

Sentencing in Hong Kong, I Grenville Cross and Patrick W.S. Cheung (in collaboration with Elaine Y.L. Tsui) [Hong Kong: LexisNexis Butterworths, 2003, 583pp, hardback, HK\$1,533, US\$216.19], ISBN 962 810 565 5

Ordinary people are generally oblivious to the sentencing rules and practices of its courts. It often takes a sensational case involving a famous personality before the ordinary person thinks twice of whether a certain sentence was “just and appropriate”. Such was the case involving Nicholas Tse, a young Hong Kong actor, who was convicted of conspiring to pervert the course of justice in 2003. Following Tse’s sentence, the airwaves were abuzz with opinions on whether Tse’s community service order was fair, particularly when compared to the six-month term of imprisonment given to the co-accused police officer, who allegedly conspired with Tse to “switch the driver” in reporting an auto collision incident.¹ The public’s attention span, however, was short, and the public debate was short-lived. It remains the case that serious discussion of sentencing laws and practices that can underpin the future development of the law cannot depend solely on ad hoc events and must be the product of scholarly research and writing. An example par excellence of such scholarship is Cross & Cheung’s *Sentencing in Hong Kong*.

Now in its fourth edition, *Sentencing in Hong Kong* is a classic in Hong Kong’s legal literature. Originally published in 1994 with only 128 pages, it has more than quadrupled in size over the past decade. One or more editions are usually found within arm’s reach in the offices of the lawyers and judges who work in Hong Kong’s criminal courts. Proof of the work’s significant impact on judging is readily found in the close to 50 Hong Kong appellate authorities that have cited the work invariably with approval, and occasionally with much praise.

Written in an *Archboldesque* style, the book is of great attraction and value to the practitioner with its short succinct statements of legal principles, plentiful citations to relevant authorities, apt quotations from cases, abundance of practical information, and occasional expressions of tempered views. Even humour has found its way into the beginning of each chapter, in the prefacing quotations by luminaries such as Aristotle, Emperor Xianfeng, Oscar Wilde, Woody Allen, Frank Sinatra, and others.

Another endearing quality of the book is its tendency to draw upon relevant authorities from various commonwealth countries including England, Australia, and Canada. However with the increasing divergence in the sentencing laws and practices of these jurisdictions, this tendency is

¹ Ultimately the police officer’s conviction was overturned by the Court of Final Appeal, although he had already served his sentence, while Tse’s conviction was left intact. See *Lau Chi Wai v HKSAR* [2004] 3 HKLRD 444 (CFA); *Tse Nicholas v HKSAR* [2004] HKEC 417 (CFA AC); *HKSAR v Tse & Another* [2003] HKEC 1415 (CFI).

destined to be on the decrease. After all, sentencing is a localised affair and very little beyond general principles and purposes can be gained from decisions made abroad. In the authors' words, "[a]lthough approaches adopted in another jurisdiction may be instructive, social conditions and mores differ greatly" (p 252). With the enactment of Part 12 of the Criminal Justice Act 2003 (UK), the gulf between English and Hong Kong sentencing law has widened even further.

The arrangement of the book's 50 chapters in its "A to Z" ordering may seem a bit odd on first impression. But after a decade it is futile to complain because this arrangement is now as much a part of the book as the book is a part of Hong Kong. The authors never fathomed that anyone would read the book from cover to cover (as one does in preparing a book review!). It was meant to be a reference book with comprehensive coverage, and suitably titled headings, to aid the quick retrieval of relevant analysis. In this respect, the book succeeds. Its 50 chapters address almost every aspect of sentencing and punishment of interest to the legal practitioner. The only glaring omissions are disqualification from company directorships and judicial versus executive pardons. The chapter titles are well chosen and each chapter covers a discrete topic, thereby avoiding any significant overlap or need for cross-referencing. This is not to say, however, that future editions could not benefit from the addition of paragraph numbers and cross-referencing to such numbers, especially between chapters.

There are essential chapters concerned with the principles and general factors relevant to sentencing. The two most useful ones delineate the various aggravating and mitigating factors that Hong Kong courts have considered and applied. Given the fruitful discussion of the totality principle in Chapter 47, the chapter on generalised sentencing, like the chapters on corporal punishment and the death penalty in the first edition, will soon become a relic of past editions. The authors could probably be more critical of the court's use of prevalence of the offence, (Chapter 33), as a sentence enhancing factor. The notion that prevalence can be used to increase an otherwise proportionate sentence is inconsistent with fundamental notions of justice. Why should a man's liberty be sacrificed for the sake of setting an example for others? This is the principled objection, and there are other difficulties with this approach in terms of the measurement of prevalence and the empirical validity of the underlying general deterrence theory.

One might also criticise the authors for not being more critical of the starting point approach to sentencing which, although adopted in Hong Kong, is by no means universally applied.² It has been argued that if appellate courts

² In *R v McDonnell* [1997] 1 SCR 948, a majority of the judges on the Supreme Court of Canada deprecated a too rigid application of the starting point approach.

use a precise starting point in setting their guidelines, this “can produce the natural effect of bunching sentences around a median rather than spreading them across a range to suit individualised circumstances. This moves the set of sentences for a particular offence up the penalty scale and increases the overall extent of imprisonment.”³ However a close reading of Chapter 25, on guidelines, reassures us that this is a criticism of little concern in this jurisdiction. Cross & Cheung note that unlike in England, the Hong Kong courts are not statutorily required to provide guidelines. This accounts for greater flexibility in the adoption and application of guidelines. According to the authors, “guidelines are neither designed nor intended to replace the discretion of sentencers” (p 248).

