

Chapter 15 Sentencing

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Biography

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Abstract

Constitutional norms, statutory rules and common law principles govern the art and science of sentencing in Hong Kong. Death penalty and corporal punishments are sentencing measures of the past. As reflected in a 2014 law reform report on suspended sentences, the emphasis now is on discretionary sentencing, although murder still carries a mandatory life imprisonment. Hong Kong courts have a full range of sentencing options to ensure that the punishment fits the crime and offender. Sentencing decisions are informed by traditional purposes of punishment including public protection, deterrence, retribution, rehabilitation and reparation for victims. The purpose of denunciation has been cited by judges more frequently in recent years. Restorative justice, however, is not commonly referred to. Hong Kong's Court of Appeal provides guideline sentences for specific offences; such guidelines assist courts in setting the starting point sentence in a particular case. Aggravating and mitigating factors serve respectively to move the sentence marker up and down. While proportionality is an applied constitutional principle of sentencing, courts still enhance sentences in cases of prevalent organised crime and routinely give sentencing discounts on pleas of guilty or for assistance given to the authorities.

Introduction

Sentencing is one of the most important aspects of the criminal process. The sentencing judge must take into account a multitude of factors including the interests of the offender, the victim and society in arriving at a just and appropriate sentence. Errors made in the sentencing process can result in the excessive detention of an individual, the premature release of a dangerous offender, aggrieved victims who feel justice has not been done, and other issues. Sentencing can also be highly political with governments using sentencing reform as a way to curry favour with voters attracted to 'get tough on crime' policies. In Hong Kong, however, with its developing state of democracy, the politicisation of sentencing

has not been seen, and indeed one might criticise the legislature for giving insufficient attention to the topic generally.

This chapter outlines the main sentencing options currently available in Hong Kong before discussing the various purposes and principles of sentencing that the judge or magistrate must consider and apply in determining the punishment to be given in a particular case.

Punishment and Sentencing

Every child knows (or should know) that doing something ‘bad’ or ‘wrong’ will usually be met by ‘punishment’ of some form from one’s parents. In this everyday sense, punishment is a response from an authority figure to misbehaviour. In law, the word ‘punishment’ is reserved for the category of misconduct that constitutes a criminal offence. Punishment is the response of a court to a person’s criminal conduct. By contrast, if a person is ordered to pay damages in a civil law suit or subject to discipline by a professional body, these measures are not typically described as punishment. Thus the word punishment carries with it a special meaning and signifies censure from a court for breaching criminal laws (von Hirsch, 1993). Easton and Piper (2005) note that punishment ‘rests on a moral foundation’ and ‘stems from an authoritative source, usually the state’ (p. 4).

Sentencing is the legal process by which a person is punished by a court. The law of sentencing is concerned with how and how much a person should be punished for the criminal offence(s) he has committed. In every case, the court balances the purposes of sentencing and applies established sentencing principles in accordance with the law to reach a just and appropriate sentence given the circumstances of the offence and the offender.

Before moving on, a word should be said about the classical debate over the theories and justification of punishment. Punishment theories generally fall within two schools of thought. The *utilitarian* school justifies punishment as a means to achieving the greatest good for the greatest number. While punishment is a source of unhappiness for the offender, it is nevertheless able to bring about a greater good in its direct and indirect consequences, e.g. deterring the offender and others from causing further harm in society. The competing school of thought is concerned more with the particular offender and his criminal offence. Punishment is justified as *just desert* for the crime committed by the offender. In other words, a person who commits a criminal offence deserves to be punished and how much he deserves is measured by the extent of the offender’s wrongdoing and blameworthiness. The essential difference between the two schools is that the former treats the offender and his punishment as a means to a greater end while the latter respects the autonomy of the offender and treats his punishment as an end in and of itself. As will be seen, Hong Kong’s system of sentencing may appear incoherent at times as it reflects elements of both schools of thought.

Sentencing Options

Sentencing options lie along a spectrum of severity and can serve different purposes. The range of options changes with time and place. As you read about the different sentencing options, reflect upon why certain options exist and the purposes they are meant to achieve. Describing them as options is not meant to suggest that the court can freely choose any option

to apply in a given case. Both the law and sentencing principles will constrain the range of options on the basis of the circumstances of each case.

Death and Corporal Punishment

The death penalty in Hong Kong was abolished in 1993, and the last execution by hanging took place in 1966 (Cross and Cheung, 1994: 32). Death was the punishment for the offences of murder, treason and piracy with violence (Liu, 1992). In the period before the formal abolition of the death penalty, death sentences imposed were commuted to sentences of life imprisonment. Corporal punishment, although it once existed in Hong Kong primarily in the form of caning, was abolished in 1990 (Cross and Cheung, 1994: 20). While both these sentencing options are now part of Hong Kong's criminal justice history, it should not be forgotten that they remain popular sentencing measures in many other Asian jurisdictions. For example, a Singapore court recently upheld the constitutionality of the use of caning in that jurisdiction. See *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 (CA).

