The Victim of Crime

To coincide with the publication of 'The Victim of Crime Charter', the Director of Public Prosecutions considers the status of the victim in the sentencing process.

Islamic law seeks retributive justice on behalf of the victim. However, if the victim, or his or her relative, decides to forgive or accept *diya*, or compensation, then the case against the accused ceases to be a capital offence. So it is that the victim or the relative decides the fate of the culprit. There will be some who would like to see this principle extended, so that the burgled have a say in the sentencing of the burglar, the mugged of the mugger, and so forth. Let the victim fix the punishment.

The courts have a duty to ensure that criminal proceedings do not focus on the offence to the exclusion of the impact. The victim, after all, has no special status, no equivalent to the accused's plea in mitigation. His or her fears and grievances are seldom formally aired. To that extent, therefore, the courts must be scrupulous not to overlook them. They are the custodians of the rights of the victim.

It is recognised that the effects of crime should be put before the courts. This is usually via reports compiled by the police and presented to the courts through existing channels by the prosecution, rather than through a Victim Impact Statement (VIS). All matters directly relevant to the seriousness of the offence should be produced to assist the sentencer. There is nothing new in this. It has always been the practice for the prosecution to tell the court, if this has not already emerged in evidence, of the consequences to the victim of, for example, violence, such as disablement or loss of employment. Nor is the court confined to a consideration of the physical and emotional harm which are the direct consequence of the crime. In *R v Barrett* [1999] 1 NZLR 146, 149, it was said that 'the sentencing judge was correct to hold (the accused) accountable for the serious psychological harm to the victim resulting from her parents' and family's rejection of her complaint about his conduct … a moment's reflection is sufficient to confirm the emotional distress and confusion a teenage girl is likely to suffer when rejected and isolated from her parents and family.'

At one time there was undoubtedly a tendency to treat the victim as if he or she had a walk-on part in the criminal process. Increased attention is rightly paid these days to the victim of crime. This reflects the growing acknowledgment by legal agencies that victims require, and deserve, a higher status in the criminal justice system. In that regard, paragraph 7 of the new 'Victim of Crime Charter' states that 'prosecuting counsel shall bring to the attention of the court the victims' circumstances and views whenever appropriate'. Although the Charter has no legal force, and the role of the prosecution in the sentencing process is limited, if the victim has suffered injury, mental or physical, the court should be informed of this. In *R v Kabariti* (1991) 92 Cr App R 362, 368, it was said that the 'dreadful problems' suffered by the victim after the rape 'should have affected the judge. It is part of the whole relevant scene. This girl has been dreadfully affected'. And in *Attorney General's Reference No 2 of 1995 (David Williams)* [1996] 1 Cr App R (S) 274, 277, Lord Taylor CJ criticised a judge for declining to examine a statement which had been prepared by the victim of a sexual assault to indicate the impact of the crime upon her. He

added that 'we consider it wholly appropriate that a judge should receive factual information as to the impact of offending upon a victim. The judge is well equipped to know whether the statement before him contains evidence of fact relevant to sentencing or whether the attempt has been made to use it to hot up the case against the offender.'

The purpose of the VIS is to inform the court of 'any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects on the victim'. That is the definition in section 8(1) of the Victims of Offences Act 1987 (New Zealand), which requires arrangements to be made 'to ensure that a sentencing judge is informed' of these effects. The Criminal Law (Sentencing) Act 1988 (South Australia) permits a written VIS to be placed before a court, as does the Act to Amend the Criminal Code (Victims of Crime) 1988 in Canada. The Crimes (Sentencing) Amendment Act 1987 (New South Wales) is in similar terms. In the United States of America almost all states now have statutes on victim participation, many requiring a court to consider any oral or written statement from the victim before imposing sentence; some states go so far as to require courts to have regard to the victim's views on sentence. In America, the President's Task Force on Victims of Crime (1982) concluded that 'victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized.'

Giving prosecutors and courts fuller information about the impact of crimes on victims is undoubtedly an important element in assessing the seriousness of the offence. But if courts are to do justice they must carefully distinguish between likely and unlikely consequences, and between foreseeable and fortuitous results, in order to ensure that sentences genuinely reflect the culpability of the accused. The distinction must be drawn between providing information about the impact of the offence and expressing a view on how severely the accused should be punished. It would not be right for the court to impose a heavier sentence on the basis that the victim favoured severe punishment. Whilst some victims are vengeful, others are forgiving. If this was allowed to determine punishment disparity of sentencing would result according to whether the victim was vengeful or forgiving. That would produce inconsistency and injustice.

