan has adopted the "Jury" system since 2009 under

which the people can participate in the "confirmation of facts" and "determination of applicable laws" in criminal justice. They also participate in "evaluation of sentencing" so that sentencing under "trial by jury" unveiled a new face of sentencing different from the independent judgment on sentencing by the professional judges:

1. Penalty recommendation and sentencing under the judgment of professional judges

（1） Reference and criteria for penalty recommendation

Under the trial of professional judges, prosecutors "must present an opinion on the facts and applicable laws" at the conclusion of the investigation procedure under Paragraph 1 in Article 293 of the Criminal Procedure Law of Japan. The statements presented by the prosecutors on "recommendation of sentencing" is generally known as "penalty claim". The content of penalty claim mainly includes the principal penalty and the subordinated penalty (additional penalty), recovery and opinion on granting probation or not (YASUTOMI KIYOSHI, 2007). Yet, there is no national criteria instituted by the Public Prosecutors Office of Japan regulating the penalty claim of the prosecutors. The penalty claim for the same type of crimes may differ by district. In general, the lack of criteria for penalty claim may fit the specific criminal policy at different stages of response or districts. For example, drunken driving, fraud, bribery in election may be punishable under stricter penal policy in a specific district at a specific time. To contrast, the policy of lesser penalty may appear otherwise.

（2） The theory and practice of sentencing

The result of the final "sentencing" of the court may be less severe than the opinion of the prosecutors in "penalty claim" by 20% to 30%. In practice, there is a tacit understanding that the punishment usually "30% discount" or "20% discount" of penalty claim. In other words, professional judges tend to impose sentence between 70% to 80% the severity as presented by the prosecutors in penalty claim (on the substantive claim for penalty by the type of crime and scope of crime). The defense lawyer or the

defendants could usually forecast the sentence on the basis of the penalty claim made by the prosecutors. This is not definitely true, but it is really an exception if the sentence is relevant with the penalty claim or more severe than the penalty claim (武内謙治, 2002). Perhaps the professional judges of Japan are constrained by the "latent rules of sentencing". Furthermore, the theory of sentencing in Japan is largely affected by the law of Germany. Indeed, the mainstream discipline and theory are introduced from Germany. The legal profession in criminal law has never paid much attention to the development of the theory of sentencing. Yet, the theory of Germany is based on the legal system of Germany that famous Japanese scholar in sentencing (Kunio Harada) has rallied to build up an independent theory of sentencing in Japan (Kunio Harada, 2011). Currently, the most convincing interpretation is adopted from the "theory of the scope of activity" (*Spielraumtheorie*) from a general rule of German law, meaning that "sentencing is determined by the severity of the crimes in consideration of general prevention of the crime" (Shintaro KOIKE 小池信太郎, 2006). In detail, this refers to the determination of the scope of liability on the basis of the "state of the crime". Penalty is given on the basis of "the general state of affair" within this scope.

2. Penalty recommendation and sentencing under "trial by jury"

（1） Special design of the evaluation of sentencing — an exclusive index search system for sentencing

The so-called "jury system" of Japan, which is similar to the public participation in trialing, introduced the people to participate in criminal trials. As such, the "sentencing procedure", which was exclusive to the professional judges of Japan, involved the participation of common people. The supreme court of Japan has designed a "sentencing index search system" (量刑検索システム) to echo with the "jury system". Under this new arrangement, ruling after April 2008 have been based on the search

result of the system where the charge, pattern of crimes, where there is the existence of accomplice or not, planned or incidental offense, the outcome and motive of crime, any fault on the side of the victim and related factors of particular case to show the outline of the "inclination" of sentence. The flexible use of these reference data on sentencing help to control the upper and lower limit of penalty or pronouncement of probation at certain stage of the review on the case so that the members of the jury could get a substantive idea of sentencing and generally control the inclination of sentencing of the case (Kunio Harada, 2010).

## III. The law of the United States of America

There was no rule or standard in the United States of America at the federal level and state level in sentencing before 1970. Then the "upper limit" system with no definite term and no definite intensity was adopted. The defined period and scope of execution of penalty could not be determined at the time of sentencing. Only specific scope could be inferred and either the convict or the victim cannot get a clear picture of the situation. For the court, there is no uniform standard to follow and is unfavorable to the recommendation of penalty by the prosecutors. As such, the voices appealing to the establishment of a systematic mechanism of sentencing were heard. The following shows the development of such mechanism at the federal level and the state level.

1. Federal level

The well-known measure in sentencing reform of the US federal government is the establishment of a set of "quantification" guides thereby a coordinate system with horizontal and vertical axis is available to the judges in sentencing. The vertical axis denotes the severity of the crime along a scale of 1 to 43 while the horizontal level denotes the personal history of the perpetrator in committing crimes along a scale of 1

to 6. The intersection point of the two axes indicates the scope of penalty to be given, which is also served as the limit of sentencing by the judges.

This system has been in place for decades but was queried by academics. Yet, academics and practitioners in the legal discipline started to query about the indefinite term of punishment in the 1960s and the 1970s. Orchestrated by the US federal government, the US Congress passed the so-called “Comprehensive Crime Control Act, 1984) in 1984, which constituted an integral part of the Code of Federal Regulations (CFR) of the USA. The principal element of the content is that an independent organization, the “United States Sentencing Commission”, was set up under the judiciary of the US federal government. This commission is responsible for setting the standard of sentencing as reference for the judges in sentencing. The authority and responsibility of this commission are also explicitly stated in Chapter 28 of the FCR of the USA that makes it an independent branch of the judiciary. The commission has proposed the standard of sentencing to the US Senate on April 13 1987, which came into full force on November 1 of the same year. Since then, the commission has published the Guidelines Manual annually.

2. State level

Not all the states in the USA have imitated the aforementioned federal model. There are only 25 states that have instituted the “Guidelines” or “Law” of sentencing since 1980. In addition, the types of crimes, the effect, and scope of these guidelines and laws are not quite the same. Some adopted the quantified model of the federal government while the others insisted on using the narration model. The state of Florida is a distinct example and suggested that the sentencing standard is too rigid and abolished the standard that has been in force for decades with the replacement of a new law featuring a hybrid system to provide leeway for the court in sentencing. California

has never instituted the standard of sentencing but has a special system in sentencing for punishment.

