Public Opinion and the Punishment of Crime

The duty of the courts is to pass just sentences. But how should sentencers respond when the public bay for blood? The Director of Public Prosecutions considers the role of public opinion in the sentencing process.

The primary object of sentencing is the protection of the public. But there are more ways than one to skin a cat. Some consider that society is best protected if criminals are locked up for as long as possible. Others feel that the use of the crushing sentence is counter-productive, and that all will benefit if the offender is reformed and reintegrated into society within a reasonable time. The debate over where precisely to draw the line is as old as the criminal justice system itself.

Tough sentences are invariably popular. The drug trafficker, the robber and the paedophile have traditionally received little sympathy from the courts. Imprisonment is also likely these days for the copyright pirate, the computer hacker and the pickpocket. There is no reason at all in principle why a crime which is heinous, prevalent or otherwise damaging to society ought not to attract condign punishment. But sentencing involves a consideration of matters relevant to the offender as well as of those which are relevant to the offence.

Much emphasis in recent years has been placed throughout the common law world upon the rehabilitation of the offender. The notion of the Home Office in London (1990) that ' prison can be an expensive way of making bad people worse' now has many adherents. This development has not gone down well with those who consider that the business of the courts is the punishment of crime. Courts, some feel, have all too often downgraded the retributivist theory of sentencing.

Retribution is a legitimate and relevant consideration in the

sentencing process. It is through the sentences they pass that the courts are able to show the repugnance which they, and the community, feel towards particular crimes. But there are limits. After all, the 'Old Testament concept of an eye for an eye and tooth for tooth no longer plays a part in our criminal law' (*R v Sargeant* (1976) 60 Cr App R 74 at 77).

In its *Report on Sentencing Reform* (1987), the Canadian Sentencing Commission argued that a theory of retribution which was based on 'just deserts' or 'just sanctions' provided a helpful organising principle for the imposition of criminal sanctions. The only legitimate ground for punishing a person was the blameworthiness of his or her conduct. It concluded that :

> In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions.

Some justify the retributive element in sentencing as representing the payment of a debt owed by the offender to society. That is fair enough, but when emotions run high the dividing line between retribution and revenge can become blurred. Courts everywhere, from time to time, confront situations in which the victim, the victim's relatives and friends, legislators, the media and the public all press for the harshest of penalties. In such situations the sentencing exercise can become vexed and contentious.

Sentencers do not have to reflect the views of the public. But they cannot simply ignore them. Perhaps the main duty of the court is to lead public opinion. Lord Bingham CJ has explained :

> I do not consider it would be right, even if it were possible, for judges to ignore the opinion of the public. They do not live the life of hermits; they are in and of the world; and they are invariably alive to the opinions of their fellow citizens. The judges are also conscious that the gift of infallibility is not conferred

> on them, alone among mortals, so when differences of opinion arise on issues of sentencing between the judges and an identifiable body of public opinion, the judges are bound to reflect whether it may be that the public are right and that they are wrong.

It is natural that the courts should share and express the anger and the concern which crimes occasion. A purpose of sentencing, after all, is the public denunciation of the conduct of the offender. But emotion has no role to play in sentencing. To be legitimate a sentence must be based upon a proper factual and legal analysis of the offence, and not upon judicial prejudice. Rightly has it been said that ' unless judicial emotions are kept in check the danger exists that the judge may impose a manifestly excessive sentence' (*R v R* [2001] 118 A Crim R 538 at 568). In *R v Willis* [1975] 1 WLR 292 at 294, Lawton LJ indicated :

> One of the difficulties which judges have in sentencing offenders of this type is their own reactions of revulsion to what the accused has been proved to have done. Right-thinking members of the public have the same reactions and expect the judges in their sentences to reflect public abhorrence.

An important function of the criminal law is to assuage the feelings of those affected by crime. Although the courts must not allow themselves to be railroaded by public outrage into the imposition of draconian penalties which are out of touch with reality, they must equally 'bear in mind that society has, in taking from the victims of crime and their relatives the satisfaction of vengeance, transferred to the courts the duty of ensuring that punishments are not so lenient that the victims or relatives will be tempted to take the law into their own hands' (*R v Lui Wai-chun and Others* [1946-1972] HKC 111 at 113). If unnecessary harshness does not promote the interests of justice, undue leniency undermines respect for the system. A balance is required of the sentencer.

