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Testing the Drugs' Sentencing Guidelines: A Comparison between England and Wales and Hong Kong

Kevin Kwok-Yin Cheng^{*}, Sayaka Ri[†] and Natasha Pushkarna[‡]

The Chinese University of Hong Kong

Corresponding author. E-mail: kevincheng@cuhk.edu.hk; leesayaka@gmail.com; npushkarna@gmail.com

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Abstract

In the era of sentencing guidelines, the punishment for traffickers is primarily based on the offenders' culpability and the drug weight. Existing literature tend to focus on the issue of proportionality as it relates to the roles and culpability of offenders. However, little attention has been drawn to the quantity of drugs. England and Wales have incorporated offender roles into their sentencing guidelines, while Hong Kong uses drug tariffs strictly based on drug weight to calculate the starting point of a sentence. Using a novel equation called 'the arithmetic starting point of sentence', this study examines the starting sentence based on each gram of drugs by undertaking a comparative analysis of the respective jurisdictions. The results show that both jurisdictions have adopted sentencing guidelines that exhibit a logarithmic curve. This implies that the scale used to measure the quantity of drugs is disproportionate, penalising smaller quantities more harshly than larger quantities.

The sentencing of drug traffickers has become a punitive measure that is often calculated with mathematical consistency. The starting point of such sentences depends on the type of drug and its weight. In England and Wales, this sentencing approach was captured in the Sentencing Council's definitive sentencing guidelines. In Hong Kong, sentencing guidelines, referred to as 'drug tariffs', are derived from the case law of the Court of Appeal. These case laws focus on issues related to hard drugs, such as cocaine, heroin, ice, ketamine, and ecstasy, and sentencing is based on the drug type and weight. For instance, the Court of Appeal in *R v Lau Tak Ming and Ors* and *HKSAR v Abdallah Anwar Abbas* stipulated that the starting point of a sentence for trafficking heroin and cocaine ranges from 2 to 5 years imprisonment for weights up to 10 grams and increases to 26 and 30 years for large weights between 4 kilograms and 15 kilograms.¹

The Hong Kong Court of Appeal has provided a further breakdown of categorical sentence ranges based on the following weight ranges (in grams): 10–50, 50–200, 200–400, 400–600, 600–1200, 1200–4000, and 4000–5000. At first glance, these ranges seem to make intuitive sense based on observed practices by street dealers and wholesale traffickers, and reflect the principle of proportionality² – the more drugs an offender traffics, the longer the imprisonment sentence.

^{*}Associate Professor, Faculty Of Law, The Chinese University Of Hong Kong. This research was wholly supported by a Direct Grant for Research (Project Code 4059045) from the Faculty of Law, The Chinese University of Hong Kong.

[†]Research Assistant, Faculty Of Law, The Chinese University Of Hong Kong.

[‡]Postdoctoral Fellow, Faculty Of Law, The Chinese University Of Hong Kong.

¹*R v Lau Tak Ming and Ors* [1990] 2 HKLR 370, [1990] HKCU 399; *HKSAR v Abdallah Anwar Abbas* [2009] 2 HKLRD 437.

²For weight examples, see Kevin K Cheng, Sayaka Ri & Natasha Pushkarna, 'Judicial disparity, deviation, and departures from sentencing guidelines: The case of Hong Kong' (2020) 17 *Journal of Empirical Legal Studies* 580.

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However, upon closer scrutiny, smaller weights are associated with sentences that increase at a higher rate than higher weight ranges.

Harsh sentences are considered necessary to serve as deterrence to drug trafficking.³ The rationale behind this reasoning is the harmful effect of drug addiction suffered by drug users and the detrimental impact of drugs on the social fabric of the community.⁴ This was a central issue concerning drug-related offences in the latter half of the 20th century.⁵ The United Nations directed states to address the manufacturing, supply, and non-medical use of drugs.⁶ States, including Britain, convened at the United States' behest to establish (stricter) regulations on the humanitarian grounds for curbing drug abuse. As a result, the Hague Convention of 1912 and subsequent conventions were established with the common goal of bringing an end to illicit drug trade. This led to a 'War on Drugs' that encouraged severe penalties for drug trafficking.⁷ Criminology scholars studying the effectiveness of the harsh sentences in curbing drug trafficking found that the deterrence was limited and that the sentences were disproportionately applied to less culpable offenders.⁸ This resulted in the question of the extent to which the proportionality principle was adhered to in drug trafficking sentences. While there has been a recalibration of offender culpability (eg, drug mules), very little attention has been drawn to sentencing that is based on harm, which is determined by the quantity of drugs.⁹

To illustrate the basis of the sentencing practice, the arithmetic starting points (which will be discussed in detail later) were calculated for the entire weight range provided in the sentencing guidelines in England and Wales and Hong Kong. For England and Wales, their sentencing guidelines account for an offender's role, and there are curves for each of the three role types (leading, significant, and lesser).¹⁰ While England and Wales consider offender culpability within their sentencing guidelines, in Hong Kong, such considerations are based on judicial discretion. Thus, for comparison purposes, only one graph per drug tariff (ie, cocaine/heroin and ketamine) is used. Analysing the slopes and overall models, this study discusses the extent to which the current sentencing regimes accomplish deterrence, promote retributive justice, and adhere to the principle of proportionality. Ideally, an effective criminal justice system is one that doles out fair punishments that convey the message of society's reprobation over an act, redresses the harm inflicted by an offence, and deters offenders and the general public from committing such an illicit act in future.¹¹ The results of this analysis reveal that the scale used to measure the quantity of drugs is disproportionate as penalties for smaller quantities are more stringent than larger quantities.

³United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 19 Dec 1988, entered into force 11 Nov 1990) UNTS No 27627.

⁴United Nations International Drug Control Programme, 'The social impact of drug abuse' (World Summit for Social Development-Copenhagen, 6–12 Mar 1995) <https://www.unodc.org/pdf/technical_series_1995-03-01_1.pdf> accessed 16 Mar 2022.

⁵United Nations Single Convention on Narcotic Drugs (adopted 30 Mar 1961, entered into force 13 Dec 1964) UNGA Resolution A/RES/3444.

⁶Gloria Lai, 'Drugs, crime and punishment: Proportionality of sentencing for drug offences' (IDPC – Series on Legislative Reform of Drug Policies No 20, Jun 2012) <[http://fileserver.idpc.net/library/Drugs-crime-and-punishment-Proportionality-of-sentencing%20\(1\).pdf](http://fileserver.idpc.net/library/Drugs-crime-and-punishment-Proportionality-of-sentencing%20(1).pdf)> accessed 16 Mar 2022.

⁷ibid.

⁸Dave Bewley-Taylor, Chris Hallam & Rob Allen, 'The incarceration of drug offenders: An Overview' (International Centre for Prison Studies – The Beckley Foundation Report No 16, Mar 2009) <https://www.beckleyfoundation.org/wp-content/uploads/2016/04/BF_Report_16.pdf> accessed 16 Mar 2022.

⁹Jennifer Fleetwood, 'Sentencing reform for drug trafficking in England and Wales' (International Drug Policy Consortium Briefing Paper, Apr 2015) <https://research.gold.ac.uk/id/eprint/20780/1/IDPC-briefing-paper_Sentencing-reform-for-drug-trafficking-in-the-UK.pdf> accessed 16 Mar 2022.

¹⁰UK Sentencing Council, 'Assessing the impact and implementation of the Sentencing Council's drug offences definitive guideline' (1 Jun 2018) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-guideline-assessment.pdf>> accessed 13 Jan 2022.

¹¹Andreas von Hirsch, *Deserved Criminal Sentences: An Overview* (Hart Publishing 2017).

Proportionality and Deterrence in Drug Trafficking Sentencing

Proportionality

When discussing the appropriate punishment for drug traffickers, it is crucial to consider the blameworthiness of an offender. An offender's blameworthiness is determined by the extent of harm inflicted and the level of culpability.¹² From the Kantian perspective, proportionality is an important aspect as a punishment should be equivalent to the offender's criminal conduct.¹³ Traditional retributive theorists did not delve into why offenders ought to be punished.¹⁴ Modern retributionists contend that sentences should address the offender as moral agents, and that a proportionate sentence should be communicated. Proportionality in sentencing is based on two aspects: original proportionality and cardinal proportionality. The former is about the ranking of various criminal offences based on their seriousness, where offenders convicted of crimes of a comparable seriousness should receive sentences of a comparable severity, and the latter requires that the sentence should not be too severe or too lenient to the gravity of the offence in question.¹⁵ Therefore, a sentence should not be grossly excessive; it should reflect the extent to which the offender is deemed responsible for the consequences of their actions.¹⁶ However, there are obvious difficulties in ranking different offences. How can certain offences be compared to others on the basis of their seriousness? Is drug trafficking more, less, or as serious as aggravated assault or burglary?

Green's qualitative analysis on Nigerian traffickers arrested within European jurisdictions and specifically sentenced according to British drug control policies questioned the usefulness of the repressive sentencing regime.¹⁷ This led to a spate of scholarship revealing that the 'traffickers' being sentenced were less blameworthy individuals, be it under coercion or through exploitation.¹⁸ Victims of human trafficking can be coerced into drug trafficking.¹⁹ Cases in Indonesia, for example, revealed the connection between victims of human trafficking being used as drug mules.²⁰ Research by the Sentencing Council for England and Wales into women imprisoned for unlawful importation of drugs found that the women interviewed either did not know that they were carrying drugs or that they committed the crime because of their desperate livelihoods and threats that they have received, and that sentencing, despite knowing a custodial sentence was likely, was not a consideration.²¹

An American judge, Jim Gray, observed that many defendants he sentenced were drug users and addicts who were only supplementing their habit with street dealing.²² These observations led to a

¹²That is, the offender's role in the commission of the offense, their intent, and whether they are mentally capable to tell right from wrong.

¹³Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, Cambridge University Press 1997).

¹⁴Andreas von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55.

¹⁵*ibid.*

¹⁶For drug trafficking, the drugs they are caught with represent the potential harm they could inflict upon society by providing drugs that can lead to dangerous symptoms like seizures or even death, as well as erode the social fabric of the community.

¹⁷Penny Green, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Waterside Press 1998).

¹⁸Jennifer Fleetwood, 'Five kilos: Penalties and practice in the international cocaine trade' (2011) 51 *British Journal of Criminology* 375.

¹⁹See for example, Louise Shelley, 'The relationship of drug and human trafficking: A global perspective' (2012) 18 *European Journal on Criminal Policy and Research* 241.