The VIS, at the very least as a statement of the harm or loss suffered by the victim, has made significant advances in most modern systems of criminal justice. It has been called 'a very important source of information of undoubted relevance to the sentencing process': *GP* (1997) 93 A Crim R 351, 378. The court added that 'a clear and cogent victim impact statement will assist to inform the court of a particular matter associated with the commission of the offence which will be important to the proper disposition of the case by way of sentence, because such a statement will amplify the general view of the seriousness of the offence which the court would otherwise take, by providing specific information about the consequences of the commission of the offence upon the particular victim.' Thus, in *R v Davis* [1991] 1 NZLR 684, 686, the VIS was such as to illustrate that 'the generalised result of the attack upon (the victim) is that no significant part of her life has been left unaffected'. A report which assists the sentencer so materially is of manifest utility. Hong Kong has not been unaffected by recent trends in this area.

The VIS has made a limited appearance in this jurisdiction. Section 27 of the Organized and Serious Crimes Ordinance provides that where an accused is convicted of a specified offence, the prosecution may furnish information to the court regarding 'the nature and extent of any harm caused, directly or indirectly, to any person by the act in respect of which the person has been so convicted'. In other words, the prosecution can adduce details as to the short and long-term effects of the crime upon the victim. The definition of 'specified offence' is such that 'harm' would seem to include all the consequences of the offence, be they physical, psychological or financial.

Once the information is before the court under section 27, subsection (11) provides that the court 'shall have regard to such matter' in imposing sentence. However, once regard has been had to it, the court is left with a discretion as to whether to act upon it. The subsection continues that the court 'may, if it thinks fit' pass a sentence which 'is more severe than the sentence it would, in the absence of such matter, have passed'. The VIS in Hong Kong is to be seen as a weapon in the fight against crime. It is a means of securing harsher, and therefore deterrent sentences. It is not to be regarded as a part of the 'victim movement' which has gained such momentum elsewhere. Section 27 apart, the opinions of the victim, the relatives and the friends upon the crime and the sentence are entitled to due deference from the courts.

The crime must not be viewed in a vacuum. The wider picture must be kept in sight. As Huggins J put it in *Re Applications for Review of Sentences* [1972] HKLR 370, 404, 'some find it all too easy to forget the demoralizing effects of criminal activities upon the immediate victims, let alone upon potential future victims, but this should not be. It must be remembered that failure by the courts to impose sentences which the thinking man in the street considers adequate may lead to various forms of self help both for protection and in retaliation. This, together with the effect of undue leniency on the criminally inclined, may eventually result in a breakdown of law and order.'

One of the purposes of the criminal law is to assuage the feelings of victims and their friends and relatives. The situation in which they, and the public at large, are left justifiably uneasy over a sentence which is disproportionate to the harm done must, wherever possible, be avoided. Although the courts must endeavour to take an overall view of cases and not to be affected unduly by any one section of public opinion, it is equally incumbent upon them, as it was put in *R v Lui Wai-chun and Others* [1946-1972] HKC 111, 113, to 'bear in mind that society has, in taking from the victims of crime and their relatives the satisfaction of personal 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.'

There are necessarily limits to the extent to which the victim can acquire any meaningful say in the determination of sentence. Victims, in light of their experiences, are not perhaps best placed to make a balanced judgment as to what is the correct sentence. After all, as Lord Bingham CJ has put it, 'the passing of the sentence must be governed by reason and guided by precedent, not coloured by emotion or a desire for revenge'. That said, the court must always have regard to the wider public interest. Public confidence in the justice and effectiveness of the sentencing process must be maintained. If in consequence of inadequate sentences victims resort to private

vengeance then civic breakdown will result. As Samuel Johnson commented, 'the right of private vengeance ... is a principle so opposite to quiet, order, and security that every nation may be considered as more civilized and every government as nearer to perfection in proportion as it is more effectually repressed and extinguished.'