## IV. The United Kingdom and Australia

The United Kingdom is the parent of Australia, but the legal systems of the two countries are not really the same. The two systems are elaborated as follows:

1. The law of the United Kingdom

British Parliament has authorized the Court of Appeal to set up a unique body, "The Sentencing Advisory Panel" pursuant to Paragraph 2 in Article 80 of the "Crime and Disorder Act of 1998", which started to function in July 1999. The function of this body is to express an opinion to the Court of Appeal in reviewing the sentence given by the original court to assure the sentence is appropriately made so as to keep the sentencing of all courts of first instance congruent. It was not until 2004 that an overall standard of sentencing has been instituted. The "Sentencing Guidelines Council" was established in accordance with Article 167 of the "Criminal Justice Act 2003" whereby the advisory groups should give recommendation to the council on sentencing and makes this council an independent and designated body in sentencing. According to Article 172 of the same law, courts at all levels should respect the recommendation of the council in sentencing, which implies its legal effect in the sentencing of the courts. "Trial" and "sentencing" are two independent procedures in the UK. In other words, the sentencing procedure may be activated only when the offender is proved guilty. Prior to the launch of the sentencing procedure, there is a four-week "court recess" in general except for cases of small crimes with the information on sentencing in place. In otherwise, no sentence will be given immediately after the proof of guilty of the offender. The purpose of court recess is to give the defendant the opportunity for

seeking legal assistance, and related agencies and institutions to gather sufficient information necessary for sentencing.

2. Australia

The development of the sentencing standard in Australia could be observed from two regions: New South Wales, Western Australia and Northern Territory.

New South Wales imitated the UK and USA in establishing the "Judicial Commission" in its development and one of the primary functions of the commission to supervise sentencing. In other words, it is an attempt to set up a uniform standard of sentencing. Yet, the standard is not operated through quantification or a coordinate system for regulating the discretion of the judges but just the supply of large volume of standard information on previous cases to the judges. This system is known as the "Sentencing Information System, or SIS). This system was further expanded into the "Judicial Information Research System, or JIRS" after 2003 (Kuo Yu-Chen, 2003). The aforementioned "Judicial Commission" does not play only the role of sentence supervision. In 2003, the judiciary of New South Wales established the "Sentencing Council" in accordance with "The Crimes (Sentencing Procedure) Act 1999) Part 8B (*New South Wales Sentencing Council*)" for New South Wales. This council started to operate in January 2003.

The development of sentencing system in "Western Australia" and "Northern Territory" is quite different from New South Wales. They did not set up quantified sentencing standard of sentencing database but set up certain limit governing the criminal cases related to property for consistency and obligation. It is summarized as follows. In November 1996, Western Australia has instituted mandatory regulations governing sentencing. The purpose then was the requirement of at least 12 months of imprisonment for offenders, adults or minors, who committed the crimes of "break in

and burglary" for more than 3 times. In 1997, Northern Territory amended the "*Sentencing Act 1995*" and the "*Juvenile Justice Act 1993*" thereby a limit has been set for the penalty of crimes related to property irrespective of the repetitions of offenses. However, the mandatory regulations in Western Australia and Northern Territory were criticized as a violation of the "International Convention of Civil Rights and Political Rights", and the "Convention on the Rights of the Child" of the United Nations. As such, The Australian Law Reform Commission suggested the aforementioned regulations are in violation of applicable legal rules governing sentencing and international law in a report of 1997 and recommended for the abolition of these regulations or the federal legislature will conduct counter-action. In 2001, Northern Territory abolished the aforementioned requirements of sentencing but Western Australia still keeps the regulations intact.

## V. The Netherlands

Being different from most countries where the source of sentencing reform came from the judicial body of the government, the reform in The Netherlands has its origin from the needs of public prosecution for the uniform discretion of the prosecutors (including the claim for penalty). They even hope the reform of penalty claim among the prosecutors could indirectly adopt the sentencing result of the judges for the proper achievement of objectivity and fairness. The Directorate-General of Prosecution of The Netherlands has promulgated the so-called "National Prosecution Guidelines" in the 1970s as reference for the prosecutors for forecasting the severity of sentencing of the court. However, the European Council suggested all member states institute customized sentencing standards in 1992 so that the Directorate- General of Prosecution of The Netherlands started to design a new set of sentencing standards for The Netherlands in 1995. The design team consisted of 8 members, the majority of whom were prosecutors.

They started with the common types of crimes and collected massive information on sentencing of these crimes for analysis, and sorted out factors for inclusion in penalty. With the combination of computer technology in 1990, they have completed the first set of penalty claim standard for the prosecutors known as the “BOS-POLARIS” (with its origin from the Dutch language Beslissing Ondersteunend system, and the abbreviation of Project Ontwikkeling Landelijke Richhtlijnen Strafvordering).

There are six objectives under the BOS-POLARIS, namely: 1. A unified standard; 2. Nondiscriminatory judiciary; 3. Orderly guideline system; 4. Easy to understand judicial proceedings; 5. Relevance between crimes and penalty; 6. Minimization of discrepant sentencing (Kuo Yu-Chen, 2013). The procedure of penalty claim could be divided into 5 stages; 1. If the system applicable to particular type of crime (determine if the BOS-POLARIS system should be applicable to such type of crime); 2. The choice of rules; 3. Application of the rules; 4. Confirmation (confirm the result of application and determine any special reason in the exclusion); 5. Execution (recommendation for sentencing). The whole process is managed by computing (DSS system) and the reference value could be computed in 2 to 3 minutes (Lin Yen-Liang, 2010). The computing mode of this computer system is based on the fundamental points of the basic offence for addition and subtraction. The final score will be classified into 5 penalty claim zones as the basic reference for the prosecutors in claiming for penalty. Furthermore, judges will not wholly rely on the recommendation of sentencing from the prosecutors in sentencing. The court also started to develop its own sentencing system – “Sentencing systems for judges and prosecutors (JDSSs)”. In the wake of IT development, The Netherlands also started to use IT to process sentencing in 2001. The judiciary also linked to the CST (Consistent Sentencing) database to set up the search system for searching cases with criminal behaviors, previous offenses, ages, and others

as parameters (Kuo Yu-Chen, 2013). Yet, this system was abolished in 2015 for several reasons with the replacement of a newly proposed standard of sentencing.