²⁰Felicity Gerry et al, 'Is the law an ass when it comes to mules? How Indonesia can lead a new global approach to treating drug traffickers as human trafficked victims' (2018) 8 *Asian Journal of International Law* 166.

²¹UK Sentencing Council, 'Drug "Mules": Twelve Case Studies, Office of the Sentencing Council' (Analysis and Research Bulletins, Mar 2011) <https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_mules_bulletin.pdf> accessed 16 Mar 2022.

²²James P Gray, *Why Our Drug Laws Have Failed and What We Can Do About It: A Judicial Indictment of the War on Drugs* (Temple University Press 2021).

supplementary policy expanding the use of drug treatment centres. For example, the European Monitoring Centre for Drugs and Drug Addiction evaluated the alternatives to the stipulated punishments for drug-related offenders. Regarding the offence of drug trafficking, there was a substantial subgroup of traffickers who were drug users forced into trafficking. Many of these individuals were found to be minors, which influenced the extreme concern expressed by the International Narcotics Control Board's about the negative effects that some sentences would have on juveniles.²³ In the UK, Reuter and Stevens assessed the efficacy of drug rehabilitation centres, which housed both juvenile and adult offenders, and concluded that this approach was rather limited in its effect on reducing the overall crime rate of drug trafficking.²⁴

Harper et al discovered that there was a preference for female couriers/mules as their punishments were usually mitigated based on the fact that most of them were mothers and poor foreigners.²⁵ However, this paternalistic treatment led to even harsher responses in cases where the defendants first pleaded not guilty and then later revealed exploitative circumstances leading to their involvement in trafficking. Fleetwood revealed how organisers gamed the system by using female drug mules to traffic substantial weights of drugs while they, at most, carried insignificant weights, thus reducing their personal risk.²⁶ This exposed the ineffectiveness of punitive sentences in deterring drug trafficking in situations where 'drug mules' are exploited or coerced into trafficking drugs. The case studies of these drug mules by Harper et al and Fleetwood suggest the need to consider the level of involvement in the actual conspiracy of drug trafficking. Intuitively, the more planning and direction by an offender, the more blameworthy they should be for inflicting the scourge of drugs upon a society.

An important question for consideration at this point is how can the level of involvement in drug trafficking be measured? In England and Wales, a combination of drug type and weight in the judicial determination of an offender's role is used (discussed in further detail below). However, for the sake of retributive justice, the harm caused must be considered. An offender is meant to suffer a punishment that is proportionate to the harm inflicted upon their victim(s). However, the debate on proportionality has not reached a satisfying resolution. Osler found that the ordinal proportionality of drug trafficking sentencing is obscenely excessive in comparison to that of other offences such as rape and murder.²⁷ This led him to conclude that the US Federal Sentencing Guidelines for drug trafficking are 'fundamentally unprincipled.'²⁸ Osler criticises drug trafficking sentencing as being based on an 'indirect risk of harm' rather than a form of direct harm that is readily apparent in other offences.²⁹ This highlights the problematic aspect of defining harm for the offence of drug trafficking. When arrested, more often than not, traffickers are in possession of a drug and there is some evidence of their intent to supply; this may be inferred from other evidence such as possession of a quantity that goes beyond what would be considered for personal use. However, the harm they are likely to cause to another person is presumed. Relying on research on the evidence of how drugs affect the human body, especially in terms of addiction, the criminal justice system focuses on preventing such harmful effects in society.³⁰ Drug abuse and addiction has

²³International Narcotics Control Board, *Report of the International Narcotics Control Board for 2007* (United Nations 2008).

²⁴Peter Reuter & Alex Stevens, 'Assessing UK drug policy from a crime-control perspective' (2008) 8 *Criminology and Criminal Justice* 461.

²⁵Rosalyn L Harper, Gemma C Harper & Janet E Stockdale, 'The role and sentencing of women in drug trafficking crime' (2002) 7 *Legal and Criminological Psychology* 101.

²⁶Fleetwood, 'Five kilos' (n 18) 375.

²⁷Mark Osler, 'Indirect harms and proportionality: The upside-down world of federal sentencing' (2004) 74 *Mississippi Law Journal* 1.

²⁸*ibid* 44.

²⁹*ibid*.

³⁰Anthony Morgan & Alex Gannoni, 'Methamphetamine dependence and domestic violence among police detainees' (Australian Institute of Criminology Research Series on Trends & Issues in Crime and Criminal Justice no 588, Feb 2020)

ramifications not only at the individual level, but also to other aspects of society (eg, engendering distrust between people, reducing the quality of life in neighbourhoods, reducing the workforce, etc).³¹

Since suppliers peddle drugs that would lead to damaging consequences, there is international acceptance that the importation of significant weights of drugs into a community and exportation of the same worldwide has expanded the scope of the harm occasioned by the use of those drugs, thus necessitating a global response.³² At both the national and international levels, consultations have been held on how to combat drug-related offences.³³ For the offence of drug trafficking, despite the change in rhetoric by subsequent governments, the common approach among the penal responses has been focused on deterrence.³⁴

Deterrence

Stories of addiction have captured the public's attention, thus impelling governments to respond with swift, certain, and severe punishment. These characteristics are captured in drug trafficking penalties and are clearly reflective of a deterrence framework. For Western nations, such as the United Kingdom, this means hefty, weight-based sentence lengths. For countries that still retain the capital punishment, the death penalty is considered to be the ultimate deterrence. Deterrence seeks to prevent future crimes through sentences. Deterrence can be viewed through general and specific deterrence. The former aims to prevent crime by sending a message to would-be offenders of the negative consequences of committing the particular offence, whereas the latter focuses on preventing a repeat offence by a specific offender to demonstrate to the offender that crime does not pay.

Overall, evidence of a deterrent effect from drug trafficking sentences is limited.³⁵ Conversely, Spohn found a significant reverse deterrent effect when comparing drug traffickers who were sentenced to prison with those who were given probation.³⁶ Spohn's study draws attention to the excessive harm that imprisonment can have on an offender. With evidence that a majority of drug offenders imprisoned are nonviolent, exploited mules, and/or addicts, the harshness of sentencing appears to trap these offenders into a life of crime.³⁷ Therefore, the legal system needs to consider the appropriateness of the anchoring points (or cardinal proportionality) selected for a sentencing scale. The harshness of the cardinal proportion represents the condemnation of society. Von Hirsch concedes that cardinal proportionality guides only broad strokes for sentencers.³⁸ The obscurity in the guidelines for setting anchoring points allows flexibility for jurisdictions to determine the

<<https://www.aic.gov.au/publications/tandi/tandi588>> accessed 16 Mar 2022; Cherry H Tam et al, 'Hidden drug abuse in Hong Kong: From social acquaintance to social isolation' (2018) 9 *Frontiers in Psychiatry* 457; United Nations International Drug Control Programme (n 4); Paul SF Yip, 'Assessing the socioeconomic costs of drug abuse in Hong Kong SAR' (HKJC Centre for Suicide Research and Prevention, The University of Hong Kong, Sep 2017) <https://www.nd.gov.hk/pdf/BDF140030_report.pdf> accessed 16 Mar 2022.

³¹ibid.

³²The first international treaty for such a response was the 1961 UN Single Convention on Narcotic Drugs (n 5).

³³European Monitoring Centre for Drugs and Drug Addiction, 'Alternatives to punishment for drug-using offenders' (EMCDDA Papers, Publications Office of the European Union, Luxembourg, 2015).

³⁴Sharon A Gardner, 'A global initiative to deter drug trafficking: Will internationalizing the Drug War work' (1993) 7 *Temple International and Comparative Law Journal* 287; Hanna Samir Kassab & Jonathan D Rosen, *Illicit Markets, Organized Crime, and Global Security* (Palgrave Macmillan 2019).

³⁵Caitlin E Hughes et al, 'The deterrent effects of Australian street-level drug law enforcement on illicit drug offending at outdoor music festivals' (2017) 41 *International Journal of Drug Policy* 91.

³⁶Cassia Spohn, 'The deterrent effect of imprisonment and offender's stakes in conformity' (2007) 18 *Criminal Justice Policy Review* 31.

³⁷Eric L Sevigny & Jonathan P Caulkins, 'Kinpins or mules: An analysis of drug offenders incarcerated in federal and state prisons' (2004) 3 *Criminology and Public Policy* 401.

³⁸von Hirsch (n 11).

appropriate level of harshness based on their unique circumstances. This was echoed in *HKSAR v Kilima Abubakar Abbas*, where the Hong Kong Court of Appeal stated that ‘each country will shape its own approach to suit its own conditions, the desires of its own people, its attitudes to punishment as well as the particular manifestation of the problem in its respective community.’³⁹

Sentencing Guidelines

England and Wales

The legislative basis for England and Wales’ legal response to drug trafficking is the Misuse of Dangerous Drugs Act of 1971, which banned the trafficking of dangerous drugs from unlicensed sources.⁴⁰ An early interpretation of the law used street value as the representative measure of harm, as it indicated how much the offender benefitted from the act and the potential harm the drugs posed.⁴¹ However, the Court in *R v Aranguren* noted that this measure was not accurate because it depended on supply availability and cautioned that if drugs were readily available, the price to the consumer would drop and, therefore, by taking the street value as the criteria rather than weight, the sentencing level for like quantities of drugs would become lower as supplies became more plentiful.⁴²

To ensure sentencing consistency in drug trafficking cases, the court laid down sentencing guidelines based on the drug weight (of 100 per cent purity). In *R v Morris*, the Court indicated that the drug weight for heroin and cocaine should be determined through a purity analysis. According to the Court, ‘Purity analysis is essential for sentencing purposes for cases of importation, or in other circumstances, where 500 grammes or more of cocaine, heroin or amphetamine are seized. It may be desirable in cases where quantities less than 500 grammes of those substances are seized.’⁴³

For smaller quantities, the Court would, in the interest of cost and time, generally sentence based on the assumption of ‘low level of retail dealing’ and the unique circumstances surrounding each case.⁴⁴ However, if the evidence adduced showed that the offender was wholesaling (and thus closer to the ‘source of supply’) rather than retailing, then a purity analysis had to be performed before sentencing.⁴⁵

Because of their openness to various interpretations, these judgements were not considered as solid responses to the criticisms of sentencing disparity and calls for greater consistency continued.⁴⁶ From the *Crime and Disorder Act* in 1998, the Court began to consider sentencing guideline proposals from a sentencing council body (then the Sentencing Advisory Panel).⁴⁷ In subsequent years, the desire for a government body providing structured sentencing guidelines grew, resulting in the *Coroners and Justice Act 2009*, which established the Sentencing Council in England and Wales.⁴⁸ Sentencing guidelines for drug offences came into force in 2012. The Council made its decisions based on consultations (with judges, the public, the drug policy commission,⁴⁹ NGOs,

³⁹*HKSAR v Kilima Abubakar Abbas* [2018] 5 HKLRD 88, [2018] HKCA 602 para 71.