Imprisonment¹

Jail is the typical sentencing option in the mind of most people. Jail sentences can range from a term as short as 'to the rising of the court' (see *White v Brown* (2003) 175 FLR 325 to one as long as life imprisonment, the most severe sentence available in Hong Kong. Statutory offences will normally specify a maximum term of imprisonment, and very few offences in Hong Kong carry a minimum term. When a judge orders different terms of imprisonment for several offences, he must specify whether the terms are to run at the same time (i.e. concurrent terms) or one after another (i.e. consecutive terms). It is a constitutional principle that a person who is imprisoned must 'be treated with humanity and with respect for the inherent dignity of the human person': Article 6(1) of the *Hong Kong Bill of Rights*.

Murder is the only offence which must be punished by life imprisonment, and a small category of serious offences, such as manslaughter, rape and robbery, can attract discretionary life sentences. When the judge sentences someone to a discretionary life sentence, the judge must also specify a minimum term in years which the person will have to serve before he can be released. There is no guarantee that the person will in fact be released after he has served the minimum term. Decisions concerning the release of such persons are made by the Long-term Prison Sentences Review Board (LTPSRB) and the Chief Executive (CE) in accordance with the *Long-term Prison Sentences Review Ordinance* (Cap. 524). A person who receives a mandatory life sentence for murder is not given a minimum term by the judge. Instead, his sentence is reviewed by the LTPSRB after five years of the sentence and every two years thereafter until he is released under the terms of the Ordinance. Hong Kong courts have held this detention review mechanism to be constitutional.

Fine

The sentencing court has a discretionary power to impose a fine in lieu of or in addition to other forms of punishment. A fine serves a punitive purpose but should only be given if the offender is in a position to pay the fine. To enforce the fine, a default period of imprisonment up to 12 months may have to be served by the offender if he fails to pay the fine. Fines can

¹ Please refer to Chapter 11 of the edited volume for a fuller discussion of the custodial sentences for offenders in Hong Kong. ****Note to editors – pls update****

range from HK\$1 to HK\$100,000 according to Schedule 8 in the *Criminal Procedure Ordinance* (Cap. 221); however, other ordinances may provide for much higher upper limits. For example, the indictable offence of making child pornography carries with it a maximum fine of HK\$2,000,000. For some offences, the fine is at large, and there is no ceiling, although regard will be had to the capacity of the offender to pay in the calculation of the amount.

Suspended Sentence

A person who receives a suspended sentence gets a chance to keep his freedom and to demonstrate his potential to rehabilitate. This option is only reserved for less serious wrongdoing, i.e. when the court orders a jail term of 2 years or less. Schedule 3 of the *Criminal Procedure Ordinance* lists a number of excluded offences including indecent assault and manslaughter for which no suspension is possible even if the actual sentence is a term of jail within the 2-year period. In February 2014, the Law Reform Commission of Hong Kong, persuaded by the findings of a report prepared by the University of Hong Kong's Centre for Comparative and Public Law and commissioned by the Law Society of Hong Kong, recommended that the list of excluded offences be abolished. The Commission believed that "judges and magistrates should not be restricted from exercising their discretion to achieve a just and appropriate sentence depending on the circumstances of the offence and the offender" (see HK Government Press Release, 25 February 2014). Before suspending a sentence, a court should first decide that a term of imprisonment is required, and then satisfy itself that exceptional circumstances exist to justify its suspension (Cross and Cheung, 2015: 541).

For a period of at least one year and up to 3 years, the offender must not recommit another offence in Hong Kong punishable by imprisonment. Otherwise he may have to serve the original sentence, which had been suspended, along with any other sentence he might receive for the subsequent offence; however, in the court's discretion the two sentences may be ordered to be served concurrently either in whole or in part. When imposing a suspended sentence the court may also impose reasonable conditions to which the offender must adhere during the period of suspension, but it is rare for conditions to be imposed. Breach of a condition is tantamount to recommitting a further offence and can result in having to serve the original sentence. As conditions can attach to suspended sentences, the imposition of a simultaneous probation order for other offences is not allowed: section 109B(2) of the *Criminal Procedure Ordinance*. This prohibition does not, however, extend to the making on a later occasion of a probation order for some other offence (see *R v Tarry* [1970] 2 QB 560 (CA)).

Probation

A probation order requires the offender to be under the supervision of a probation officer and to adhere to certain conditions during the period of the order which must be at least 1 year in duration but no more than 3 years, see section 3 of the *Probation of Offenders Ordinance* (Cap. 298). The conditions aim at securing the good conduct of the offender or to prevent re-offending by the offender. They can provide that the offender reside at a particular residence or approved youth institution but cannot require the offender to pay compensation (as compensation orders are provided for separately). The probation officer plays an important supervisory role in respect of the discharge, amendment and review of probation orders.