## C. Research Method and Process

### I. Quantitative study of indictment and verdict

1. Research framework

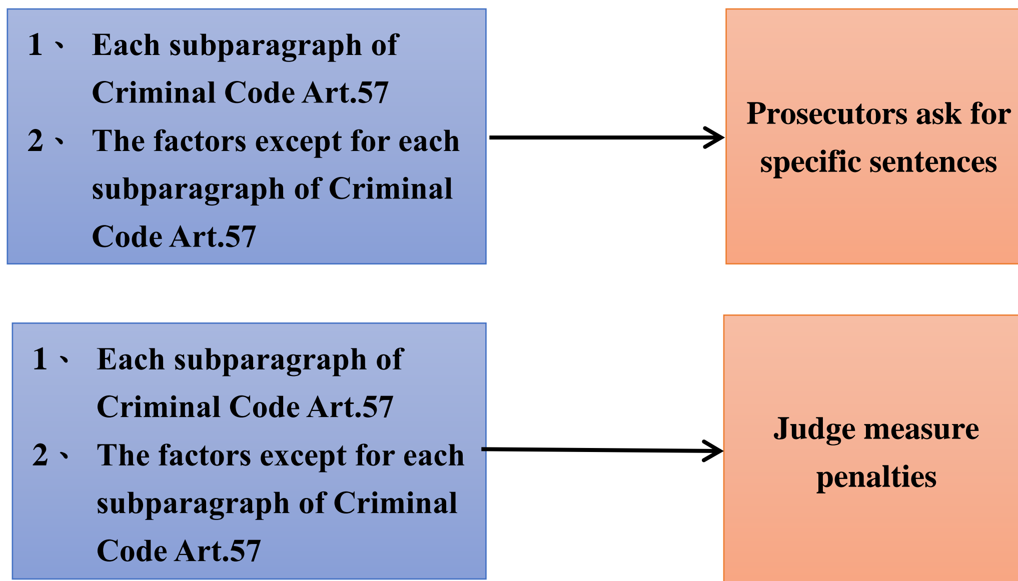


**Figure 3-1-1 The Factors that Influence Asking for Specific Sentences and Measurement of Penalties**

（1） Content of Article 57 of the Criminal Code

"The motive, purpose of crime", "provocation at the time of committing crime", "the means of committing crimes", "the livelihood of the perpetrator", "the conduct of the perpetrator (a recidivist, any prior criminal record), "level of education of the perpetrator", "the relation between the perpetrator and the victim", "the danger or damage caused by the crimes (number of fatalities)", "attitude after committing the crime (voluntary surrender to police, any regret, voluntary admission of committing the crime)".

（2） Factors beyond Article 57 of the Criminal Code

"Year of investigation/verdict", "relation between the perpetrator and the victim", "the defendant is the principal offender or the accomplice", "factors favorable to the defendant", and "factors unfavorable to the defendants being considered by the judge".

2. Issues for study

（1） The effect of the content of Article 57 of the Criminal Code on the penalty claim of the prosecutors?

（2） The effect of the content of Article 57 of the Criminal Code on the sentencing of the judge?

（3） The effect of other factors beyond Article 57 of the Criminal Code on the penalty claim of the prosecutors?

（4） The effect of other factors beyond Article 57 of the Criminal Code on the sentencing of the judge?

3. Hypothesis of the study

The researchers put forward the following hypotheses on the basis of the aforementioned issues:

（1） Hypothesis (1): the content of Article 57 of the Criminal Code has significant influence on the penalty claim of the prosecutors.

（2） Hypothesis (2): the content of Article 57 of the Criminal Code has significant influence on the sentencing of the judge.

（3） Hypothesis (3): factors beyond Article 57 of the Criminal code have significant influence on the penalty claim of the prosecutors.

（4） Hypothesis (4): factors beyond Article 57 of the Criminal code have significant influence on the sentencing of the judge.

4. Research method

（1） Subject matter of study

The Academy of the Judiciary, Ministry of Justice, provided the indictments of the prosecutors for penalty claim, including the two types of crimes, “drunk driving causing severe injuries or fatalities”, and “homicide (murder)”, which draw the most of social attention as the foundation. Corresponding verdicts issued by the courts of first instance are also provided. The two help to sketch out the mapping between the factors affecting the prosecutors in penalty claim and the factors affecting sentencing. The changes and key factors between the penalty claim of the prosecutors and the sentencing of the judges were induced to clarify the key factors affecting the two and the variation in the term of sentence.

① “Drunk driving causing severe injuries or fatalities”

The study is based on the cases on “Drunk driving causing severe injuries or fatalities” pursuant to Paragraph 2 in Article 185-3 of the Criminal Code provided by the Academy of the Judiciary, Ministry of Justice covering the period from 2012 to 2017. There are 22 indictments (including the sequence number of the verdicts), 18 cases of indictments without verdicts, no penalty claim by the prosecutors, and the charges instated by the prosecutors were made under Paragraph 1 in Article 185-3 of the Criminal Code. There are 4 remaining samples. Quantitative analysis is not possible as the sample size is too small.

②“Premeditated murder”

There are 241 indictments (including the sequence number of verdicts) instated pursuant to Paragraph 1 in Article 271 of the Criminal Code provided by the Academy of the Judiciary, Ministry of Justice on “premeditated murder” covering the period from 2008 to 2016, net of the cases without verdicts, with only detention warrants, judgment as declined for public prosecution, no proceedings is necessary, trial not for disclosure,

and the charges pressed by the prosecutors is attempted murders (not for this project), and cases with no penalty claim from the prosecutors. There are only 122 cases left behind as the samples with 40 cases with court rulings as manslaughter, assault, negligent manslaughter, and acquittal. The result is only 82 samples that fit the purpose of this study. The Academy of the Judiciary, Ministry of Justice, then provided further assistance in availing prosecution statement on 2019/2/25. The research team stopped accepting prosecution statement on 3/15 at which point there were 9 additional cases to the samples (prosecution statement included the penalty claim of the prosecutors). Finally, there are 91 samples used in the study (the law adopted by the prosecutors in pressing the charges is premeditated murder with penalty claim and the trials and sentences of the judges were also based on the charge of premeditated murder).

（2） Research tools

The analysis of the category of indictments and verdicts is adopted in this study with the searching of factors from the categories of the documents relevant with this study (including the paragraphs in Article 57 of the Criminal Code, other factors affecting penalty claims and sentencing). The words were translated into numbers for statistical analysis in order to find out what factors affect the penalty claim of the prosecutors and the sentencing of the judges. The method of triangulation is used in the coding. Discussion with 3 experts (2 scholars in law, and 1 scholar in statistics) on questionable cases was also held.

5. Research findings

（1） Comparing penalty claim and sentencing

①Comparing the types of penalty claims of the prosecutors and sentencing of the judges

There were 36 cases on prosecutors recommended for prison term (excluding the samples of death penalty and life imprisonment) and the sentence of defined-term imprisonment by the judges (excluding the samples of death penalty and life imprisonment) and are referred to analysis with descriptive statistics. The findings indicated that the term of imprisonment sentenced by the judges is 23.4 months shorter than the prison term claimed by the prosecutors for punishment on average.