⁴⁰Julian V Roberts, ‘The evolution of sentencing guidelines in Minnesota and England and Wales’ (2019) 48 *Crime and Justice* 187.

⁴¹*R v Aramah* [1982] 4 Cr App R (S) 407.

⁴²*R v Aranguren* [1995] 16 Cr App R (S) 211, 212.

⁴³*R v Morris* [2001] 1 Cr App R (S) 87 para 21.

⁴⁴*ibid* para 22.

⁴⁵*ibid* para 23.

⁴⁶Roberts (n 40).

⁴⁷UK Sentencing Council, ‘History’ (2021) <<https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/history/>> accessed 13 Jan 2022.

⁴⁸*ibid*.

⁴⁹UK Drug Policy Commission, ‘Response to the Sentencing Council drug offenses guideline consultation’ (UK Drug Policy Commission Briefing, Jun 2011) <<https://www.ukdpc.org.uk/wp-content/uploads/Briefing%20-%20Submission%20to%20the%20Sentencing%20Council%20Drug%20Offences%20Guideline%20consultation.pdf>> accessed 16 Mar 2022.

and experts in drugs and criminal justice) and social scientific research to develop guidelines that respond well to the current conditions in society.⁵⁰ For instance, the Council consulted the legal profession when it was determining the sentencing guidelines.⁵¹

The 2012 sentencing guidelines, which incorporated the offender's role in perpetuating the offence of supplying controlled drugs, were generally supported.⁵² Through public consultations, it was revealed that greater focus was on the harm caused by drug offences rather than offender culpability, resulting in greater sympathy for drug mules.⁵³ This matches the sentiments expressed in international conventions such as the International Covenant on Civil and Political Rights, which focus on protecting those who are exploited within the context of drug trafficking.⁵⁴

The current definitive guidelines for supplying or offering to supply a controlled drug or possession of a controlled drug with the intent to supply to another came into force in April 2021 and superseded the 2012 guidelines. It provides sentencers with a two-step process in determining the starting point of a sentence.⁵⁵ As part of the determination of the offence category in step one, there are dual considerations of assessing the offender's culpability and the harm caused, with the latter mainly based on the quantity of drugs. The culpability of the offender is based on the offender's role in the offence and is divided into three groups. The most culpable is a *leading role*, which may mean that the offender has been found to be directing or organising the buying and selling of controlled drugs at a commercial scale, has substantial links to such an enterprise, exerts considerable influence on others in the supply chain, or has an expectation of substantial financial gain. The second most culpable is an individual who plays a *significant role*, which may mean that the offender has an operational or management function in the supply chain, involves other individuals in the illegal operation and possesses some awareness and understanding of the scale of the operation. The least culpable is a *lesser role*, which may mean that the offender performed a limited function in the operation under another's instructions, was involved through naivety or exploitation, and has very little or no understanding of the scale of operation. However, as observed in *R v Healey*, the guidelines for culpability as are not exhaustive nor absolutely indicative.⁵⁶

The determination of the category of harm is more straightforward as it is based on the type and quantity of drugs. The category of harm is divided into four categories. Category 1, for example, includes heroin, cocaine of 5 kilograms, ecstasy of 7,000 tablets, cannabis of 200 kilograms and ketamine of 5 kilograms. Category 2 consists of heroin, cocaine of 1 kilograms, ecstasy of 1,300 tablets, cannabis of 40 kilograms and ketamine of 1 kilograms. Category 3 consists of heroin, cocaine of 150 grams, ecstasy of 200 tablets, cannabis of 6 kilograms and ketamine of 150 grams. Lastly, Category 4 includes heroin, cocaine of 5 grams, ecstasy of 13 tablets, cannabis of 100 grams and ketamine of 5 grams.

After determining the category in step one, the judge or sentencer will then consult the table provided in the guidelines in step two to determine the starting point of a sentence, depending on the class of drugs as stipulated by legislation. For example, heroin and cocaine are Class A drugs, and their corresponding sentence starting point is as follows:

⁵⁰Release, 'Release's response to the Sentencing Council's drugs offences guideline professional consultation' (2011) <<https://www.release.org.uk/sites/default/files/pdf/publications/Sentencing%20Consultation%20Submission.pdf>> accessed 16 Mar 2022.

⁵¹Sentencing Council, 'Drug Offences, Response to Consultation,' (Sentencing Council, 2012) <https://www.sentencing-council.org.uk/wp-content/uploads/Drug_Offences_Response-web2.pdf> accessed 8 Jan 2022.

⁵²ibid.

⁵³Amy Kirby & Jessica Jacobson 'Public attitudes to the sentencing of drug offences' (2013) 14 *Criminology and Criminal Justice* 334.

⁵⁴Lai (n 6) 1–12.

⁵⁵ibid.

⁵⁶*R v Healey (Robert)* [2013] 1 Cr App R (S) 33 para 13.

Table 1. Sentencing Guidelines in England and Wales for Heroin and Cocaine

Heroin, Cocaine	Leading role	Significant role	Lesser role
>5 kg	12–16 years' custody	9–12 years' custody	6–9 years' custody
1–5 kg	9–13 years' custody	6 years 6 months'–10 years' custody	3 years 6 months'–7 years' custody
150 g–1 kg	6 years 6 months'–10 years' custody	3 years 6 months'–7 years' custody	2–4 years 6 months' custody
5–150g	4 years 6 months'–7 years 6 months' custody	2–5 years' custody	High-level community order–3 years' custody

Ketamine is a Class B drug, and its corresponding sentence starting point is as follows:

Table 2. Sentencing Guidelines in England and Wales for Ketamine

Ketamine	Leading role	Significant role	Lesser role
>5 kg	7–10 years' custody	5–7 years' custody	2 years 6 months'–5 years' custody
1–5 kg	4 years 6 months'–8 years' custody	2 years 6 months'–5 years' custody	26 weeks'–3 years' custody
150 g–1 kg	2 years 6 months'–5 years' custody	26 weeks'–3 years' custody	Low level community order–26 weeks' custody
5 g–150 g	26 weeks'–3 years' custody	Medium-level community order–26 weeks' custody	Band B fine–medium level community order

Like other sentencing guidelines, after the determination of the starting point of the sentence, the court will then consider other aggravating factors that may enhance the sentence, and mitigating factors that may reduce the sentence, any sentence reduction for guilty pleas, and the totality principle in cases of multiple offences,⁵⁷ as well as consideration for time spent remanded in custody. In determining a sentence, the court must have regard to the purposes of sentencing specified under section 57(2) of the *Sentencing Act 2020*, they are: the punishment of the offender; the reduction of crime (including through deterrence); reform and rehabilitation; the protection of the public; and making reparations.

Hong Kong

In Hong Kong, drug trafficking is regulated through ordinances. The ordinances related to drug trafficking have been updated numerous times, but the *Dangerous Drugs Ordinance* remains the primary legislation for all drug-related offences, with section 4 specifically providing for drug trafficking. Sentencing guidelines, like other common law jurisdictions, are set by the Court of Appeal. The Court refers to such sentencing guidelines as drug tariffs for drug trafficking.

One of the leading cases on sentencing guidelines is *R v Lau Tak Ming and Ors*, where the Court updated the guidelines to reflect the drug situation in Hong Kong in the early 1990s. In this case, the judge expressed the seriousness of the offence and the need to provide an appropriate punishment that takes into consideration the unique context of Hong Kong society. Considering the downward

⁵⁷See UK Sentencing Council, 'Offences Taken into Consideration and Totality: Definitive Guideline' (6 Mar 2012) <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Offences-Taken-into-Consideration-and-Totality-definitive-guideline-Web.pdf>> accessed 16 Mar 2022.

trend of product purity of the drugs being sold, the judge stressed the need ‘to take into account the rapid changes that have occurred and to at least attempt to provide assistance that can cover future trends.’⁵⁸ The Court also warned that this trend of lower purity increases the dangers posed by drug abuse, as less pure drugs increase the risk of impurities entering the bloodstream.⁵⁹ The judgement also emphasised the hazards that drugs pose to society (for both individual and community health and the proliferation of deviance), with its ultimate goal being the ability of the guidelines to respond not only to the changing trends of drug trafficking (eg, purity dropping), but also to future shifts in practice.

The constant decline of the purity levels of drugs made purity a problematic and far too variable⁶⁰ a measure for sentences. Thus, the Court sought to look for other effective and reliable bases that can serve as the starting point for sentencing deliberations. Price (in either consumer or export market context) was ruled out as it was ‘dependent on too [many external] factors [such as] the harvest in the Golden Triangle;⁶¹ the overseas demand; and the adulteration of mixture.’⁶² The Court in *Lau Tak Ming* suggested that the existing method be retained. However, the flaws of this method were pointed out, such as ‘the concept of notional conversion and a blurring of the differences between the three types of narcotic purity’ that existed at the time.⁶³ This flaw could lead to injustices occurring from contention over the resultant variables of the conversion method employed and greatly increase ‘administrative inconvenience.’ As a result, it was agreed that ‘the quantity of narcotic’ was the only constant across cases, and so this was chosen as ‘the basis for the tariff that *Lau Tak Ming* went on to set out.’⁶⁴ When setting the specific bands for the tariff, the court purposely set them to be wide, to allow sentencing judges to consider other relevant factors when determining the final sentence. The overall harshness of the scale (a minimum of 2 to 5 years for 10–50 grams of narcotics in the first band to a maximum of 18–20 years for 400–600 grams of narcotics) was stated to strongly deter ‘the international trade in drugs.’⁶⁵

The absolute maximum sentence provided for drug trafficking was life for weights above 600 grams, which was considered a substantial weight. Additionally, the court sought to stop traffickers from ‘tailoring the quantities sent out into the street and procuring for his sellers to sell, his couriers to carry or his store-keepers to keep so as to reduce, for them, the length of the inevitable custodial sentence that will be passed upon conviction – in other words, playing the “bands.”’⁶⁶

This seems to be another justification for widening the sentencing bands in the hopes of reducing such gaming of the system. Subsequent rulings by the Court of Appeal have expanded the sentencing guidelines to include other types of drugs beyond heroin and cocaine, such as ketamine.