Like the suspended sentence, the probation order has rehabilitative aims and is a measure that gives the offender a second chance, albeit with some restrictions on his liberty. It is not available for offences whose sentence is fixed by law (e.g. murder), and when the judge orders probation he is not allowed to sentence the offender any further, see *R v Isherwood* (1974) 59 Cr App R 162 (CA). Thus, probation is only an option for less serious offending and will not be available for serious offences, even if the offender has an impeccable background. It is a common method of dealing with juvenile offenders.

A probationer who breaches a condition of his probation order is required to return to court where he may be cautioned, fined up to HK\$500, or in serious cases re-sentenced for the original offence as if he had just been convicted of it. If the probationer commits another offence during the period of the probation order, he will also be liable to be re-sentenced for the original offence in addition to any sentence he receives for the new offence (see **Chapter 10**update**** of this edited volume).

Community Service

In 2002, the then young actor Nicholas Tse Ting-fung received a controversial community service order for perverting the course of justice by trying to conceal his responsibility for a vehicle accident. A community service order requires the offender to perform unpaid work in the community up to a maximum of 240 hours: *Community Service Orders Ordinance* (Cap. 378). Such orders can only be given to an offender of or over 14 years of age who consents to the order and only after conviction for an offence punishable with imprisonment. The order will not be made if the judge finds that the offender is not a suitable person to perform work under such an order.

As with probation and suspended sentences, the community service order serves the primary purpose of rehabilitation with a meaningful degree of liberty restriction to convey a punitive message. This sentencing option was first introduced in 1984 following a study and report on the topic by the Law Reform Commission of Hong Kong (1983, see **Chapter 10 **update** of this edited volume**).

Discharge

Where an offender is convicted of an offence, he may receive a conditional or absolute discharge by a magistrate (section 36 of the *Magistrates Ordinance* (Cap. 227)) or a conditional discharge by the Court of First Instance or District Court (section 107 of the *Criminal Procedure Ordinance*). An absolute discharge is reserved for wrongdoing of a very low order while conditional discharges serve a similar purpose to probation orders. Absolute discharges are typically not appropriate for shoplifting cases given the offender's moral blameworthiness: *Secretary for Justice v Tse Sheung Kai & Others* [2001] 3 HKLRD 487 (CA).

When a person is discharged he cannot be given a custodial sentence, fine or community service order. Before ordering a discharge, the court must find that it is "inexpedient to inflict any punishment or any other than a nominal punishment" on the offender having regard to "the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the

offence was committed”: section of 36 of the *Magistrates Ordinance*; section 107 of the *Criminal Procedure Ordinance*.

Binding Over

The power to bind over an individual is a non-custodial measure that helps to keep the peace in a potentially violent context and/or to ensure good behaviour from that individual. “The making of binding-over orders is sometimes explained as constituting ‘preventive’ justice”: *HKSAR v Lau Wai Wo* (2003) 6 HKCFAR 624 at para. 39, applied in *David Morter v HKSAR* (2004) 7 HKCFAR 53.

Under section 109I of the *Criminal Procedure Ordinance*, the judge or magistrate has the power to bind over a person who or whose case was before the court irrespective of whether he has been convicted of an offence. But where the court proposes to bind over an acquitted person, the court must give him fair notice of this proposal and an opportunity to make representations. The power obligates the person to enter into his own recognisance or to find sureties or both, and for the duration of the recognisance (usually 1 year but not more than 3 years) to keep the peace and/or be of good behaviour. Failure to enter into the recognisance can result in contempt proceedings against the person who has been bound over. In fixing the amount of the recognisance, the judge or magistrate should try to satisfy himself that the amount is such that the person could reasonably be expected to be able to pay: *Lau Wai Wo* at para. 55. If the recognisance is breached then the amount of the recognisance may be forfeited.

Restitution and Compensation

In recent times, victims of crime have been given a greater role in the trial of persons accused of crime. It has been recognised that victims should not have to bring their own legal proceedings (and suffer all the costs of doing so) to obtain either the return of property from the offender or compensation for harm caused by the offender. The restitution order and compensation order are two different orders available to the sentencing judge in order to bring corrective justice to the victim: sections 73 and 84 of the *Criminal Procedure Ordinance*. Both orders are made in addition to the sentence which the offender receives.

Forfeiture and Confiscation

Forfeiture and confiscation orders aim at depriving the offender of property related to crime. Such crime related property is of three kinds: (1) property which is in itself illegal to possess (i.e. contraband); (2) property used in the commission of the offence (i.e. an instrument of crime); and (3) property derived directly or indirectly from crime (i.e. proceeds of crime). In respect of contraband and instruments of crime, there are a number of disparate provisions which allow the court to forfeit property ranging from dangerous drugs, counterfeit goods to detained property used in the commission of an offence.

In respect of proceeds of crime, there exists a complex legal regime in the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap. 405) and *Organized and Serious Crimes Ordinance* (Cap. 455) that allows the sentencing court to order the offender to pay a confiscation order in an amount equivalent to the degree to which the offender has benefited from drug

trafficking and/or serious crime. If the offender fails to pay the confiscation order, he may be liable to serve an additional term of imprisonment up to 10 years.