In all cases of premeditated murder, the claim for death penalty by prosecutors accounted for 13.19% of the total, life imprisonment accounted for 42.86% of the total, and defined–term imprisonment accounted for 43.95% of the total. As for the court, the sentence of death penalty by the judges accounted for 4.4% of the total, the sentence of life imprisonment accounted for 24.18% of the total, and the sentence of defined-term imprisonment accounted for 71.42% of the total. These findings indicated that, in a trial of premeditated murder at the court of first instance, the sentence of the judges in response to the claim of the prosecutors for death penalty is 8.79% less than the claim, and the sentence in response to the claim for life imprisonment is 18.68 % less than the claim, and the sentence in response to the claim for defined-term imprisonment is 27.47% less than the claim.

② Comparing the difference between the prison term recommended by the prosecutors and the sentence of the judges for imprisonment

Of all the 91 samples in this study, prosecutors have claimed for penalty by imprisonment in 40 cases whiles the judges sentenced for imprisonment in 65 cases. The judges tended to sentence for imprisonment in more cases. The average prison term recommended by prosecutors for penalty of imprisonment is 171 months in average while the sentence made by the judge for imprisonment is 158.9 months in average. The difference between the recommendation of penalty and the sentence is 12.1 months.

In Japan, there are the hidden rules of so-called “30% discount”, “20% discount” meaning that the judges tend to discount the prison term recommended by prosecutors by 30% or 20%. The findings from this study also indicated that there is no such thing as a 30% discount or 20% discount as is in Japan in the sentencing of prison term by the judges of the Republic of China. Comparatively, our judges tend to make a 10% discount on the prison term recommended by prosecutors.

（2） Analysis of the factors causing the variation between penalty recommendation or sentencing

① Factors affecting the penalty claim of the prosecutors

Factors significantly affected the penalty claim of the prosecutors mentioned in Hypothesis (1) and Hypothesis (3) in all paragraphs of Article 57 of the Criminal Code and beyond Article 57 of the Criminal Code were analyzed and specified in Table 3-1-1.

“Whether the perpetrator has admitted the crimes or not as stated in the indictment”, “the perpetrator felt regretted after committing the crimes as stated in the indictment”, and “whether the perpetrator is an accomplice (*Mittäterschaft*) or not as stated in the indictment” are key factors affecting the penalty claim of the prosecutors. In other words, if the perpetrator admitted the committing of crimes and felt regretted in the afterward, the term of imprisonment recommended by the prosecutors will be affected. In general, prosecutors tend to claim for less severe penalty for perpetrators who have admitted the committing of crimes and felt regretted in the afterward. If the perpetrator just played the role as an accomplice (*Mittäterschaft*) in the crime, less severe penalty will be recommended in favor of this perpetrator as compared with other accessories, who will encounter the recommendation for more severe penalty.

Table 3-1-1 Source Table of One-Way ANOVA of Research Hypothesis (1) and (3)

| **Dependent variable** / **Independent variable** | **Prosecutors ask for specific sentences** |
|---|---|
| **The motive and purpose of the offense in the statement of indictment** | - |
| **The stimulation perceived at the moment of committing the offense in the statement of indictment** | - |
| **The means used for the commission of the offense in the statement of indictment** | - |
| **The offender’s living condition 1 in the statement of indictment** | - |
| **The offender’s living condition 2 in the statement of indictment** | Unable to analyze |
| **The offender is recidivism or not in the statement of indictment** | - |
| **The offender has the crime record or not in the statement of indictment** | - |
| **The offender surrender or not in the statement of indictment** | - |
| **The education and intelligence 1 of the offender in the statement of indictment** | Unable to analyze |
| **The education and intelligence 2 of the offender in the statement of indictment** | Unable to analyze |
| **The offender confesses the offense or not in the statement of indictment** | $p < .05$ ($M_{YES}$=158.7 months：$M_{NO}$=206.4 months) |

| | |
|---|---|
| **The offender has the remorse after the offense or not in the statement of indictment** | $p < .05$ ($M_{DO}$=143.0 months：$M_{DO\ NOT}$=188.8 months) |
| **Applying to Criminal Code Atr.59 or not in the statement of indictment** | Unable to analyze |
| **The offender is the joint principal offender or not in the statement of indictment** | $p < .05$ ($M_{YES}$=188.0 months：$M_{NO}$=152.2 months) |
| **The offender is the solicitor or not in the statement of indictment** | Unable to analyze |
| **The offender is the accessory or not in the statement of indictment** | Unable to analyze |
| **Relationship between the offender and the victim** | - |
| **The number of the victim** | - |
| **The year of Investigation** | - |

「Unable to analyze」：Because the sample number is insufficient, we are unable to analyze.
「-」：Nonsignificant

② Factors affecting the sentencing of the judges

Factors significantly affected the sentencing of the judges mentioned in Hypothesis (2) and Hypothesis (4) in all paragraphs of Article 57 of the Criminal Code and beyond Article 57 of the Criminal Code were analyzed and specified in Table 3-1-2.

Key factors affecting the judges in sentencing are “whether the defendant has surrendered to police authorities after committing the crimes as stated in the verdict”, and “the judges did not consider factor 1 unfavorable to the defendant in sentencing”. In other words, if the defendant has surrendered to police authorities after committing

the crime, the defendant is likely to receive less severe sentence than a defendant who has not surrendered to police authorities. As stated in Article 62 of the Criminal Code of the Republic of China, surrender to police authorities is a necessary condition for mitigating punishment. Yet, the findings from statistical analysis indicated that defendants who have surrendered to police authorities tended to receive sentence of prison term 42 months shorter than those who have not. Factors such as no reconciliation with the defendants, additional punishment provided by other applicable laws, killing of next of kin, and fugitives are more likely to receive sentence of more severe penalty.

Table 3-1-2 Source Table of One-Way ANOVA of Research Hypothesis (1) and (3)

| **Dependent variable** / **Independent variable** | Judge measure penalties |
| --- | --- |
| **The motive and purpose of the offense in the statement of judgement** | - |
| **The stimulation perceived at the moment of committing the offense in the statement of judgement** | - |
| **The means used for the commission of the offense in the statement of judgement** | - |
| **The education and intelligence 1 of the offender in the statement of judgement** | - |
| **The education and intelligence 2 of the offender in the statement of judgement** | Unable to analyze |
| **The offender is recidivism or not in the statement of judgement** | - |
| | - |

| | |
|---|---|
| **The offender has the crime record or not in the statement of judgement** | |
| **The offender surrender or not in the statement of judgement** | $p < .05$ ($M_{YES}$=125.0 months：$M_{NO}$=167.4 months) |
| **The education and intelligence 1 of the offender in the statement of judgement** | - |
| **The education and intelligence 2 of the offender in the statement of judgement** | Unable to analyze |
| **The offender confesses the offense or not in the statement of judgement** | - |
| **The offender has the remorse after the offense or not in the statement of judgement** | - |
| **Applying to Criminal Code Atr.59 or not in the statement of judgement** | Unable to analyze |
| **The offender is the joint principal offender or not in the statement of indictment** | - |
| **The offender is the solicitor or not in the statement of indictment** | Unable to analyze |
| **The offender is the accessory or not in the statement of indictment** | Unable to analyze |
| **The judge considers the other factor that is favorable to the accused 1** | - |
| **The judge considers the other factor that is favorable to the accused 2** | - |

| | |
|---|---|
| **The judge considers the other factor that is unfavorable to the accused 1** | $p < .05$ ($M_{YES}$=162~210 months：$M_{NO}$=151.0 months) |
| **The judge considers the other factor that is unfavorable to the accused 2** | Unable to analyze |
| **The judge considers the other factor that is unfavorable to the accused 3** | Unable to analyze |
| **The number of the victim** | - |
| **The year of judgement** | - |