An important factor to consider is the proportionality principle. A punishment should neither be too lenient nor excessive. According to the court in *HKSAR v Thattephin Tanyamon*,

In the case of *Lau Tak Ming*, this court stated that 20 years’ imprisonment is an extremely heavy punishment. This shows that the court should not, in sentencing cases of over 600 grams of drugs, adjust the sentence upwards [mathematically] proportional to the increase

⁵⁸*R v Lau Tak Ming and Ors* (n 1) 384.

⁵⁹*ibid* 382.

⁶⁰The narcotic purity was observed to change monthly, ‘from mixture to mixture and from locality to locality’: *R v Lau Tak Ming and Ors* (n 1) 386.

⁶¹The Golden Triangle refers to the junction of the Mekong and Ruak rivers where the borders of Thailand, Laos, and Myanmar meet. All three countries are known for manufacturing many drugs, especially heroin. Their cross points and access to waterways make the area ideal for trafficking transnationally. This Southeast Asian region is considered by China to be the main and most dangerous source for drugs entering China.

⁶²*R v Lau Tak Ming and Ors* (n 1) 387.

⁶³*ibid*.

⁶⁴*ibid*.

⁶⁵*ibid*.

⁶⁶*ibid* 384.

in quantity. After considering the quantity of drugs in this case, this court is of the view that the starting point of 24 years' imprisonment in this case is manifestly excessive.

This Court [does] not have evidence to show that the applicant was the main instigator of the drug trafficking or was a repeat offender. This Court is of the view that the appropriate starting point is 21 years' imprisonment.⁶⁷

As noted above, the blameworthiness of the offender is the focus of contention when applying the proportionality principle. The question then is what sentence reflects the level of the offender's culpability in inflicting harm? It has been observed that drug mules (often unaware of what they are transporting in their luggage) are the ones who are caught with substantial drug weights, while those with significant or leading roles in the drug trafficking ring carry small amounts so that, if caught, they will not have to face lengthy sentences.⁶⁸ Although 600 grams was initially considered a substantially heavy weight, the growth and trends in drug trafficking over the years necessitated further clarification of the sentencing bands. The court in *Abdallah* provided supplementary guidelines for weights of cocaine and heroin above 600 grams. This supports the existing guidelines in *Lau Tak Ming*.⁶⁹ Till this day, these guidelines still stand as the drug tariffs for cocaine and heroin.

Although the supplementary sentencing bands for cocaine and heroin are a response to concerns about the harshness of the sentence range, the cardinal proportion for sentencing dangerous drugs traffickers in Hong Kong is deemed necessary to deter this act, where the Court considers drug trafficking as a 'world-wide problem.'⁷⁰ The Court commented on the apparent deterrent effect in Hong Kong in *HKSAR v Kilima Abubakar Abbas*:

[...] having had to consider in the past few months the trends and statistics for the seizures, arrests and convictions in respect of a wide spectrum of dangerous drugs in Hong Kong since January 2015, is that rather than being swamped by a problem which is out of control, as other countries seem to have been, the problem in Hong Kong is being steadily contained, if not, in certain respects, reduced. And since in this jurisdiction we do not have the death penalty for drug trafficking, unlike almost all of our neighbours, that position is in no small measure due to our own particular policy of law enforcement, backed up by harsh, but consistent, sentencing for drug trafficking.⁷¹

Corroborating statistics from the Hong Kong Police Force, there appears to be a reduction in the number of cases over the years (eg, -9.9 per cent from 2017 to 2018 and -47.1 per cent from 2018 to 2019). However, it is important to note that these statistics are for all serious drug offences, which include possession, manufacturing, and trafficking.⁷² *Kilima* further clarifies the point on focusing on consistency in sentencing by quoting *HKSAR v Manalo*:⁷³ 'It is important for the courts to avoid distinctions, which will often be irrational or speculative, being drawn between drug traffickers who are couriers or storekeepers because the resulting disparity in the levels of sentence will understandably lead to feelings of grievance.'⁷⁴

⁶⁷Official English translation quoted in *HKSAR v Abdallah Anwar Abbas* (n 1) paras 19.

⁶⁸Jennifer Fleetwood (n 18) 375–393.

⁶⁹*Lau Tak Ming* (n 1).

⁷⁰*HKSAR v Kilima Abubakar Abbas* (n 39) para 71

⁷¹*ibid.*

⁷²Hong Kong Police Force, 'Crime statistics comparison' (GovHK, 2020) <https://www.police.gov.hk/ppp_en/09_statistics/csc_2018_2019.html> accessed 16 Mar 2022.

⁷³*HKSAR v Manalo* [2000] HKCA 265.

⁷⁴*HKSAR v Kilima Abubakar Abbas* (n 39) para 149.

This comment reflects the reasoning behind Hong Kong's refusal to instate a formal consideration of the offender's culpability (through their role) in calculating the sentence starting point – instead, Hong Kong opted to leave such consideration within the purview of judicial discretion. Currently, Hong Kong has adopted a sentencing regime that follows tariffs set forth by the Court of Appeal, which are solely based on the drug type and weight (in grams). For comparison with England and Wales, this study looks at two drug tariffs: cocaine/heroin and ketamine.⁷⁵

The tariffs simply provide a range of sentences corresponding to the quantity of drugs based on the drug type. The following tables summarise this:⁷⁶

Table 3. Sentencing Guidelines in Hong Kong for Heroin and Cocaine

Drug Name	Drug Weight Min. (g)	Drug Weight Max. (g)	Min. Sentence (months)	Max. Sentence (months)
Heroin/Cocaine	>0	10	24	60
	10	50	60	96
	50	200	96	144
	200	400	144	180
	400	600	180	240
	600	1200	240	276
	1200	4000	276	312
	4000	15000	312	360
	15000	Infinite amount	Judges' discretion	

The following table summarises the drug tariffs for ketamine in Hong Kong, where the same guidelines apply to the ecstasy drug.⁷⁷

Table 4. Sentencing Guidelines in Hong Kong for Ketamine

Drug Name	Drug weight Min. (g)	Drug weight Max. (g)	Min. Sentence (months)	Max. Sentence (months)
Ketamine	up to 1 gram		within the sentencer's discretion	
	>1	10	24	48
	10	50	48	72
	50	300	72	108
	300	600	108	144
	600	1000	144	168
	1000	2000	168 months upwards	
	2,000	3,000	No less than 18 to 20 years	
	Over 3,000		20 years or more	

⁷⁵UK Sentencing Council, 'Class B: Supplying or offering to supply a controlled drug/ Possession of a controlled drug with intent to supply it to another' (2021) <<https://www.sentencingcouncil.org.uk/droppable/item/class-b-supplying-or-offering-to-supply-a-controlled-drug-possession-of-a-controlled-drug-with-intent-to-supply-it-to-another/>> accessed 16 Mar 2022.

⁷⁶As set out in the case of *HKSAR v Abdallah Anwar Abbas* (n 1).

⁷⁷*Secretary for Justice v Hii Siew-cheng* [2009] 1 HKLRD 1.

Methodology

The drug trafficking guidelines for each jurisdiction were individually sourced. In England and Wales, the Sentencing Council publishes guidelines for each offence type on their website and the information is accessible by the general public. The *Drug Offences: Definitive Guidelines* published by the Council were used in this study, while Hong Kong's drug trafficking sentencing guidelines were extracted from the Court of Appeal judgements that laid down the sentencing guidelines for drug trafficking.

The drug types chosen in this study were dependent on certain inclusionary factors: (1) the presence of lower and upper thresholds of sentences and drug weights for the calculation of an arithmetic sentence, and (2) drug types that are provided for by the sentencing guidelines of both jurisdictions. An arithmetic sentence is defined as the exact calculation of the expected sentence length, which is dependent on the drug type and the drug weight. This calculation assumes that, when sentencing, judges use the laid down guidelines to ascertain the starting point of the sentence. This study compares cocaine, heroin, and ketamine. Since England and Wales use guidelines encompassing classes of drugs rather than individual drug types, these three drug types (ie, cocaine, heroin, and ketamine) correspond to Class A and Class B guidelines; with cocaine and heroin in Class A and ketamine in Class B. Similarly, in Hong Kong, cocaine and heroin share the same sentencing guidelines.

Using the guidelines, graphs were created to comparatively assess the differences between the sentencing guidelines in England and Wales and those of Hong Kong. To graph the guidelines, the arithmetic starting points corresponding to full integer drug weights were calculated using the following equation (Equation 1).

Deriving the Arithmetic Starting Point:

$$P_{arithmetic} = S_{min} + \left[\frac{S_{max} - S_{min}}{D_{max} - D_{min}} \times (D_{actual} - D_{min}) \right]$$

where $P_{arithmetic}$ = arithmetic starting point
 S_{min} = category minimum sentence
 S_{max} = category maximum sentence
 D_{actual} = weight of trafficked drug
 D_{min} = category minimum drug weight
 D_{max} = category maximum drug weight

(1)

The arithmetic starting point was the exact sentence length that should be given to a defendant based on their jurisdiction's sentencing guidelines. This starting sentence is based on the drug type and drug weight, and is ascertained before any adjustments based on aggravating or mitigating factors are made. The arithmetic starting point is the sentence length that judges should use as a starting point, and it is dictated by guidelines laid down to ensure consistency across drug trafficking offences. To ascertain the arithmetic starting point, the drug weight and sentence thresholds must be used. For example, the calculation of the arithmetic starting point for 5 grams of cocaine in Hong Kong is captured in Table 3 above. Five grams is the first drug weight category of the table, which provides the category's minimum and maximum drug weight (>0 grams to 10 grams). This category's minimum and maximum sentences are 24 months and 60 months, respectively. Plugging the variables into the above equation computes to 42 months. Therefore, a defendant who trafficked 5 grams of cocaine in Hong Kong would have a starting sentence of 42 months. Through this equation, it is possible to calculate the sentence starting point of any drug that weighs between the minimum and maximum category of drug weights stipulated in the guidelines.