Other Orders

Disqualification orders prohibit the offender from engaging in certain activities as a preventative measure to possible re-offending. Such orders include disqualifying the offender from driving or in cases of white collar crime from being a company director for fixed periods of time. A criminal bankruptcy order, which can only be made by the District Court or Court of First Instance, can force the offender's bankruptcy and assist in ensuring that the proceeds of crime are returned to victims. A judge or magistrate can also order a hospital order for an accused where there is medical evidence that the person is a mentally disordered person and the nature and degree of the mental disorder from which the person is suffering warrants his detention in a mental hospital for medical treatment: section 54(3) of the *Mental Health Ordinance* (Cap. 136).

Sources of Purposes and Principles under the *Basic Law*

Surprisingly while most of the above sentencing options are clearly spelled out in legislation the statutes are silent when it comes to the purposes and principles of sentencing. In other words, the Hong Kong ordinances contain no express guidance on when a certain sentencing option should be given and on how much a person should be sentenced. This of course does not mean that there are no rules that govern a judge's exercise of his sentencing powers in a particular case. Rather, the purposes and principles of sentencing are found in the common law and have been developed over the years by judges in England and Hong Kong.

In 1991, Hong Kong passed the *Hong Kong Bill of Rights Ordinance* (Cap. 383) (BORO) as the means to implement the United Kingdom's international treaty obligations in respect of Hong Kong under the International Covenant on Civil and Political Rights. After 1997, China allowed the BORO to continue alongside the many human rights protections under Hong Kong's constitution, the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the Basic Law). As will be seen, both the BORO and the Basic Law contain very important constitutional principles relevant to sentencing.

In the constitutional framework of the *Basic Law*, courts have recognised the operation of the principle of separation of powers. The independence of the judiciary is protected in Article 85. Courts have also held that judicial powers, including those that relate to sentencing, cannot be conferred on the executive or legislative authorities. In *Yau Kwong Man & Another v Secretary for Security* [2002] 3 HKC 457 (CFI), Mr Justice Hartmann found that the old scheme whereby the Chief Executive would fix the minimum term of imprisonment for a young person convicted of murder was unconstitutional as it infringed the principle of separation of powers. The scheme infringed the *Basic Law* as it conferred what amounted to a judicial power on the executive and according to the judge this was not permitted under our constitution. However, it is clear that under the *Basic Law*, the administration of a sentence and the granting of a pardon or commutation of penalties are matters within the authority of the executive (see Articles 48(12) and 62(2) of the *Basic Law*).

The Purposes of Sentencing

There are many varied sentencing purposes which express themselves more or less strongly in any given case. It would be incoherent if all the sentencing purposes were to have full expression in every case. Instead, the relative emphasis given to the different purposes varies depending on the nature of the criminal offence of which the offender is convicted, its prevalence in a particular community, public attitudes to that offence, the harm caused to the particular victim, and the moral culpability and background of the offender (see the discussion in *R v Sargeant* (1974) 60 Cr App R 74).

While sentencing purposes can explain what the sentence is trying to achieve, they are poor indicators of how much punishment should be given in a particular case. For this, it is necessary to apply established sentencing principles which provide greater guidance on the quantum of punishment. Even greater precision comes from the development of case law by appellate courts establishing certain guidelines and precedents as to sentences for certain types of cases.

Public Protection

It is uncontroversial that one of the main purposes of sentencing is to protect the public. Imprisoning the offender is not the only means to protect the public but can be an effective one. Any measure, including a binding over order, which can prevent the offender from re-offending would also achieve the purpose. In cases of habitual offenders whose criminal record shows an escalation of seriousness in offending, the purpose of public protection will find strong emphasis in the sentence.

Deterrence: General and Specific

Deterrence sees punishment for a particular offence as a means to lower the incidence of that offence. In this respect, deterrence has much in common with public protection since lowering the incidence of crime has the effect of protecting the public. General deterrence uses the offender as an example to deter others from committing the same or a similar offence. Specific deterrence punishes the offender to deter him from recommitting offences.

At a theoretical level, deterrence ‘works’ because of the notion that humans are rational beings who will choose to avoid conduct that can result in a deprivation of liberty or other personal discomfort. In respect of imprisonment, however, this theory breaks down for two categories of offenders: rational decision-makers, often motivated by profit, who are prepared to take the risk of non-apprehension, and those with mental disorders or substance abuse problems who do not think rationally before committing an offence. For these offenders, other sentencing purposes and options may need to find more prominent expression in the sentence.