「Unable to analyze」：Because the sample number is insufficient, we are unable to analyze.
「-」：Nonsignificant

③ Analysis of association between penalty claim and sentencing

Chi-Square analysis has been conducted on 8 factors to find out any association between the factors affecting the penalty claim of the prosecutors and the sentencing of the judges. These factors are “recidivism”, “prior criminal record” of the offender as stated in Subparagraph 5 in Article 57 of the Criminal Code, “whether the offender has surrendered to police authorities or not”, “whether the offender has admitted the committing of crime”, and “any regret of the offender” as stated in Subparagraph 10 of the same article under the same law, and “if Article 59 of the Criminal Code shall govern”, “if the offender an accomplice *(Mittäterschaft* )”, and “if the offender is an accessory”. The findings of the analysis indicated that judges tended to focus on factors such as if there is recidivism, any prior criminal record, the attitude of the defendant after committing the crime (truthful admission of the crime and feel regret), if Article 59 of the Criminal Code shall govern, if the defendant is one among the few who jointly committed the crime (the defendant is an accomplice or accessory) in sentencing in

contrast with the penal claim of the prosecutors. Both the prosecutors and the judges will consider the attitude of the defendant after committing the crime – if the defendant has surrendered to police authorities in penalty claim of the former and the sentencing of the latter.

## II. Quantitative study on questionnaire to the public

1. Research framework

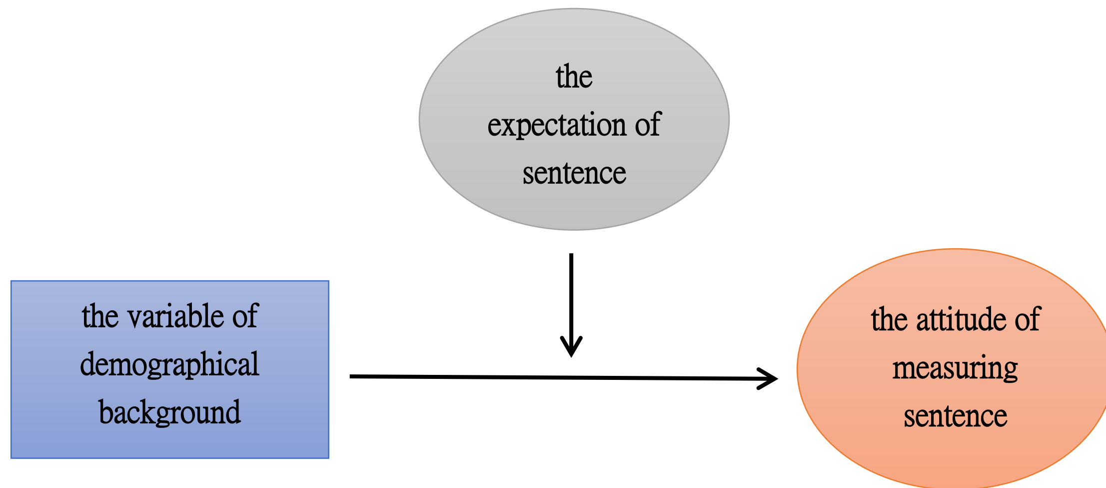


Figure 3-2-1 the factors that influence increasing and reducing the punishment

（1） Population background variable

① Gender

② Education

③ Any legal background? Or has studied criminal law, criminal procedure and other courses on law?

④ Age

（2） Attitude towards sentencing

① The defendant: If the intensity of the defendant in defiance of obligation, means of offenses, the damages caused, the attitude after the crime, the returning to society in the future, the age have been considered.

② The victim: If the needs of the victim being addressed to.

③ The society: If the overall impression of society has been taken into account.

④ Peer influence: If the judge is affected by other colleagues (other judges).

（3） Expectation of prison term

Consider the factors of the defendant, victim, society, and peer influence in more severe or less severe a penalty in sentencing.

2. Issues for study

（1） Drunk driving causing fatalities

① Will be the influence of “gender, education, and legal background, age” affect “Subparagraphs 5, 8, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a more severe penalty in sentencing”?

② Will “gender, education, and legal background, age” affect “Subparagraphs 5, 8, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a less severe penalty in sentencing”?

（2） Homicides

① Will “gender, education, and legal background, age” affect “Subparagraphs 1, 3, 5, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a more severe penalty in sentencing”?

② Will “gender, education, and legal background, age” affect “Subparagraphs 1, 3, 5, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a less severe penalty in sentencing”?

3. Research hypothesis

The researchers in this study proposed the following hypotheses on the basis of the aforementioned issues:

（1） Drunk driving causing fatalities

① Hypothesis (1): “Gender, education, and legal background, age” affect “Subparagraphs 5, 8, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a more severe penalty in sentencing” at a significant level.

② Hypothesis (2): “Gender, education, and legal background, age” affect “Subparagraphs 5, 8, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a less severe penalty in sentencing” at a significant level.

（2） Homicide

① Hypothesis (1): “Gender, education, and legal background, age” affect “Subparagraphs 1, 3, 5, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a more severe penalty in sentencing” at a significant level.

② Hypothesis (2): “Gender, education, and legal background, age” affect “Subparagraphs 1, 3, 5, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a less severe penalty in sentencing” at a significant level.

4. Research method

(1) Targets of study

Two questionnaires have been designed basing on two categories of crimes attracting most of the social attention, namely, “drunk driving causing fatalities” and “homicide (premeditated murder)”. The case on drunk driving causing fatalities was Taiwan Kaohsiung District Court 2012 Verdict of Criminal Offenses Jiao-Su-Zi No. 52 (Young Master Yeh Incident of 2012). The case on homicide was Taiwan Taipei District Court 2008 Verdict of Criminal Offenses 2008 Chong-Su-Zi No. 36. Critical factors affecting the public with resulting in a more severe or less severe penalty in sentencing were sorted out and clarified.