After calculating the arithmetic starting points for each gram between the minimum and maximum drug weight thresholds, a linear plot for each guideline was graphed. In England and Wales,

the guidelines are separated by two factors: (a) the class of the drug and (b) the culpability of the defendant (eg, lesser role, significant role, and leading role). Hence, a linear graph was created for each drug class and the defendant's culpability. For Hong Kong, the guidelines focus on the drug type and weight range. The defendant's culpability is not a factor in calculating the starting point. Corresponding linear graphs were then created for each guideline. The degree of the proportionality of the linear functions was assessed using the linear graphs. The proportionality was then measured using three states that correspond to the following figures:

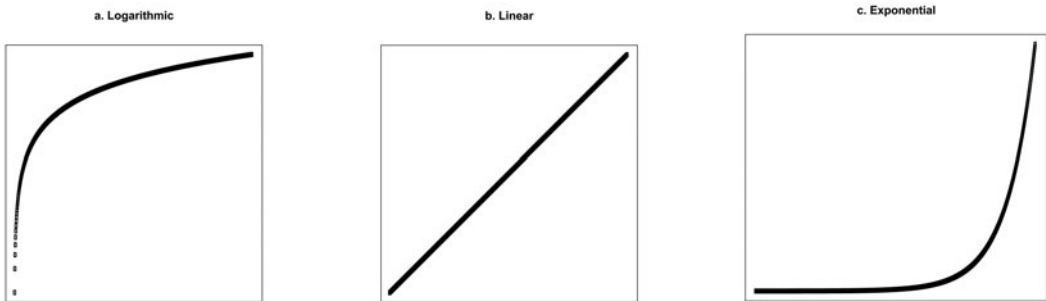


Figure 1. Standard Models for Comparing the Degrees of Proportionality

Through the creation and comparison of the graphs with the above standard models, inferences about the guidelines were drawn. For example, a strictly proportional sentence with drug quantity and sentence length is captured in the graph in Figure 1b above. This implies that an increase in the drug weight relates to a proportional increase in the sentence given to the defendant. However, such sentences will likely neither encourage nor deter drug trafficking behaviour. The extant literature raises doubts on the possibility of preventing repeat offences based on the sentence length. For instance, in a review of studies measuring imprisonment length and re-offending rate, Nagin, Cullen, and Jonson found little evidence on the connection between the length of incarceration and re-offending rate.⁷⁸ In a subsequent review by Jonson, it was even found that longer imprisonment sentences are associated with slightly higher rates of re-offending.⁷⁹

A logarithmic curve, in the graph in Figure 1a, denotes a more lenient sentencing guideline as the trafficked drug weight increases. Therefore, the heavier the contents of the trafficked drug, the more proportionally lenient the sentence will be. A curve mimicking the graph in Figure 1a would seek to deter the trafficking of smaller drug weights more than the trafficking of heavier drug weights after a given threshold is achieved, marginal increases in the drug weight tend to correspond with only a minor increase in sentence length. The exponential curve, the graph in Figure 1c, highlights a more severe sentence for heavier drug weights. The consequence would be inverse to that of the graph in Figure 1a, where the trafficking of heavier drugs weights would face an exponentially heavier sentence than the trafficking of smaller drug weights. Using these three models as baseline comparisons helps to ascertain whether the guidelines represent a logarithmic, proportional, or exponential sentencing mechanism for drug trafficking.

To present a more accurate comparison of the two guidelines, the slopes of each linear function were also compared. The slope of each linear function highlights the added sentence for an

⁷⁸Dan Nagin, Frank Cullen & Cheryl Lero-Jonson, 'Imprisonment and reoffending', in Michael Tonry (ed), *Crime and Justice: A Review of Research* (vol 38, Oxford University Press 2009).

⁷⁹Cheryl Lero-Jonson, 'The effects of imprisonment', in Francis T Cullen & Pamela Wilcox (eds), *The Oxford Handbook of Criminological Theory* (Oxford University Press 2012).

additional gram of drugs for each sentence category. The slope is calculated using the following equation (Equation 2):

Slope of Linear Function:

$$\text{Slope} = \frac{S_{max} - S_{min}}{D_{max} - D_{min}}$$

where S_{min} = category minimum sentence
 S_{max} = category maximum sentence
 D_{max} = category maximum drug weight
 D_{min} = category minimum drug weight

(2)

From the equation above, the slope can be calculated by dividing the difference between the minimum and maximum sentence for each categorical range by the upper and lower bounds of the category's drug weight. This computation provides the months added for each extra gram of drug in the respective category. The unit of measurement for the slope is the months of sentence per gram of trafficked drug. The slope of the linear functions provides a numerical basis for interjurisdictional comparisons of the leniency or severity of the jurisdictions' guidelines. For example, if the slope of the guidelines for drug X in jurisdiction A equals 3, this indicates that every additional gram of drug X from the minimum category drug weight would result in 3 months being added to the defendant's sentence. If this slope with jurisdiction B is compared with drug X having a slope of 1 with the same minimum weight category threshold, every additional gram of drug trafficked will add another month to the defendant's sentence. Given that the weight of the additional trafficked drug is the same in both scenarios, the slope indicates that jurisdiction B's guidelines are more lenient in regard to drug X. Intra-jurisdictional comparisons can also be conducted using slopes of the guidelines' linear functions to ascertain the types of drugs that are viewed as more harmful than others. All graphs and calculations were created via Microsoft Excel v16.0.

Results

The figures of each of the drug trafficking guidelines for the selected drug types in England and Wales and Hong Kong are displayed below. The slopes of the guidelines are combined in the tables based on the drug type for intra- and interjurisdictional comparison.

Comparison of Cocaine and Heroin Guidelines in England and Wales and Hong Kong (Figures 2–4)

Figure 2 highlights the arithmetic starting point for cocaine and heroin in England and Wales, stratified by offender role category. From the figure, the linear functions combined form a plateau resembling the logarithmic curve. This implies that the heavier the drug trafficked, the smaller the additional increase in sentence length as compared to previous weight categories. This is corroborated by the decreasing steepness of the slopes as the drug weight increases. The slopes for each of the curves are conserved for each offender role category. The only difference between the different offender roles is the minimum starting point weight. This signifies that an increase per additional gram trafficked from the lower threshold is equal in all categories, regardless of the offender's role. It is interesting to note that within the guidelines, the upper thresholds of starting sentences do not overlap with the lower thresholds of the succeeding category. Instead, the upper thresholds of the first and second categories exceed the lower thresholds of the second and third categories, respectively. For example, the sentence starting point for 149.9 grams is approximately 7 years and 6 months, whereas the sentence starting point for 150.1 grams is approximately 6 years and 6 months. However, it is important to note that, in contrast to Hong Kong's sentencing guidelines, where the arithmetic

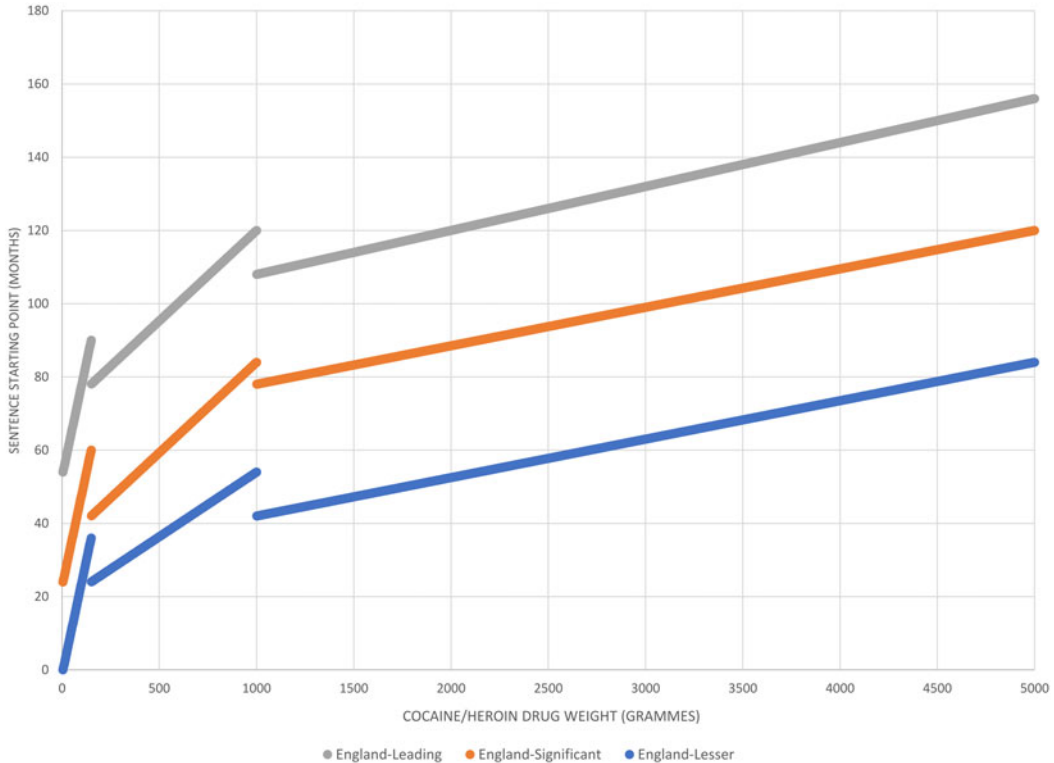


Figure 2. Cocaine and Heroin Starting Sentence Points for Category 1–4 Drug Weights for each Offender Role Category (England and Wales).

starting point is typically followed, each category weight in England and Wales' guidelines has a recommended starting point that can take precedence over the arithmetic starting point. The recommended starting points are typically the midpoint between the upper and lower sentence thresholds of the category weight and can explain the disjointed nature of the linear curves in Figure 2.

Figure 3 is a plot of the linear function for Hong Kong's sentence starting point for cocaine and heroin. Since Hong Kong's guidelines are not differentiated by offender roles, only one curve exists. Compared to England and Wales' guidelines, Hong Kong's guidelines depict a logarithmic function. However, in Hong Kong, the drug range displayed in the figure has a wider range than that of England and Wales. For smaller weight categories, each additional gram of the trafficked drug has a steeper increase in sentence length than heavier weight categories. However, as the weight continues to increase, specifically at 1000 grams, the guidelines begin to plateau. By the time the weight is 4000 grams and above, the increase for each gram of drug trafficked is negligible.

Figure 4 presents the linear functions of both jurisdictions within the prescribed range of 5000 grams. From this figure, it is clear that Hong Kong has a much steeper, and thus harsher, sentencing range for cocaine and heroin. At the maximum weight category, 5000 grams of cocaine would result in a sentence of 316 months in Hong Kong, versus 192 months for offenders with a leading role in England and Wales. The difference between these two starting points is 124 months and the stark discrepancy between the two jurisdictions is widened for defendants charged with either a significant or lesser role. Even for starting points with smaller drug weights (from 0 grams to 133 grams), Hong Kong's starting points correspond more closely with the sentences of those with a leading role. Although both slopes plateau from approximately 1000 grams onwards, the steepness of the curve from 150 grams to 1000 grams is significantly more pronounced for Hong Kong's linear function.