When sentencing judges have regard to the prevalence of the offender’s offence in the community, they are giving effect to the purpose of general deterrence. In Hong Kong, section 27 of the *Organized and Serious Crimes Ordinance* allows the court to take into consideration admissible evidence concerning the prevalence of the offence committed by the offender to order a more severe sentence than it would have ordered had it not considered this evidence. For example, in *HKSAR v Ma Suet Chun & Others* [2001] 4 HKC 337, the Court

of Appeal approved an enhancement of sentence in a case concerning street deception. The prosecution had called three police officers to testify to the increasing number of street deception complaints made in the New Territories and West Kowloon region. The Court held that in future cases of this kind the enhancement could be as great as 50 per cent. While there has yet to be a constitutional challenge to section 27, courts will need to be wary that giving general deterrence such great emphasis could well put the sentence in conflict with other established sentencing purposes and principles. In a serious case concerning high volume sales of pirated compact disks, the Court of Appeal thought the 50 per cent enhancement was too great given that the judge had already used a high starting point; the enhancement was reduced to one-third, recognising that “restraint should be exercised by the court when passing sentences and the sentencing guidelines should be followed”, see *HKSAR v Chan Cheong Kit* [2010] 2 HKLRD 636 at para 30 (CA).

Retribution

If public protection and deterrence were the only sentencing purposes then long custodial sentences would be the norm. Retribution reins in excessive punishments by ensuring that the offender is only punished for what he deserves. There is a misconception that retribution is the same as vengeance. This passage from a Canadian judgment explains the difference (see *R v M(CA)* [1996] 1 SCR 500, para. 80, per Lamer CJC):

Vengeance...represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

This was cited with approval by Mr Justice McWalters in *HKSAR v Lee Yau Wing* [2013] 1 HKC 572 at para 34 (CA). Retribution is closely related to the principle of proportionality, which is a fundamental principle that informs all sentences.

Denunciation

There are times when the circumstances of the offence are so aggravating in terms of the harm done to the victim and society that it calls for denunciation by the court. See recent references to the purpose of denunciation in *HKSAR v Tsang Pui Yu, Shirlina* [2014] 5 HKC 111 at para 45 (CA) and *HKSAR v Ma Tik Lun Dicky* [2015] 1 HKLRD 380 at para 40 (CA). To achieve this purpose, the court denounces the offender and his crime in the public forum of the courtroom and orders a severe sentence to reflect the denunciation. Thus there is a strong communicative element when giving effect to the purpose of denunciation. The court sends a message voicing the sentiments of the victim and community that the offender's conduct is wrong and must be sharply condemned. The “sentencing principle of denunciation brings home to the offender, those affected by his conduct and the public generally that the punishment that is meted out...is because by their conduct they have fallen below the values

that society has imposed on them” (*HKSAR v Lee Yau Wing* [2013] 1 HKC 572 at para 37 (CA)).

Denunciation was voiced in the case concerning the infamous Mr Yip Kai Foon, who, after escaping from jail, led a criminal gang armed with assault rifles and explosives in a street battle with the police. He was sentenced to 30 years imprisonment on top of the 11 years and 3 months he had left to serve when he escaped custody. As a result of the shootout with the police, Yip became paralysed from the waist-down. The Appeal Committee of the Court of Final Appeal (by majority) refused to hear Yip’s appeal and held that even if appropriate weight was given to Yip’s paralysed condition, his offences were so extremely grave that they deserved the sentence given (albeit reduced slightly by the Court of Appeal): *HKSAR v Yip Kai Foon* (2000) 3 HKCFAR 31. The Appeal Committee described the actions of Yip and his gang as coming “very close to declaring war on society” and approved of the Court of Appeal’s statement in this case that “[s]entences must be imposed which, to use the words of Lord Denning, express the emphatic denunciation by the community of such crimes”: cited in the Committee’s determination at p. 37.

Rehabilitation

Rehabilitation aims to address the underlying causes of the offender’s criminal behaviour and thereby serves to prevent a re-occurrence of the offending. Rehabilitative aims are often served by non-custodial orders such as the suspended sentence, community service order, probation, discharge, and binding-over order. If the offender has a drug or alcohol addiction problem, which caused him to commit the crime, rehabilitation would require the offender to be treated for this substance abuse problem.

Long-terms of imprisonment are often perceived as being inconsistent with achieving rehabilitative aims. Article 6(3) of the *Hong Kong Bill of Rights* requires that custodial institutions “comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”. This, however, relates not to the appropriateness of the sentences passed, but to the treatment of offenders who are detained: *R v Chu Man Chiu*, Cr App 198/1991 (CA). In Hong Kong, specialised custodial settings have been established to pursue specific rehabilitative aims. For example, young offenders can be sentenced to serve a term in a reformatory school or training centre. Those with drug problems can be sentenced to a term in a drug addiction treatment centre. In one case of serious drug trafficking by offenders aged 17 and 18 years old, the Court of Appeal held that it was too lenient to send the young offenders to a training centre (where the detention period averages from 18 months to 2 years) when the appropriate was 4 years imprisonment on a plea of guilty (see *Secretary for Justice v Chau Tsz Tim* [2015] 1 HKLRD 853 (CA)).