There are 365 valid respondents from the questionnaire on the case of drunk driving causing fatalities, with 24 being screened out after cautious selection that gives the remainder of 341 valid cases. 162 cases with a sentence of death penalty and life imprisonment were excluded and only 179 cases were included in the analysis. There are 327 valid respondents from the questionnaire on the case of homicide with 18 being screened out after cautious selection that gives the remainder of 309 cases. 159 cases of death penalty and life imprisonment were excluded and only 150 valid cases were included in the analysis.

(2) Research tools

The questionnaires were designed under the GOOGLE program and conducted through online release. The case on drunk driving causing fatalities was Taiwan Kaohsiung District Court 2012 Verdict of Criminal Offenses Jiao-Su-Zi No. 52 (Young Master Yeh Incident of 2012). The case on homicide was Taiwan Taipei District Court 2008 Verdict of Criminal Offenses 2008 Chong-Su-Zi No. 36. The real names of the perpetrators were synonymous to avoid bias of the respondents that may cause criterion contamination and keep the facts of the cases intact. The factors emphasized by the

prosecutors and the judges were proposed on the basis of the conclusion from the qualitative interview, including Subparagraphs 1, 3, 5, 8, 9, and 10 in article 57 of the Criminal Code and the needs of the victim, social impression, peer influence (other judges), the return to society of the defendant, and the age of the defendant as the questions in the questionnaire. The questions of drunk driving causing fatalities and homicides are specified below.

① Drunk driving causing fatalities:

A drove after drinking and passed the road junction where the accident occurred. The speeding vehicle driven by A bumped into a trash truck, which was making an illegal u turn, and further knocked down the first victim B (age 47). The bumper of the vehicle driven by A cut off the head of B that caused the immediate death of B on the scene. The husband of B, C, also passed away three days after the accident due to excessive sorrow. They left an orphan girl at the age of 8. D (age 24), a friend of A who was also in the vehicle on the day of the accident, was hospitalized and died later due to severe injury.

The result of the alcohol test on A indicated that the concentration of alcohol found in the body of A on the day of the accident was 171 mg/dl, which is equivalent to 0.855 mg/l of alcohol concentration in breathing (the Criminal Code specified that alcoholic content from exhalation at 0.25 mg/liter or at 0.05% in blood shall be punished. In this case, A was heavily drunk). It was A who drove a motor vehicle after heavy drinking, and A and the family of A behaved arrogantly after the accident that triggered social grievances. There is no property under the title of A that nothing has been offered for compensation for the families of the victims.

This case was tried by the aforementioned court and defendant A was sentenced to “6 years” of imprisonment in the trial of the first instance of criminal proceedings. If

you are the judge who tried this case, what sentence do you suggest the defendant deserved on the basis of your own view (by percentage).

② Homicide:

A suspected his wife B of having an affair with C, and went to the kitchen of "OOO Restaurant", the working place of C to query about this matter. C denied of having an affair with B and verbally incited A. A was discontent and returned home in the morning of the same day to get his gun and bullets. A then drove his mini truck to go back to the working place of C, and shot C in the neck. C was wounded and fell on the ground. The female owner D of the restaurant rushed into the kitchen after hearing the gun shot, and attempted to persuade A not to shoot. Yet, A continued to fire one shot at the neck of C. C suffered a gunshot wound on the neck and was then sent to hospital for medical attention. C did not survive the injury and was died under emergency rescue at the hospital. A then asked the other employees of the restaurant to call the police after the incident and called the police by himself to surrender. He admitted the crime on the arrival of the police and surrendered to investigators.

This case was tried by the aforementioned court and defendant A was sentenced to "12 years" of imprisonment in the trial of the first instance of criminal proceedings. If you are the judge who tried this case, what sentence do you suggest the defendant deserved on the basis of your own view (by percentage).

（3） Schedule for the release of questionnaires

The questionnaires were released in the period of 2019/5/31~2019/6/7 and the targeted viewers are the netizens.

5. Research findings

（1） Comparing the questionnaires of drunk driving causing fatalities and homicide

There were 369 respondents to the questionnaire of drunk driving causing fatalities of whom 158 (42.8%) were males and 211 (57.2%) were females. There were 172 respondents (46.8%) ranging from age 20-30, the majority group of the respondent, followed by 63 respondents ranging from age 31-40 (17.7%), 75 respondents (20.4%) ranging from age 41-50, 50 respondents (13.6%) ranging from age 51-60, and 7 respondents (1.9%) ranging from age 61-70. Of these respondents, 168 (45.5%) have legal background, and 201 (54.5%) have no legal background. Similarly, 85 of these respondents suggested that the defendant should be sentenced to death, 85 suggested the defendant be sentenced to life imprisonment, and 195 suggested the defendant be sentenced to defined-term of imprisonment. Only 4 respondents suggested probation.

There were 330 respondents to the questionnaire of homicide of whom 127 (38.5%) were males and 203 (61.5%) were females. There were 128 respondents (38.9%) ranging from age 20-30, the majority group of the respondent, followed by 55 respondents ranging from age 31-40 (16.7%), 81 respondents (24.6%) ranging from age 41-50, 56 respondents (17%) ranging from age 51-60, and 9 respondents (2.7%) ranging from age 61-70. Of these respondents, 139 (42.1%) have legal background, and 191 (57.9%) have no legal background. Similarly, 73 of these respondents suggested that the defendant should be sentenced to death, 88 suggested the defendant be sentenced to life imprisonment, and 166 suggested the defendant be sentenced to defined-term of imprisonment. Only 3 respondents suggested probation.

（2） Analysis of the association of sentencing between drunk driving causing fatalities and homicide

① Drunk driving causing fatalities

The findings from the analysis of the relation between the variables of “gender”, “education”, “any legal background or training in courses of criminal law or criminal procedure law”, “age group”, and “Subparagraphs 5, 8, 9, and 10 in Article 57 of the Criminal Code and the consideration of the needs of the victim, social impression, peer influence (other judges), the return of the defendant to society in the future, and the age of the defendant” were exhibited in Table 3-2-1.