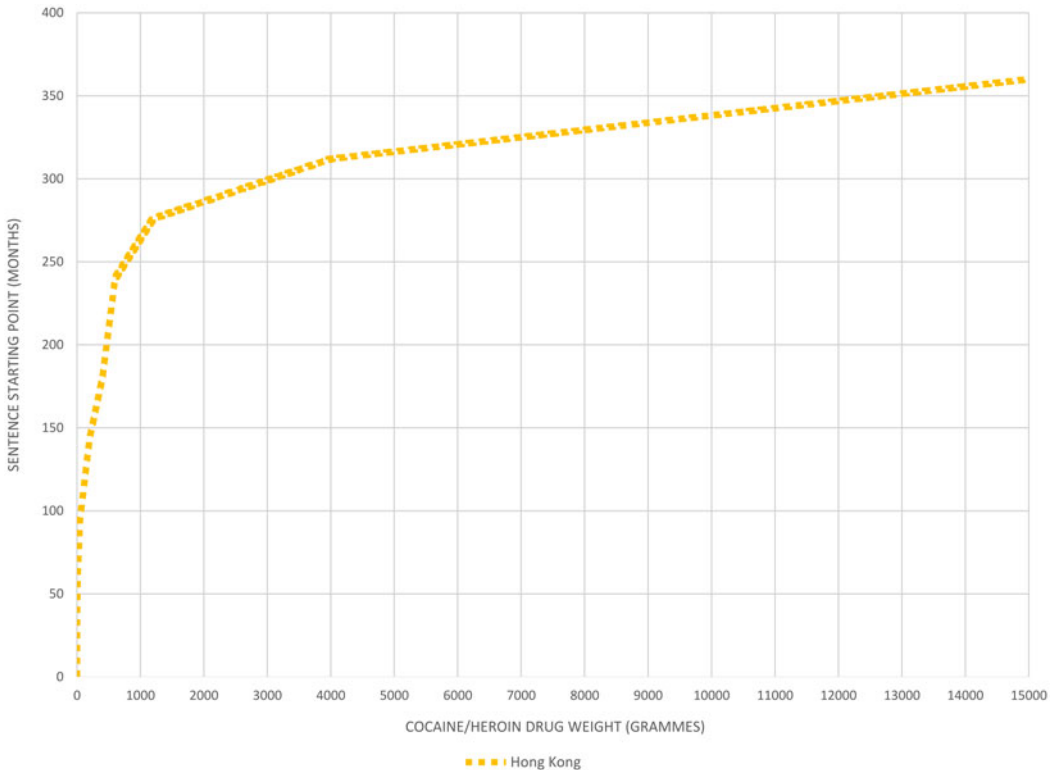


Figure 3. Sentence Starting Point for Cocaine and Heroin in Months (Hong Kong).

A comparison of the slopes will provide a more nuanced understanding of how the guidelines are developed to penalise offenders. An overall analysis of the slopes reveals that the Hong Kong guidelines provide a more comprehensive framework than the England and Wales guidelines – with a wider range and increased divisions for the drug weight categories. In Hong Kong, there are nine categories of drug weights covering a range of 15,000 grams, each with their own sentence thresholds, compared to four categories in England and Wales that only cover a range of 5000 grams. Furthermore, England and Wales’ guidelines include an additional level of grouping based on the defendant’s culpability. Although the slopes themselves are similar across offenders’ role categories, the minimum thresholds clearly distinguish the sentencing ranges. For example, 8 grams of cocaine in England and Wales would correlate to 24 months and 54 months for a significant and leading role, respectively. In Hong Kong, 8 grams of cocaine would equate to 52.8 months. As illustrated in this example, Hong Kong’s guidelines for cocaine and heroin are more punitive towards defendants of lower culpability. This is mainly because they fail to recognise the offender’s culpability. Particularly in the lower category ranges, Hong Kong’s sentencing guidelines more closely equate to England and Wales’ sentence for defendants with leading roles rather than lesser or significant roles.

The intrajurisdiction comparisons reveal how each additional gram is penalised within category drug weights. In both jurisdictions, as shown in Figures 2 and 3, the earlier categories have a steeper slope than the succeeding categories. However, the difference between the slopes of the smallest and largest drug weight categories is substantially greater in Hong Kong than in England and Wales. Within the entire framework of England and Wales’ guidelines, the largest difference between the slopes is 0.234 months of sentence per gram of trafficked drug. This means that the difference between England and Wales’ most punitive sentencing guidelines for cocaine and heroin and its most lenient differs by 0.234 months per gram. This difference is miniscule when compared to

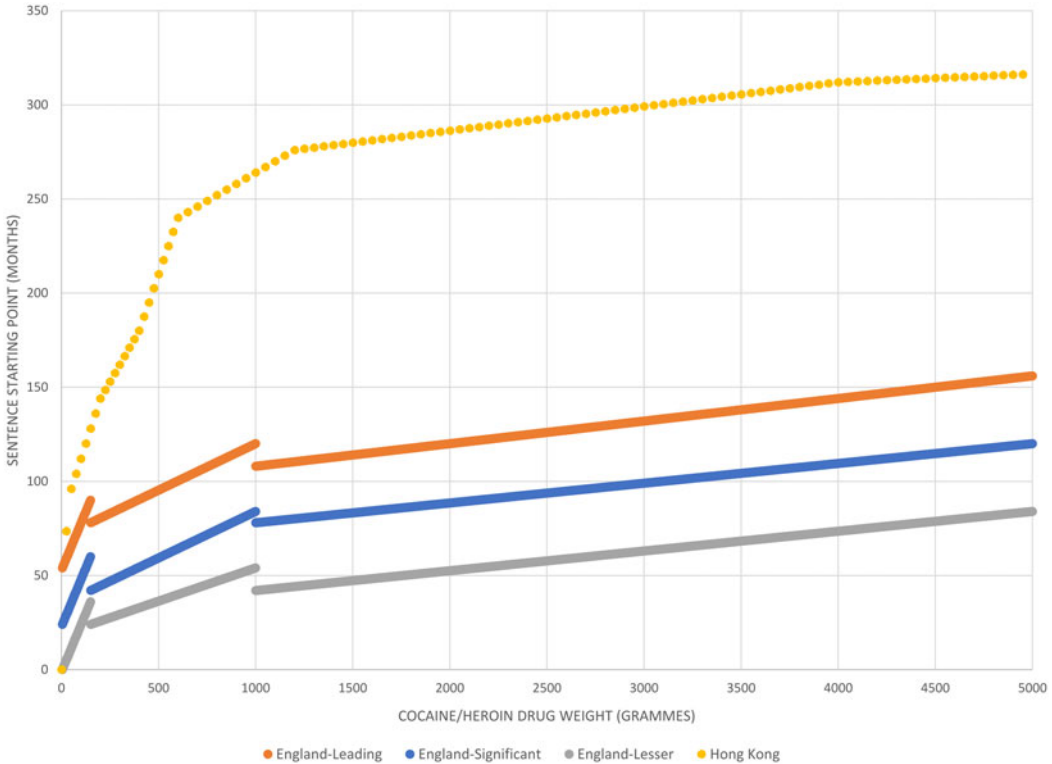


Figure 4. Cocaine and Heroin Starting Sentence Points by Drug Weights for each Offender Role Category (England and Wales).

Hong Kong. In Hong Kong, the difference between the slopes is 3.596 months per gram of trafficked drug. This means that Hong Kong's most punitive sentencing guidelines for cocaine and heroin and its most lenient differs by 3.596 months of sentence per gram of trafficked drug. Using an example to emphasise the disparity between the sentencing guidelines, a sentence for 10 grams of cocaine and heroin would result in an approximate two-month difference between the most punitive and most lenient sentences in England and Wales, while the same dosage would result in a 36-month difference between the most punitive and most lenient sentences in Hong Kong. This discrepancy underscores the fact that, in Hong Kong, the guidelines are significantly more lenient with larger sums of trafficked drugs compared to smaller drug weights.

Notably, there is an inconsistency in Hong Kong's cocaine and heroin guidelines. Unlike England and Wales, where heavier weight categories correspond to lower slopes, Hong Kong increases in slope for the weight range category of 400 to 600 grams. The increments for this weight range are inconsistent with the assumption of proportionality, which assumes a decreased penalty for each additional drug added. However, this is an anomaly within Hong Kong's overall drug trafficking sentencing guidelines as the decreasing slope pattern resumes after 600 grams onwards.

Comparison of Ketamine and Ecstasy Guidelines in England and Wales and Hong Kong

Figure 5 presents the arithmetic starting points for ketamine in England and Wales. The functions follow a logarithmic pattern as well, thus corresponding to a more lenient sentence as the weight of the trafficked drug increases. This is exhibited by the decreased steepness of the slopes as the weight progresses. Unlike cocaine and heroin, the slopes for the leading roles are pronouncedly steeper than

Table 5. Slopes of the Functions for Cocaine and Heroin Guidelines

Category Weights	England and Wales (months of sentence/gram of trafficked drug)			Category Weights	Hong Kong (months of sentence/gram of trafficked drug)
	Lesser Role	Significant Role	Leading Role		
5 g–150 g	N/A	0.248	0.248	0–10 g	3.600
				10–50 g	0.900
				50–200 g	0.320
150–1000 g	0.035	0.049	0.049	200–400 g	0.180
				400–600 g	0.300
				600–1200 g	0.060
1000–5000 g	0.011	0.011	0.012	1200–4000 g	0.013
				>5000 g	---
				4000–15000 g	0.004
				>15000 g	---

the slopes for significant and lesser roles. Contrary to initial assumptions that the more offensive the offender role, the steeper the slope, the lesser category has a steeper slope than the significant role. Although marginal, a difference manifests at greater drug weights where the difference between the two linear functions of the lesser and significant roles in 1000 grams is larger than the difference at 5000 grams. The same disjunction captured in Figure 2 – between the upper thresholds of preceding categories and the lower thresholds of succeeding categories – can be seen in the guidelines of both lesser and leading roles. This can be attributed to how the sentencing guidelines are written, ie, where a recommended starting point is listed along with the lower and upper sentence thresholds.

Figure 6 presents a logarithmic curve of sentencing guidelines for ketamine in Hong Kong. For the smaller weight categories, the slope is steeper. This implies that the sentences for smaller drug weight categories are considerably harsher than those of heavier weight categories. Notably, the curve in Figure 6 is more discontinuous than those in previous figures. The slopes between the second and third weight categories at 50 grams have a discernible difference towards a plateau. In addition, the guideline range for ketamine has a narrower range than that of cocaine and heroin, only encompassing drug weights to a maximum of 1000 grams.