When controversy rages, the court can do little better than to apply the established principles of sentencing. These reflect competing factors and policies. They include the need to punish the offender, to

protect society, to deter others, to compensate the victim and to rehabilitate those convicted of crime. Although no single sentence can be expected to achieve all of those objectives, the purposes of criminal punishment overlap and they should not be viewed in isolation from one another in the calculation of sentence. They are guideposts and, having weighed the principles carefully, the court must decide which has the greatest relevance in the circumstances of the case. In that a sense of proportion is vital. In *Attorney General v Liu Wing-chun* AR 7/74, Briggs CJ explained :

> The courts are aware of their responsibilities to the public in the matter of sentencing, but aware also that one of their primary functions is to maintain a necessary balance, which involves a refusal to be stampeded by public opinion or by the existence of any current campaign into the imposition of penalties which are unduly harsh in all the circumstances of any particular case.

If the incidence of a crime increases, or if a new or dreadful offence needs to be discouraged, the public are entitled to look to the courts for an appropriate response. Deterrence, after all, is a cardinal principle of sentencing. It is essential for the courts to maintain public confidence in the sentencing system. In *R v Keogh* (1994) 15 Cr App R(S) 279, the court was prepared, when considering the appropriateness of a sentence for shop theft, to have regard to ' the present climate of opinion, in relation to this sort of offence'. But public opinion may sometimes prove a fickle guide. It has been said that ' public opinion is, of course, a matter to be taken into account, but that opinion must be informed' (*Secretary for Justice v Wong Yin-tak* [2000] 3 HKC 482 at 492).

Retributive justice involves a recognition that some offences are so grave that ' the only way judges can demonstrate that society will not tolerate a particular type of conduct is by passing a sentence which truly reflects the abhorrence which right-minded members of the public have of the offender's conduct' (*R v Prime* (1983) 5 Cr App R(S) 127 at 133). It seems that the ' right-minded member of the public' in this context equates to the reasonable person, who provides the ideal against whom the judge's thinking can be tested. If the reasonable person, properly informed,

supports the sentence, the judge will, in theory at least, be on sure ground. That perhaps explains why his support is so often enlisted.

In *R v Broady* (1988) 10 Cr App R(S) 495 at 498, it was accepted that ' public abhorrence of behaviour like the defendant' s should not be, and must not be disregarded by the courts, who have a duty to pass judgment in a way which is generally acceptable amongst right-thinking, well-informed persons'. In its calculation of sentence in *R v So Ching-kwan* [1993] 1 HKCLR 156 at 162, the court relied upon the ' very strong feeling among the Hong Kong public at the moment' that armed robbers who opened fire ' should be shown no mercy whatsoever'. In *Attorney General v Yeung Kwong-chi* [1989] 1 HKLR 266 at 269, it was said that a sentence was required ' to mark the absolute repugnance with which the public views such deliberate abuse of the criminal process'. But sentence cannot properly be adjusted according to the lowest common denominator of public opinion.

Although informed public opinion can properly be weighed in the balance, there is no role for populist punitiveness. In a rational sentencing system, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. With these in mind, and having considered the mitigation, the incidence of the offence, the offender' s antecedents and the likelihood of the offender being reformed, the task of the court is to exercise a balanced judicial discretion to decide how best to sentence. As Malcolm CJ has explained :

> It is very easy for a judge to bow to what might be the current climate of public opinion and throw the book at those he has to sentence. Nothing would be easier. What takes courage is to do what he knows and believes to be right.

If a court incorrectly assesses sentence, the Secretary for Justice may seek to challenge it on review. But before this is done, it must be obvious that the sentencer has erred, and that it is in the public interest to act. Although public pressure to review sentences sometimes develops, a review is never instituted simply to satisfy the public clamour. The Court of

Appeal, in any event, has indicated that ' the power of review was conferred to correct errors in exceptional cases' (*Attorney General v Lau Chiu-tak* [1984] HKLR 23 at 25).

Lord Bingham has said that ' the passing of sentence must be governed by reason and guided by precedent, not coloured by emotion or a desire for revenge'. Punishment, that is, must be proportionate to the individual features of the offence and to the considerations personal to the offender. The Mikado, as far as he went, was right in his call to let the punishment fit the crime. But it should also fit the criminal. The challenge of the sentencer, daunting though it can undoubtedly be, is to seek to achieve a sentence which pays due respect to public opinion and, at the same time, leaves all concerned with the feeling that justice has been done.