Table 3-2-1 Chi-Square Analysis of The Case of Drunk Driving Results in Death

| Independent variable / Dependent Variable | Gender | Education | Have legal background or not | The group of age |
|---|---|---|---|---|
| **A. Consider the seriousness of obligation violation of the accused or not** | | | | |
| **C. Consider the disposition of the accused or not** | Have significant relationship | | Have significant relationship | Have significant relationship |
| **D. Consider the damage caused by the accused or not** | | Have significant relationship | | |
| **E. Consider the attitude of the** | | | | |

| | | | |
|---|---|---|---|
| **accused after committing the offense or not** | | | |
| **F. Consider the need of the victim or not** | | | |
| **G. Consider the social perception or not** | | Have significant relationship | |
| **H. If you are a judge, will you be influenced by other colleagues (other judges) or not when you are judging this case** | | | Have significant tendency ($0.05< p <0.1$) |
| **I. Consider the future rehabilitation of accused or not** | | Have significant tendency ($0.05< p <0.1$) | |
| **J. Consider the age of the accused or not** | Have significant tendency ($0.05< p <0.1$) | | |

② Homicides

The findings from the analysis of the relation between the variables of “gender”, “education”, “any legal background or training in courses of criminal law or criminal procedure law”, “age group”, and “Subparagraphs 1, 3, 5, 9 and 10 in Article 57 of the Criminal Code and the consideration of the needs of the victim, social impression, peer influence (other judges), the return of the defendant to society in the future, and the age of the defendant” were exhibited in Table 3-2-2.

Table 3-2-2 Chi-Square Analysis of The Case of Homicide

| **Independent variable** / **Dependent Variable** | **Gender** | **Education** | **Have legal background or not** | **The group of age** |
|---|---|---|---|---|
| **A. Consider the motive and purpose of accused or not** | | | | |
| **B. Consider the means used for the commission in the offense of accused or not** | | Have significant relationship | | |
| **C. Consider the disposition of the accused or not** | | | | |
| **D. Consider the damage caused by the accused or not** | | | | |

| | | | |
|---|---|---|---|
| **E. Consider the attitude of the accused after committing the offense or not** | | Have significant relationship | Have significant tendency ($0.05< p <0.1$) |
| **F. Consider the need of the victim or not** | | Have significant tendency ($0.05< p <0.1$) | |
| **G. Consider the social perception or not** | | | |
| **H. If you are a judge, will you be influenced by other colleagues (other judges) or not when you are judging this case** | | Have significant tendency ($0.05< p <0.1$) | |
| **I. Consider the future rehabilitation of accused or not** | Have significant relationship | Have significant relationship | |
| **J. Consider the age of the accused or not** | | | |

（3） Analysis of variance of the factors affecting sentencing of drunk driving causing fatalities and homicide

① Drunk driving causing fatalities

A. According to Hypothesis (1) "Gender, education, and legal background, age" affect "Subparagraphs 5, 8, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a more severe penalty in sentencing" at a significant level. The findings are exhibited in Table 3-2-3

Table 3-2-3 Source Table of One-Way ANOVA of Research Hypothesis (1) of The Case of Drunk Driving Results in Death

| **Independent variable** / **Dependent variable** | **Gender** | **Education** | **Have legal background or not** | **The group of age** |
|---|---|---|---|---|
| **A. Consider the seriousness of the obligation violation of the accused then increase the punishment** | | | Have no legal background > Have legal background ($0.05 < p < 0.1$) | |
| **C. Consider the disposition of the accused then increase the punishment** | Male > Female | Doctor and Master > Bachelor / two-year technical program ($0.05 < p < 0.1$) | Have no legal background > Have legal background | 51-60years old > Under 50 years old |
| **D. Consider the damage caused by the accused then** | | | Have no legal background > Have legal background | |

| | | | |
|---|---|---|---|
| **increase the punishment** | | | |
| **E. Consider the attitude of the accused after committing the offense then increase the punishment** | | | Have no legal background > Have legal background ($0.05< p <0.1$) |
| **F. Consider the need of the victim then increase the punishment** | | | |
| **G. Consider the social perception then increase the punishment** | Male > Female | | |
| **I. Consider the future rehabilitation of accused then increase the punishment** | | | |
| **J. Consider the age of the accused then increase the punishment** | | | |

B. According to Hypothesis (2): "Gender, education, and legal background, age" affect "Subparagraphs 5, 8, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing less severe penalty in sentencing" at a significant level. The findings are exhibited in Table 3-2-4.

Table 3-2-4 Source Table of One-Way ANOVA of Research Hypothesis (2) of The Case of Drunk Driving Results in Death

| **Independent variable / Dependent Variable** | **Gender** | **Education** | **Have legal background or not** | **The group of age** |
|---|---|---|---|---|
| **A. Consider the seriousness of obligation violation of the accused but reduce the punishment** | | | | |
| **C. Consider the disposition of the accused but reduce the punishment** | | | | |
| **D. Consider the damage caused by the accused but reduce the punishment** | | | | |
| **E. Consider the attitude of the accused after committing the** | | | Have legal background > Have no legal background ($0.05< p <0.1$) | |

| | |
|---|---|
| **offense nut reduce the punishment** | |
| **F. Consider the need of the victim but reduce the punishment** | |
| **G. Consider the social perception but reduce the punishment** | |
| **I. Consider the future rehabilitation of accused but reduce the punishment** | 20-40 years old > above 41 years old |
| **J. Consider the age of the accused but reduce the punishment** | |

② Homicides

A. According to Hypothesis (1):"Gender, education, and legal background, age" affect "Subparagraphs 1, 3, 5, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing a more severe penalty in sentencing" at a significant level. The findings are exhibited in Table 3-2-5.

Table 3-2-5 Source Table of One-Way ANOVA of Research Hypothesis (1) of the Case of Homicide

| Independent variable / Dependent Variable | Gender | Education | Have legal background or not | The group of age |
|---|---|---|---|---|
| **A. Consider the motive and purpose of accused then increase the punishment** | | Doctor and Master > Bachelor / two-year technical program | | |
| **B. Consider the means used for the commission in the offense of accused then increase the punishment** | | | Have no legal background > Have legal background | |
| **C. Consider the disposition of the accused then increase the punishment** | Female > Male ($0.05<p<0.1$) | | | |

| | | | |
|---|---|---|---|
| **D. Consider the damage caused by the accused then increase the punishment** | | Have no legal background > Have legal background | |
| **E. Consider the attitude of the accused after committing the offense then increase the punishment** | Female > Male | | 20-50 years old> above 51 years old ($0.05< p <0.1$) |
| **F. Consider the need of the victim then increase the punishment** | | | |
| **G. Consider the social perception then increase the punishment** | | | |
| **I. Consider the future rehabilitation of accused then increase the punishment** | | | |
| **J. Consider the age of the accused then increase the punishment** | | | |

B. According to Hypothesis (2): "Gender, education, and legal background, age" affect "Subparagraphs 1, 3, 5, 9, and 10 in Article 57 of the Criminal Code, and the consideration of the needs of the victim, social impression, the return of the defendant to society in the future, and the age of the defendant in imposing less severe penalty in sentencing" at a significant level. The findings are exhibited in Table 3-2-6.