Reparation for Victims

While the victim is not a formal party to criminal proceedings, modern criminal justice systems have accorded the victim a greater role, particularly in the sentencing stage. Some jurisdictions use victim impact statements to convey the victim’s views to the sentencing judge. In *HKSAR v Tsoi Chi Ming*, unreported HCCC308/2014, 28 November 2014, CFI, Mr Justice Zervos called for the greater use of such statements in Hong Kong courts: “A victim impact statement plays a vital role in assisting the court in imposing a just and appropriate

sentence on the offender. Its function is to help the sentence understand the impact of a crime on the victim which is an important consideration when sentencing someone.”

The restitution and compensation orders are two mechanisms by which the sentencing court can achieve a degree of civil justice as between the victim and the wrongdoer. The availability of such orders at sentencing saves the victim time and money from having to bring his own lawsuit.

There are, however, limits to the ability of the sentencing court to make full reparation to the victim(s). Sentencing proceedings are typically held immediately after conviction and once commenced, expeditiously completed; they are not supposed to be long drawn-out hearings in which complex factual and legal issues are decided. Ultimately it is at the discretion of the sentencing judge to decide whether and how much reparation should be made for victims. Where the issues are likely to distort and delay the sentencing process (e.g. many victims, each raising contested factual and liability issues), the judge may decide not to order restitution or compensation and to leave such issues for a civil court to resolve.

Restoration

A separate but related sentencing purpose to reparation is restoration, sometimes known as restorative justice. Where all parties are willing, restorative justice aims to reintegrate the offender back into the community by having him accept responsibility for his wrongdoing and make amends to the victim for the harm caused. The process by which this is achieved typically involves the offender and victim agreeing to meet in mediation conducted by a neutral mediator. While achieving acknowledged responsibility and reintegration is an end in itself, restorative justice can also protect the public by lowering the risk of re-offending by the offender. While much literature now exists on restorative justice, it has yet to be generally accepted in Hong Kong sentencing law, nor has the legislature enacted provisions aimed at furthering restorative justice.

The Principles of Sentencing

It is imperative that the courts apply the correct principles of sentencing in every case as an error of principle is a recognised ground of appeal. Where an appeal court has found an error of principle in the reasons for sentence, the appeal court will sentence the offender afresh applying the correct principles. Some of the major sentencing principles are discussed below.

Proportionality

The principle of proportionality requires that the sentence and punishment be calibrated according to the seriousness of the offence and the circumstances of the offender. Seriousness of the offence will depend on the nature of the offence, the gravity of the harm caused to individual victims and society generally, and the degree of moral culpability of the offender. The maximum sentence for the offence is often a reliable indicator of the relative seriousness of different offences. The circumstances of the offender, including his criminal history and the consequential hardship which the sentence will have on him, are all relevant to the application of the proportionality principle. However, in general, a person with a long criminal record should have already received proportionate punishment for all of his past

crimes and should not be punished again for them. That said, a recidivist on deterrence grounds must expect to receive a longer sentence than a first offender: *HKSAR v Chan Pui Chi* [1998] 2 HKLRD 830 (CA).

Proportionality is a fundamental principle since all sentences are liable to be altered on appeal if they are manifestly excessive or inadequate. A good illustration of the application of this principle is found in *HKSAR v Wong Chun Cheong* (2001) 4 HKCFAR 12. Wong, who was aged 16 at the time of the offence, pleaded guilty to participating in a lion dance in a public place without a permit. The magistrate sentenced Wong to be detained in a training centre where the period of detention would range from a minimum of 6 months up to a maximum of 3 years. However, the maximum sentence for the offence for which Wong was convicted was only a \$2,000 fine and imprisonment for 6 months. In allowing the appeal and substituting a fine of \$100 (Wong had already served 4 months in the training centre), the Court found that detention in a training centre for the period allowed by the legislation would be a “wholly disproportionate period given the triviality of the offence” (p. 25). This was true even if Wong was a suitable candidate for rehabilitation in a training centre. The case stands for the proposition that a man should not lose his liberty in the name of rehabilitation if it would be disproportionate to do so.

Proportionality in the sentence is also a constitutional principle. Article 28 of the *Basic Law* protects individuals from “arbitrary or unlawful...detention or imprisonment”, and Article 3 of the *Hong Kong Bill of Rights* provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. In *HKSAR v Lau Cheong & Another* (2002) 5 HKCFAR 415, the Court of Final Appeal held that a sentence would give rise to arbitrary imprisonment if it was “manifestly disproportionate” (at para. 110). In relation to Article 3 of the *Bill of Rights*, the Court held that the threshold test for determining whether a sentence constituted cruel, inhuman or degrading punishment was either the same or higher than the threshold for arbitrary imprisonment. *Lau Cheong* was concerned with a challenge to the mandatory life imprisonment sentence for murder. In rejecting all the constitutional arguments, the Court noted the “inherent and unique gravity of the offence” and the “legislative judgment” to have the mandatory sentence together with a statutory regime for review of all life sentences by an independent board: at paras. 123–125.