The attitude of the victim to the accused is not usually of itself a factor relevant to the deliberations of the court. That the victim feels vengeful is neither here nor there; the opinions of the victim are subsumed into the broader interests of the public in seeing that an appropriate penalty is imposed. Sentence cannot, that is, be tailored according to the views of the victim, even if they are forgiving. As Bridge LJ put it in *R v Buchanan* (1980) 2 Cr App R (S) 13, 15, 'the courts cannot be deflected from their duty of imposing sentences appropriate to the gravity of the offence when crimes of violence of this nature are committed against a domestic background.'

The clear public interest is that those who commit serious crimes be appropriately punished. Thus in *R v Tsui Mei-ying* Cr App 409/87, it was said that little weight could attach to the fact that the victim had forgiven the accused since the gravity of the offence lay 'in the terrible injury, deliberately occasioned, and in its probable consequences to the victim'. Victims of domestic violence frequently forgive the attacker, contrary to their own interests and welfare. As Hunt CJ observed in *R v Rowe* (1996) 89 A Crim R 467, 473, 'the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have'. That apart, the attitude of the victim is inevitably hedged around with imponderables.

The reality is that the opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide a sound basis for assessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways leading to improper and unfair disparity. The views of the relatives of the victim may not, of course, be identical, and, in that situation, which one is to prevail? Even assuming unanimity, if carried to its logical conclusion the process would produce unfair pressures on the victims of crime or the survivors of a crime resulting in death, to play a part in the sentencing process which many of them would find painful and distasteful. This is very far removed from the court being kept properly informed of the anguish and suffering inflicted on the victims by the crime. Those, however, cannot be the last words upon this difficult subject.

Sentencing does not readily lend itself to generalisations. In *R v Chau Kam-cheong* MA 189/93, the court, having emphasised that 'matrimony is not a licence for one spouse to assault another', added that it could not 'be said that where there is an assault by a man upon a woman, the circumstances are irrelevant to the question of sentence'. The accused in *R v Lee Kam-lun* Cr App 597/93, was sentenced to four years' imprisonment for wounding his wife with intent and, on appeal, the victim begged the court to release him. Bokhary JA responded that 'in the wholly exceptional circumstances which confront us, and because the wife asks us, and with considerable reluctance and some misgivings ... we reduce the sentence to such extent as to effect his immediate release'. Likewise, in *R v Pau Yiu-kwan* Cr App 559/87, the court was prepared to release an accused who had injured his wife on the

basis that she had supported him throughout, visited him in prison, and 'it would be consistent with public policy that he be returned to his family'.

If the offence is not of the most serious, the court may feel able to give greater weight than otherwise to the entreaties of the victim. In the unlikely event that the imprisonment of the accused will have 'a positively adverse effect on the victim of the offences', as it was put in *R v Brett* [1996] 1 Cr App R (S) 196, 198, the court may be persuaded to vary the sentence passed. An important sentencing consideration is to assess the impact of the particular crime on a particular victim and also, although perhaps rarely, the court is required to consider a refinement of that principle when assessing whether the imposition of a custodial sentence will add to the distress and concern suffered by the victim. The weight to be attached to it will depend on the crime itself and the different facets of the case which the judge has to balance.

At the sentencing stage, the function of the court is firstly to determine the appropriate sentence for the offence. At that point, the role of the victim is at most limited. On rare occasions, the intercession of the victim may assist the accused at the next phase, when the court is considering whether the accused can pray in aid in mitigation matters justifying reduction in sentence. Just such a situation arose in *R v Sung Chin-pang* [1995] 2 HKC 352, 356, where the court was confronted with a plea of leniency from the victim of the kidnapping. The court recognised that it was necessary to take account of the 'impact of such offences on the public at large, whatever view the actual victims of the offences might have expressed'. Nonetheless, as Seagroatt J put it, 'the exceptional plea is considered, unemotional and sustained. It has in it all the elements which judges and lawyers look for as a test of its balanced approach. It is rational and intelligent. We are often asked to reflect the views of the public, or a section of the public, in imposing severe sentences on offenders ... When members of the public, particularly victims, seek to persuade the court to exercise mercy or leniency in a wholly unsolicited, but principled manner, it would be wholly wrong for the court not to pay some regard to it.' The judge added, however, that such cases would be 'exceedingly rare'.