Figure 7 presents the linear functions of both jurisdictions plotted on the same scale with a maximum weight of 1000 grams. In this graph, it is again apparent that overall, Hong Kong's starting points are much higher than those of England and Wales. The lower threshold of Hong Kong's lowest category drug weight (of over 1 gram to 10 grams) is closer to the upper threshold of England and Wales' lowest category drug weight. In England and Wales, at the lowest drug weight of 1 gram, a leading role would be equivalent to a 12-month starting point, while this would result in a 24-month starting point in Hong Kong. The largest starting point difference between the two jurisdictions is 132 months at 1000 grams. The starting point in England and Wales is greater than Hong Kong's starting point only at 5 grams for defendants of a leading role. In all other cases, Hong Kong's starting points are 1.1 times to 2 times greater than the starting points of England and Wales.

The slope differences are analysed in Table 6. All the slopes follow the proportionality assumption that the heavier the weight category, the lower the slope. However, the slopes in England and Wales for ketamine and cocaine or heroin are comparable. In other words, each additional gram of trafficked drug, regardless of whether it is a Class A or Class B drug, attracts the same penalty. As seen in Figure 6, the slopes for defendants of a lesser role are slightly steeper than those of a significant role within the range of 1000 to 5000 grams. Although the difference is 0.001 months

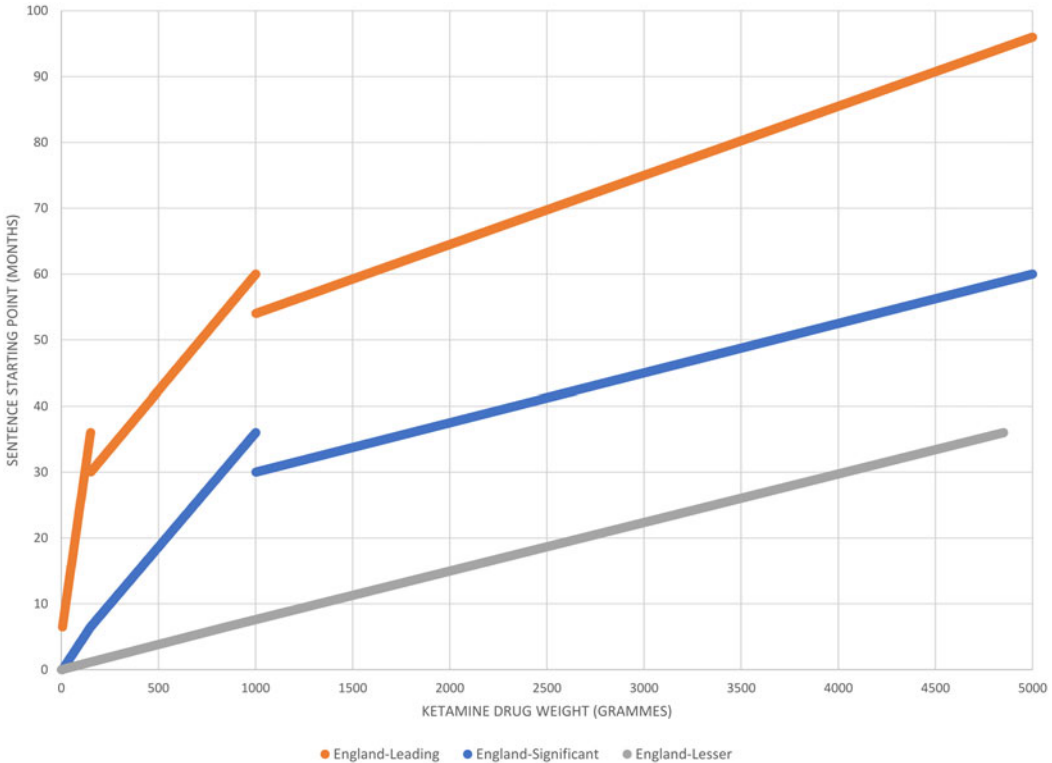


Figure 5. Ketamine Starting Sentence Points for Category 1–4 Drug Weights for each Offender Role Category (England and Wales).

per additional gram, this difference compounds with heavier drug weights. Like with cocaine and heroin, there are a greater number of drug weight categories in Hong Kong than in England and Wales. Nonetheless, the maximum weight category ranges are more closely aligned in ketamine, with an upper threshold of 5000 grams in England and Wales and 3000 grams in Hong Kong than with cocaine where the disparity is above 5000 grams and 15000 grams respectively. The difference between the largest and smallest slope in England and Wales is 0.231 months per gram, whereas in Hong Kong, the difference is 2.607 months per gram. Once more, the logarithmic plateau is more prominent in Hong Kong's drug weight categories than in England and Wales.

Discussion

The cross-comparative analysis of the guidelines underscores the existing sentencing discrepancies between the two jurisdictions when it comes to drug trafficking offences. It also highlights the different assumptions made behind the guidelines and the consequences that can manifest from their implementation.

In England and Wales, the main aim of the sentencing guidelines is to 'ensure consistency in sentencing across the country.'⁸⁰ The Sentencing Council was established for this reason, and it has drafted guidelines across a wide range of criminal offences. The principle that 'like cases are treated alike' is also upheld within Hong Kong's sentencing guidelines. Although deterrence is at the forefront of heavy sentences for serious drug trafficking offences, the Hong Kong Court of

⁸⁰UK Sentencing Council (n 47).

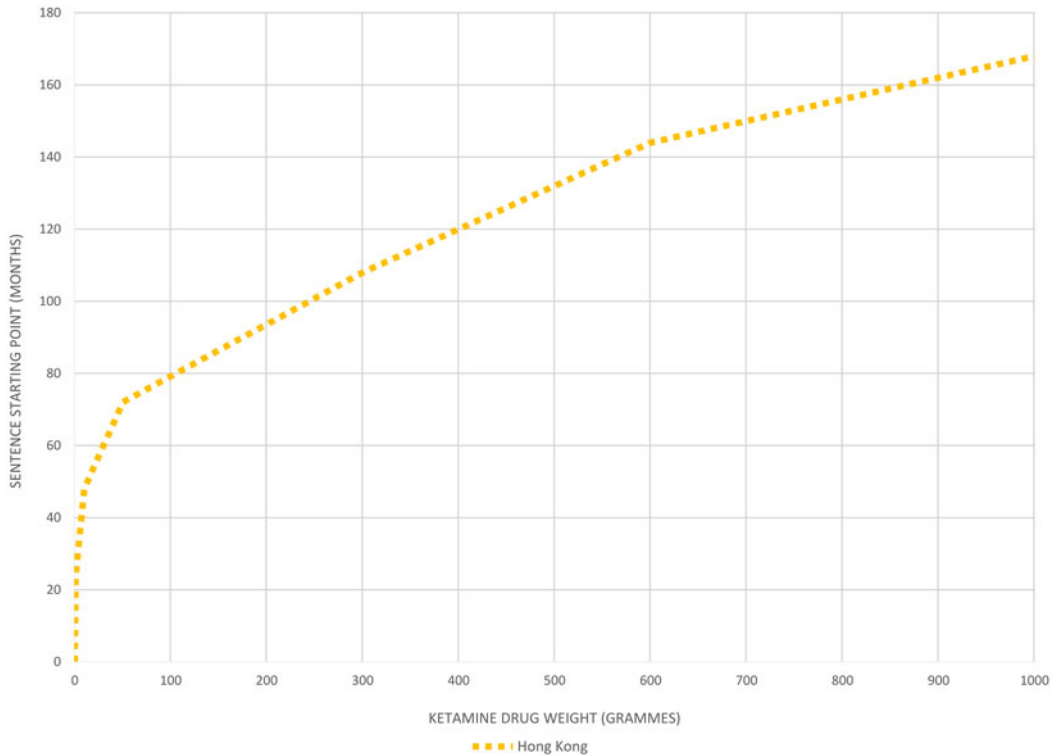


Figure 6. Sentence Starting Point for Ketamine/Ecstasy in Months (Hong Kong).

Appeal also observed that sentencing tariffs would ‘assist trial courts in achieving consistency and fairness in sentencing and guide lawyers in the giving of advice to lay clients.’⁸¹ It is apparent that in both jurisdictions, the prospect of equal justice is promoted through sentencing guidelines.

Consistency is maintained through the determination of starting points of sentences. In both jurisdictions, the starting point of a sentence is determined by the seriousness of the offence. The seriousness of an offence is ascertained by the harm and culpability of the offender. In drug trafficking cases where dangerous drugs are involved, harm is defined by the trafficked drug weight and drug type. In England and Wales, individual drug types are placed into three different categories (Classes A, B, and C), depending on the drug’s potency. In Hong Kong, drug types are viewed independently and may have overlapping sentencing guidelines, such as cocaine and heroin. Therefore, the starting point of a sentence, which is based on the seriousness of an offence, is a formulaic result of drug weight, drug type, and offender culpability.

Thus, both jurisdictions exhibit logarithmic curves for the starting point of sentences for each drug type and offender culpability. Each additional gram in a larger sum of trafficked drugs is penalised to a lesser degree relative to each additional gram in a smaller weight of trafficked drugs. This is exhibited by the decreasing value of the slopes as the weight categories increase. For example, in Hong Kong, each gram in 7 grams of ketamine would attract a sentence of approximately 2.7 months in addition to the minimum sentence length of the corresponding category. For 14 grams of ketamine, each gram would add only 0.9 months to its categorical minimum sentence length. In England and Wales, this trend of decreasing the value of slopes is also observed across the three curves stratified by offender culpability.

⁸¹R v *Lau Tak Ming and Ors* (n 1) para 70.