Totality

The principle of totality ensures proportionality when the offender is sentenced, whether at the same time or different times, for multiple offences. In *HKSAR v Ngai Yiu Ching* [2011] 5 HKLRD 690 at para 22, Stock VP wrote that the principle was there “to ensure not only fairness to the offender, in the sense that he is not punished twice for the same offence and, further, that the sentence is not an unduly crushing punishment, but it is also a tool by which to ensure that ‘the overall effect of the sentence is sufficient having regard to the usual principles of deterrence, rehabilitation and denunciation’: *R v KM* [2004] NSWCCA 65 at para 55.”

In practice, the court “should fix appropriate sentences for each offence, then consider the application of the totality principle, and, in particular, whether any adjustment needs to be made to any of the sentences to achieve the total effective sentence which is consistent with the application of the principle” (Cross and Cheung, 2015: 562). The principle was applied in *HKSAR v Chung Yiu Ming* [2003] 3 HKLRD K14 (CA) where the offender was sentenced

to 5 years imprisonment for drug trafficking to be served consecutively to a sentence of 3½ years imprisonment he was already serving also for drug trafficking. The Court of Appeal held that the total 8½ years term was excessive and had the judge properly applied the totality principle the total custodial sentence should have been 7 years. The principle was applicable because the offence for which he was being sentenced related to the previous charges which concerned drug trafficking in the same premises and were closely related in time. The Court looked to see what the appropriate sentence would have been had all the charges been dealt with at the same time.

Parity of Sentencing

Another important principle of sentencing requires parity of sentencing as between offenders. In theory, this principle requires that two offenders with similar backgrounds committing the same offence receive the same sentence. In practice, this position is rarely seen since the circumstances in any two given cases invariably differ in some respect. Nevertheless, the principle, like the principle of *stare decisis*, still holds to ensure that like cases are decided alike and any material differences in two similar cases are reflected in the difference between the two sentences.

The sentencing of co-accused in the same case will usually put this principle to test. Two co-accused whose degree of involvement in the crime is the same and whose backgrounds are similar should in principle receive the same sentence. But if different sentences were accorded to the co-accused it must be justified according to the gravity of their role in the offence and/or their backgrounds, particularly in terms of their criminal record.

Aggravating and Mitigating Factors

It is a basic principle that the presence of aggravating factors will tend to make the sentence more severe while mitigating factors will lighten the sentence. From time to time, appellate courts in Hong Kong will provide guidelines on sentencing for a given offence having certain factual characteristics. For example, in *Secretary for Justice v Ho Mei Wa* [2004] 3 HKLRD 270 (CA), the Court set a new starting point sentence of 3 months imprisonment in cases where an employer knowingly or recklessly employed an employee who was not lawfully employable. This sentence applied where there was casual employment and no aggravating factors. The case was important because previous appellate authority had set the starting point at 15 months imprisonment but magistrates had for many years not followed this guideline. In *HKSAR v Tsang Chiu Tak* [2013] 1 HKLRD 422 (CA), the court laid down guidelines on sentencing principles for cases involving sexual assaults by adults on children.

Aggravating factors are those which highlight the seriousness of the offence and the criminal record of the offender. Circumstances such as the planning and premeditation of the offender, a breach of trust owed to the victim, and the degree of violence involved are some aggravating factors pertaining to the offence. Where the offence is possession of dangerous drugs, it is an aggravating factor if the circumstances in which the drugs were found, e.g. in multiple small bags, indicated a risk of dissemination; this was not the same as imputing an unproven intent to traffic to the defendant, see *HKSAR v Minney, John Edwin* (2013) 16 HKCFAR 26. Commission of an offence while on bail is also regarded as an aggravating factor, see *HKSAR v Leung Ting Fung* [2015] 1 HKC 290 at para 29 (CA).

Mitigating factors are generally factors concerning the background of the offender, the remorse of the offender, and consequential hardship of the sentence on the offender. In 2001–2002, there was a lively debate on whether the fact the offender was a foreigner could constitute a mitigating factor given the hardship of serving the sentence in an alien jail in Hong Kong. Despite one appellate judgment showing sympathy for this position, the prevailing position was that for serious offences, particularly drug trafficking, the element of foreignness will carry little if any weight: see *HKSAR v Rohrer* [2001] 3 HKC 371 (CA) and *HKSAR v Hong Chang-chi* [2002] 1 HKC 295 (CA) which are discussed by Young (2001). A well recognized mitigating factor is where the offender provides assistance to the authorities. “Its object is to provide an incentive for offenders to co-operate with the authorities”, see *Z v HKSAR* (2007) 10 HKCFAR 183, para 11. A discount of up to two-thirds the starting point sentence may be granted.