The book contains a host of chapters on the arsenal of orders and measures within the jurisdiction of the sentencing court. In addition to the traditional modes of punishment, eg imprisonment, fines, community service, probation, suspended sentence, etc, less traditional orders are also addressed including driving disqualification orders and hospital orders. Practitioners who have a property element in their case, whether in the form of proceeds of crime, or an instrument of crime, will welcome the chapters on confiscation orders, compensation orders, criminal bankruptcy orders, fines, restitution orders, and forfeiture orders. A read of these chapters demonstrates a strong need for legal reform to bring coherence to this area. An added bonus is the chapter on costs in criminal cases, which strictly speaking is not concerned with sentencing, but is an issue of great importance for all students and practitioners of the criminal law.

The new practitioner especially will find the chapters that examine the institutional side of sentencing of great utility. It is a challenge for anyone new to Hong Kong’s sentencing regime to distinguish between prisons, detention centres, drug addiction treatment centres, hospital detention, reformatory schools, and training centres. The relevant chapters clarify any possible confusion and illustrate how very seriously rehabilitation is taken in the past and current regime.

There are of course chapters that concern the procedural and jurisdictional issues related to sentencing. Appeals and reviews of sentences are covered, together with procedural issues such as pleas, the factual basis for sentence, use of background reports, postponement of sentence, reasons for sentence, and taking offences into consideration. A minor point of disappointment is that the authors do not state a firm view on whether hearsay evidence is admissible in sentencing proceedings, particularly in sentence enhancement applications made under section 27 of the Organized and

³ See A. Manson, “McDonnell and the Methodology of Sentencing” (1997) 6 *Criminal Reports* (5d) 277.

Serious Crimes Ordinance (Cap 255). In *HKSAR v Ma Suet-chun*, the Court expressed the view that it was permissible in Hong Kong to follow the Canadian approach set down in *R v Gardiner* (1982) 68 CCC (2d) 477 (SCC) to admit credible hearsay in such applications.⁴ At its highest, the authors only say that “hearsay material is not likely to suffice [or qualify]” (see pp 159, 366, 381) without engaging the view expressed in *Ma Suet-chun* directly. Hopefully before the next edition, either the Hong Kong courts or the authors will have reached a firmer view on the matter.

The most intellectually interesting chapters are those concerning plea bargaining, the roles of the prosecution and defence, victims, and young offenders. The authors are to be commended for their progressive views on plea bargaining. If there is to be liberalisation in this area surely it must be accompanied by a more active role for the prosecutor in the sentencing proceeding. Here the authors are more conservative, going only as far as the orthodox position that the prosecutor’s role is to assist the court (p 378). If however there is to be effective plea bargaining, the prosecutor must not only be entitled to make submissions on sentence but also to take positions on sentence and be bound by those positions when they form the basis of an agreement on a guilty plea. The prosecutor is both adversary and minister of justice at all times.⁵ He or she does not suddenly remove the “adversarial hat” on entering the sentencing arena. The authors are generally in favour of victim impact statements (pp 507–509); hopefully these views will help lead to the enactment of a provision that will institutionalise the practice of preparing, tendering and receiving such statements.

It is difficult to recommend improvements to an already excellent text. Nevertheless, in keeping with its pattern of evolutionary development, the authors may wish to consider three developmental ideas for future editions. First, there could be an expansion of the appendix which currently lists the significant cases on quantum of sentence for various offences. The section is already a practitioner’s dream but could become a practitioner’s nirvana if there was a short description of each case with an indication of the sentence given. Secondly, there is a need for a chapter to recognise distinctively the impact of constitutional human rights norms on sentencing. *HKSAR v Lau Cheong* is one of the most important sentencing decisions since 1997 for it affirmed that under Hong Kong’s new constitutional order it is possible to review sentencing laws and decisions on grounds of arbitrary imprisonment

⁴ *HKSAR v Ma Suet-chun* [2001] 4 HKC 337, 342 (CA).

⁵ See the interesting discussion of the tension between these two roles in *R v Cook* [1997] 1 SCR 1113.

and cruel, inhuman or degrading treatment.⁶ A “manifestly disproportionate” sentence could constitute arbitrary imprisonment.⁷ Constitutional rights serve as a bulwark against the possible rise of minimum sentences, a phenomenon which Hong Kong has managed to resist thus far. Finally, with concerns about an increasing incarceration rate and the need for new jails in Hong Kong, it would not be outside the remit of the book to include a chapter on alternative measures or diversion from the traditional system. The binding over order (Chapter 5) is one form of diversion but other avenues may exist particularly when dealing with first time offenders.

Sentencing in Hong Kong is an influential text of great importance to the study and practice of criminal law in Hong Kong. One hopes for it to reach double-digit editions. It is only fitting to conclude with the following relevant quotation: “That is a good book which is opened with expectation, and closed with delight and profit”, A. Bronson Alcott.

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⁶ *HKSAR v Lau Cheong & Another* (2002) 5 HKCFAR 415, para 112. See Article 28 of the Basic Law and Article 3 of the Hong Kong Bill of Rights.

⁷ *Ibid.*

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