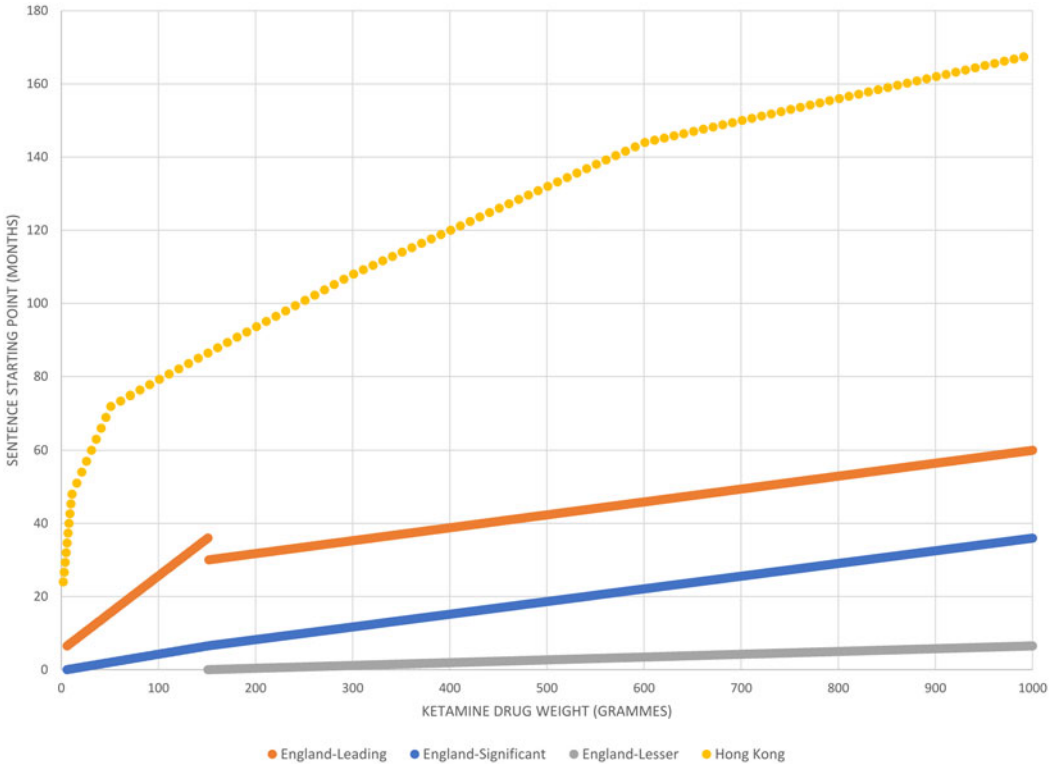


Figure 7. Ketamine Starting Sentence Points for Category 1-4 Drug Weights for each Offender Role Category (England and Wales).

Table 6. Slopes of the Functions for Ketamine Guidelines

Category Weights	England and Wales (months of sentence/gram of trafficked drug)			Category Weights	Hong Kong (months of sentence/gram of trafficked drug)
	Lesser Role	Significant Role	Leading Role		
5–150 g	N/A	N/A	0.242	1–10 g	2.667
				10–50 g	0.600
150–1000 g	N/A	0.041	0.035	50–300 g	0.144
				300–600 g	0.120
1000–5000 g	0.009	0.008	0.011	600–1000 g	0.060
				1000–2000 g	---
				2000–3000 g	---
>5000 g	----	----	---	>3000 g	---

There are two anomalies from the pattern of decreasing slopes as the weight band increases. In Hong Kong, the slope for cocaine and heroin’s category weight of 200 to 400 grams is smaller than that of 400–600 grams. More specifically, each gram of cocaine in a 300-gram sample adds 0.18 months to the sentence, whereas a 500-gram sample adds a 0.30 month increase for each additional

gram. This does not match the other category weights, where the slopes continue to decrease as the category weight increases. When it comes to England and Wales' guidelines on ketamine, the slope for those with a significant role in trafficking 1000–5000 grams is lower than for a defendant of a lesser role. The random nature of these inconsistencies underscores the arbitrary nature of the guideline thresholds. These anomalies challenge the conservation of proportionality in the guidelines and the assumption that defendants with a lesser role should be given a lower sentence than those with a more significant role. The mere existence of these anomalies suggests that the category weight and sentence thresholds should receive closer inspection.

Despite these minor discrepancies, the logarithmic guidelines in England and Wales and Hong Kong are not directly proportional. Thus, the guidelines should follow the graph in [Figure 1c](#), where the slope of each additional gram of trafficked drug is consistent across all drug band weights. Sentencing guidelines structured this way would be proportional to the seriousness of the offence in question, demonstrating that trafficking greater quantities of drugs is considered as more serious.

It is also important to note that Hong Kong's sentencing guidelines have a greater number of weight categories than those of England and Wales. Especially in the earlier weight categories, specifically ranging from 0 grams to 150 grams, England and Wales only use one weight category while that range encompasses three weight categories in Hong Kong. For each weight category, there is a separate slope attributed to it. As seen in [Figure 4](#), this makes the linear slopes of Hong Kong's guidelines more discrete than that of England and Wales. In addition, Hong Kong entertains significantly higher sentences for each drug type. In [Figures 4](#) and [7](#), Hong Kong's linear functions are much steeper than England and Wales', specifically in the lower drug categories, where a majority of sentences lie. Thus, in Hong Kong, 1000 grams, or one kilogram, of heroin or ketamine would result in an additional 132-month sentence, which is equivalent to 11 years. The slopes are also much greater for comparatively similar drug weights. For instance, for cocaine and heroin, the largest slope is 0.248 months of sentence per gram of trafficked drug in England and Wales, while the largest slope in Hong Kong is 3.6 months of sentence per gram of trafficked drug, which is more than ten times greater. When comparing the category weights, it is also clear that Hong Kong's slope range of 0 to 200 grams is greater (3.6 to 0.32) compared to that of England and Wales (0.248). These differences are a clear indication that Hong Kong harbours more punitive guidelines than England and Wales. Furthermore, the large gaps between Hong Kong and England and Wales in [Figures 4](#) and [7](#) signify that an offender with a leading role in England and Wales can be given a significantly more lenient sentence than an offender with a minor role in Hong Kong.

The difference between the two guidelines is especially more pronounced when acknowledging that Hong Kong's guidelines are for defendants of the lowest culpability. In *Kilima*,⁸² the Court stated that: 'Given that the sentence to be imposed on an applicant who is a courier is fixed by reference to the tariff, without regard to his role as such.'⁸³ Therefore, the equivalent guidelines from England and Wales that can be compared to the guidelines alluded to in this statement are those of a lesser role. It is important to note that the sentence can be enhanced by aggravating factors such as if the 'trafficker is a mastermind or senior player, such as a financier, in a syndicate.'⁸⁴ Without a systematic integration of culpability into the guidelines, the assessment of the offender's role is left to the judge's discretion. Additionally, lack of a standard stipulation on the extent to which sentences should be enhanced as a result of increased culpability creates more leeway for deviation when accounting for a defendant's culpability in Hong Kong.

However, there is some justification behind Hong Kong's decision not to incorporate culpability into its sentencing guidelines. In the same case, Hong Kong judges in *Kilima* compared the two

⁸²*HKSAR v Kilima Abubakar Abbas* (n 39).

⁸³*ibid* para 45.

⁸⁴*ibid* para 38.

jurisdictions' guidelines and stated that England and Wales' guidelines are too 'over-prescriptive.'⁸⁵ Macrae VP argues that the inclusion of culpability would present an additional challenge of ascertaining the culpability first. According to him

In reality, in most cases, it is very difficult to know how closely a defendant is linked with the original source of the drugs, what his awareness and understanding of the scale of the operation might be or how limited his function really is; questions which become even more difficult to answer with a foreign defendant who has travelled across the world on an elaborate itinerary from one country or continent to another before entering Hong Kong with cocaine secreted within his body worth hundreds of thousands, if not millions, of dollars. That is perhaps why we set the bar at the level of the courier, raising it if there is an international element and when the scale of the applicant's role becomes clear.⁸⁶

Therefore, Hong Kong's courts are aware that accurately determining an offender's role is not always feasible. Since the evidence may not clearly indicate an offender's culpability, the guidelines are set at the lowest level and can be enhanced when necessary. However, the onus is placed on the judges to scrutinise each case for any additional signs of culpability. While England and Wales' sentencing guidelines and judgements, provide guidelines for determining culpability, the delineation between offender roles is still debatable and can lead to sentencing challenges.

While comparing the various levels of offender involvement, the authors highlight the surprising disproportionality within the sentencing guidelines where lower weight ranges attract more severe punishment than higher weight ranges. The principle of proportionality reflects the idea that a punishment should be proportionate to the harm inflicted by the criminal act. Using the measure of drug weight, an exponential curve model would present a proportional response and alleged deterrent effect.

An exponential curve would allow for the exponential risk of harm corresponding with higher drug weights to be accurately reflected in the sentencing guidelines. As sentence lengths are a composite of a defendant's culpability and risk of harm, an exponential model incorporates the assumption that the risk of harm exponentially increases as the trafficked drug weight linearly increases. In execution, larger drug weights imply a high risk of greater victimisation as the substantial supply could be divided among more users. Additionally, large amounts of trafficked drugs are representative of complex, and possibly multinational, enterprises.⁸⁷ Through an exponential curve, defendants trafficking smaller drug weights would not be subject to disproportionately harsh sentences compared to defendants trafficking higher drug weights; this would be more effective in deterring large shipments of drugs. The gentler slope increase for lower weights provides a proportionate response towards street dealers whose scope of harm is more limited, and whose culpability is potentially reduced by addiction or exploitative circumstances. Evidence on lower culpability would be considered under judicial discretion to arrive at a fairer and proportional sentence for drug mules who carry substantial amounts of drugs.⁸⁸

Conclusion

This study compares drug trafficking sentencing guidelines in England and Wales and Hong Kong. Through cross-comparative analysis, the methodologies judges use to arrive at the starting point of sentencing and the assumptions behind the sentencing guidelines are revealed. Both jurisdictions adopt sentencing guidelines that exhibit a logarithmic curve. In other words, the lower the drug

⁸⁵ibid para 74.

⁸⁶ibid para 75.

⁸⁷Fleetwood, 'Five kilos' (n 18) 375–393.

⁸⁸ibid.

weight trafficked, the more steeply the penalty increase for each additional gram of drug being trafficked.

Regarding sentencing guidelines in particular, Hong Kong adopts a different *modus operandi* from England and Wales in two respects: defenders' culpability and the standard of punitive measures. In England and Wales, the sentencing guidelines systematically incorporate culpability of the offender into the guidelines through the stratification of offender culpability into three categories: lesser role, significant role, and leading role. Each stratification, along with the trafficked drug weight, dictates the sentence starting point. Through this methodical structure, culpability and harm are weighed equally in determining a sentence.

In Hong Kong, the sentence guidelines focus on the trafficked drug weight and do not incorporate a structured consideration of culpability like in England and Wales. Instead, the Hong Kong courts treat each defendant at the lowest level of culpability unless presented with additional evidence. Since the Hong Kong Court of Appeal desires a fair and consistent sentencing approach, the exponential model can provide an objective framework for the starting basis of sentencing across all drug trafficking cases. Not only does the exponential model convey strong condemnation with the significant increments, but it also provides a structure to differentiate between low level street dealers and trafficking ring organisers more aptly.