No Retrospective Punishment

It is a constitutional principle that an offender shall not be sentenced retrospectively to a heavier penalty than the one that was applicable when the offence was committed: Article 12(1) of the *Hong Kong Bill of Rights*. For example, if at the time the offence was committed, the maximum sentence for the offence was 10 years imprisonment and by the time the offender was sentenced the maximum had been increased by the legislature to 14 years, it would offend the principle if the judge imposed a jail sentence of 12 years under the new law.

The principle does not apply in respect of a lighter penalty applied retrospectively: Article 12(1) of the *Hong Kong Bill of Rights*. If, in the same example, the law was changed by lowering the maximum sentence to 5 years imprisonment, at the time of sentencing the offender would be entitled to benefit from this change in the law as it could result in a lighter penalty. This principle of benefiting from a change in the law that results in a lighter penalty applies even if the change is by way of a reformulated offence with a lower maximum sentence: *R v Chan-Chi Hung* [2005] 2 HKCLR 50 (PC). In *Seabrook v HKSAR* (1999) 2 HKCFAR 184, the Court held that the principle also applied to judge-made changes in the law so that an accused could benefit from a change which lowered the guideline sentences for a particular offence.

Rehabilitation of Juvenile Offenders

In Hong Kong, the current minimum age of criminal responsibility is 10 years: section 3 of the *Juvenile Offenders Ordinance* (Cap. 226). In the *Juvenile Offenders Ordinance*, a child is defined as a person under the age of 14 years and a young person is defined as a person 14 years of age or upwards and under the age of 16 years. There is a general principle that in the sentencing of children and young persons, rehabilitation above all other purposes of sentencing should be emphasized, see *HKSAR v Law Ka Kit & Others* [2003] 2 HKC 178 (CA). There are at least two reasons for this.

First, young offenders who commit the same crime as an adult will generally do so with a lower degree of moral culpability since their mental faculties have not been fully formed. Secondly, and perhaps more importantly, even if the young offender acts with full moral culpability the principle reflects the policy that one’s misdeeds in childhood should not haunt one’s future as an adult and thus there should be a clean break as one makes the transition

from being a young person to an adult. For these reasons a sentence that emphasises rehabilitation will generally be a more lenient sentence, attentive to the needs and problems of the individual young person. The juvenile offender is to be “accorded treatment appropriate to their age and legal status”: Article 6(3) of the *Hong Kong Bill of Rights*. But if the principle could result in an excessive deprivation of liberty, the principle of proportionality will step in to limit the rehabilitative measures as was seen in *Wong Chun Cheong’s* case.

In giving effect to this principle, legislation prohibits imprisoning children in default of payment of fines, damages or costs: section 11(1) of the *Juvenile Offenders Ordinance*. No young person is to be sentenced to imprisonment if he can be suitably dealt with in any other way: section 11(2) of the Ordinance. For persons 16 years or over and under 21 years of age, the court must not sentence the person to imprisonment unless it is of the opinion that no other method of dealing with such person is appropriate: section 109A(1) of the *Criminal Procedure Ordinance*. Thus, imprisonment is a last resort. This rule, however, does not apply to a list of serious offences including murder, manslaughter, rape, serious drug offences, and so on: see Schedule 3 of the *Criminal Procedure Ordinance*. In February 2014, the Law Reform Commission of Hong Kong recommended repealing this list of excepted offences as part of its recommendations for removing the list of excepted offences for suspended sentences. A person who was under the age of 18 years when he committed murder may be sentenced to imprisonment for life or a lesser period at the discretion of the court: section 2 of the *Offences Against the Person’s Ordinance* (Cap 212).

A related principle is the one found in the *Hong Kong Bill of Rights* and elsewhere that juvenile accused and offenders shall be segregated from adults: Article 6(3) of the *Hong Kong Bill of Rights*; sections 6 and 11(3) of the *Juvenile Offenders Ordinance*.

Conclusion

It must always be remembered that the purposes and principles of sentencing operate in the real world of criminal proceedings. Thus efficiency and judicial economy are also important considerations that can affect the sentence and punishment of an offender. These considerations are the basis for the rule which reduces an offender’s sentence up to as much as one-third from the starting point if he pleads guilty without going to trial (see *Yu Fai Tat v HKSAR* (2004) 7 HKCFAR 293, para 9). Similarly, another rule exists to disallow the offender from counting the time which he spends in jail pending the determination of his application for leave to appeal as part of his sentence if the application was totally without merit: *HKSAR v Hau Kin & Others* (2005) 8 HKCFAR 63, applying *Nauthum Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540, para 56. But however important these considerations may be, the constitutional safeguards in Hong Kong ensure that the offender’s dignity and liberty interest will be of paramount importance in the law of sentencing.

Review Questions

1. Why is it said that the purposes of sentencing are often in conflict?
2. What are the constitutional principles of sentencing that exist in Hong Kong?

3. What sentencing purpose was emphasised in Yip Kai Foon's case?
4. Why should juvenile offenders be sentenced differently than from adult offenders?
5. Is remorse an aggravating or mitigating factor on sentence? Why?

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