Table 3-2-6 Source Table of One-Way ANOVA of Research Hypothesis (2) of The Case of Homicide

| **Independent variable / Dependent variable** | **Gender** | **Education** | **Have legal background or not** | **The group of age** |
|---|---|---|---|---|
| **A. Consider the motive and purpose of accused but reduce the punishment** | | | | |
| **B. Consider the means used for the commission in the offense of accused but reduce the punishment** | | | | |
| **C. Consider the disposition of the accused but reduce the punishment** | | | | |
| **D. Consider the damage caused by the accused but** | | | | |

| | | | | |
|---|---|---|---|---|
| **reduce the punishment** | | | | |
| **E. Consider the attitude of the accused after committing the offense but reduce the punishment** | Male > Female ($0.05< p <0.1$) | | | |
| **F. Consider the need of the victim but reduce the punishment** | | | | |
| **G. Consider the social perception but reduce the punishment** | | | | |
| **I. Consider the future rehabilitation of accused but reduce the punishment** | | | | |
| **J. Consider the age of the accused but reduce the punishment** | | Doctor and Master > Bachelor / two-year technical program ($0.05< p <0.1$) | | |

# D. Conclusion and Policy Recommendation

## I. Conclusion of the study

The research team comes up with the following conclusion on the purpose of this study:

**1. The penalty recommended by the prosecutors is obviously more severe than the sentencing of the judges**

The findings of the quantitative study on the case of premeditated murder indicated that there is a higher proportion of the cases where the prosecutors recommended the death penalty and life imprisonment than the judges. The death penalty constituted the least number of cases, while defined-term imprisonment constituted the largest number of cases sentenced by the judges. Further, prosecutors tended to recommend longer prison terms in the case of imprisonment, while judges of the Republic of China tended to discount the prison term by 10% as recommended by the prosecutors.

**2. Key factors affecting the prosecutors in penalty claim**

The key factors affecting the prosecutors in penalty claim are “whether the perpetrator has admitted the crimes or not as stated in the indictment”, “the perpetrator felt regretted after committing the crimes as stated in the indictment”, and “whether the perpetrator is an accomplice (*Mittäterschaft*) or not as stated in the indictment”.

**3. Key factors affecting the judges in sentencing**

Key factors affecting the judges in sentencing are “whether the defendant has surrendered to police authorities after committing the crimes as stated in the verdict”, and “the judges did not consider factor 1 unfavorable to the defendant in sentencing”.

In other words, if the defendant has surrendered to police authorities after committing the crime, the defendant is likely to receive a less severe sentence than a defendant who has not surrendered to police authorities. As stated in Article 62 of the Criminal Code of the Republic of China, surrender to police authorities is a necessary condition for mitigating punishment. Yet, the findings from statistical analysis indicated that defendants who have surrendered to police authorities tended to receive sentence of prison term 42 months shorter than those who have not. Factors such as no reconciliation with the defendants, additional punishment provided by other applicable laws, killing of next of kin, and fugitives are more likely to receive a more severe penalty.

**4. Chi Square Analysis of the association between penalty claim and sentencing**

Chi-Square analysis has been conducted on factors to find out any association between the variables affecting the penalty claim of the prosecutors and the sentencing of the judges. The findings of the analysis indicated that judges tended to focus on factors such as if there is recidivism, any prior criminal record, the attitude of the defendant after committing the crime (truthful admission of the crime and feel regret), if Article 59 of the Criminal Code shall govern, if the defendant is one among the few who jointly committed the crime (the defendant is an accomplice or accessory) in sentencing in contrast with the penal claim of the prosecutors. Both the prosecutors and the judges will consider the attitude of the defendant after committing the crime – if the defendant has surrendered to police authorities in penalty claim of the former and the sentencing of the latter.

**5. Factors affecting sentencing of "drunk driving causing fatalities" and "homicide"**

From the analysis of the indictment and the verdict: there were only 4 valid samples for "drunk driving causing injuries or fatalities" that statistical analysis is impossible. The analysis of cases of "homicide" led us to know that the factors affecting the sentencing of judges are "whether the defendant has surrendered to police authorities after committing the crimes as stated in the verdict", and "the judges did not consider factor 1 unfavorable to the defendant in sentencing"

## II. Policy Recommendation

This study is an attempt to be served as the blueprint for the competent authority for pursuit. As such, substantive objectives were prescribed with recommendation from short to long run specified below:

1. Recommendation in the short run (immediate action possible)

If is affirmed that prosecutors should be granted the right of recommendation in criminal judgment for sentencing at the penalty claim stage or the debate over sentencing. The reason is the same as stated in this study, "firstly, in the debate of the 3rd trial of the murder case of Wu O-Cheng on sentencing of death penalty was held for the first time. Further, this case also highlighted the close association between the penalty claim of the prosecutors and sentencing. The defense counsel in this case suggested that the prosecutor did not conduct the investigation on the cause of sentencing in the original judgment in the appeal for assessing and sorting any abusive use of the discretion in punishment and held that the appeal is unlawful. In replying to this query, the Supreme Court of Taiwan mentioned that the possible applicability of

the principle of prohibiting the alteration of benefit should be elaborated in requesting a reversal of the judgment.[3]

Secondly, Paragraph 2, Article 289 of the Code of Criminal Procedure specified that, "after the debate regarding the previous 2 paragraphs, the presiding judge shall grant an opportunity for the parties concerned to express an opinion within the scope of sentencing." The opinions of the prosecutors on the investigation of the factors for sentencing and penalty claims in the investigation process and legal proceedings are utmost important. As such, prosecutors should perform the function of monitoring the sentencing at the end of the investigation for prosecution or in the cross-examination in the proceedings after prosecution is instituted so that the people could have fair trial and sentence at a higher level."

2. Intermediate range recommendation

Reinforcement of the debate on sentencing in the proceedings incrementally. The statement presented at the stage of sentencing should be as objective as possible and verifiable to establish trust of the people on the judiciary.

3. Recommendation in the long run

(1) Establish the position of a sentence investigation officer

For further refinement of the sentencing procedure, it is recommended to establish the position of "sentencing investigation officer" similar to the "juvenile investigators" of the juvenile court, which would be an irreversible trend of development.

(2) Bolster empirical legal study

It is recommended that the focus could also cover the attitude of the general public towards the legal system in association with social cognition survey. Social cognition study mainly targets at "causal attribution" and "analysis of the factor affecting the

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[3] Tsai Pi-Yu, "Penalty Recommendation and Sentencing", in *Court Case Times*, No. 21, June 2013, Page 65.

process of social cognition”. This study further recommends that surveys could be conducted in the future on different sample groups like the general public, legal system, legal experts, and inmates on social cognition to clarify “sentence lag”. A study on the feasibility of introducing a dialogue with the general public in the course of sentencing basing on the above suggestion should also be done in the future.

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