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INTRODUCTORY MATTERS

1.1 Introduction

Criminal law is a complex yet fascinating subject, and is in a real sense a reflection of the values held by a society. Its prime purpose is the identification and suppression of criminal activity. It is also the area of law that is most popularly associated with the term ‘law’, and regularly attracts the attention of the media and politicians. The media, in all its guises, devotes an enormous amount of time and space to crime issues. Some studies, for example, have found that as much as a quarter of all newspaper news space is devoted to crime and crime-related issues.¹ Politicians, for their part, are all anxious to address the activities of criminals, and proposals for dealing with criminals form a prominent part of the election manifestos of all political parties, regardless of ideology. Perhaps due to this official attention, criminal law has also entered mainstream consciousness in a way unthinkable for other areas of law. One has only to glance at the television listings to see the sheer number of popular programmes that revolve around crime and the attempts by law enforcement officials to control it. By contrast, there are few television programmes dealing with the law of real property – it would seem that the rule against perpetuities does not hold the same public fascination as the law of murder!

The main purpose of this book is to explain in an accessible manner the substantive criminal law of Ireland as found in a typical university syllabus. Part I of the book deals with preliminary issues such as the development and structure of the criminal law, and with the basic rules for the attribution of criminal liability. Part II concerns the general defences to criminal liability; and these two parts make up the so-called general part of the criminal law. The remainder of the book then discusses the main offences, and is broken down by the principal subject area of the offences in question.

THE SOURCES OF IRISH CRIMINAL LAW

1.2 Introduction

As with all branches of Irish law, criminal law is an amalgamation of principles derived from a variety of sources. The principal sources of criminal law are

¹ See, for example, Reiner, ‘Media Made Criminality’, in Maguire *et al.* (eds), *The Oxford Handbook of Criminology*, Oxford: Oxford University Press, 2003, pp. 381–3; Kilcommins *et al.*, *Crime, Punishment and the Search for Order in Ireland*, Dublin: IPA, 2004, p. 92; National Crime Council, *Fear of Crime in Ireland and Its Impact on Quality of Life*, Dublin: Department of Justice, Equality and Law Reform, 2009, especially Chapter 2.

common law and statute, with international institutions also beginning to have some impact; each of these sources will be considered in turn. However, the reader should also bear in mind the overriding importance of the Constitution, to which all criminal law rules and principles must conform. As a result, legislation may not unjustifiably impinge upon the personal rights of citizens that are guaranteed by Articles 40–44 of the Constitution. In particular, criminal legislation must respect the right of personal liberty protected by Article 40.4. By virtue of Article 15.5.1°, the legislators must also avoid enacting retrospective legislation (which is considered later in section 2.2). Additionally, certain provisions of the Constitution have particular importance for criminal law and the trial of criminal offences. For example, Article 34.1 requires justice to be administered in public except in special and limited circumstances. Consequently, any member of the public is generally entitled to attend and observe any criminal trial. However, there are exceptions to this, particularly trials involving incest, rape offences and aggravated sexual assault, in which the evidence is likely to be of a unique and personal nature. Article 38.1 requires all criminal trials to be conducted in due course of law. The essence of this requirement is that all criminal trials must be conducted fairly, with due regard to the personal rights of the defendant. Finally, Article 38.5 requires that all criminal trials be conducted before a jury, with the exception of trials heard in military or special courts, or those involving minor offences. The Constitution, therefore, has helped to shape the course of criminal trials, and creates the framework within which substantive criminal rules are made. The vast majority of those substantive rules, however, come from common law and statute, and it is these sources that are considered next.

1.3 Common Law

Common law is important as a source of criminal law in several respects. First, the common law is the direct source of much of the criminal law in Ireland. For centuries the common law courts have exercised the power to declare certain actions illegal without having any statutory basis for doing so. Such declarations made prior to 1937 continue to have the force of law in Ireland by virtue of Article 50 of the Constitution, which provides that any laws in force in Saorstát Éireann (the Irish Free State) are to continue in force to the extent that they are compatible with the current Constitution. Manslaughter is a good example of a pre-existing common law offence that has no statutory basis. The decisions of the courts when dealing with such common law offences are obviously of crucial importance, as it is these decisions alone that define and develop the offence. The formal power of the courts to extend the common law no longer exists by virtue of Article 15.2.1°, which vests exclusive law-making power in the Oireachtas. It is therefore no longer possible for the courts to prohibit actions even where there is a clear need for it to be done; this is the responsibility of the Oireachtas. This

has the advantage that for the creation of new offences and defences, the proper democratic and accountable process must be followed. The disadvantage is that if the Oireachtas is unwilling for political reasons to address an issue, a gap in the law will remain unfilled. Notwithstanding Article 15.2.1^o, however, the Irish courts continue to exercise a power to develop existing common law rules. Further, the courts have sometimes taken it upon themselves to alter a common law rule. The defence of provocation provides an excellent example (see Chapter 18): beginning with the decision in ***People (DPP) v. MacEoin (1978)***, the Court of Criminal Appeal has moved Irish law on provocation far from its common law roots by removing the objective element of the legal test. Further, in ***People (DPP) v. Davis (2001)***, the same Court indicated that it might circumscribe the extent of the defence should the need arise in a future case. Such assertions of law-making power are controversial: arguably, the decisions on the reform of the law of provocation are constitutionally best left to the Oireachtas.

Second, when statutes are enacted by the Oireachtas, many of them merely codify earlier common law rules. A good example of this is provided by sections 18, 19 and 20 of the Non-Fatal Offences Against the Person Act 1997, which set out the statutory basis for the defence of the lawful use of force. For the most part, these provisions simply re-enact the principles developed at common law, and therefore the earlier common law decisions are still relevant as they assist in the interpretation of the statutory provisions. Finally, even when dealing with offences that have no basis in common law, such as the offence of unauthorised interference with computer data under section 5 of the Criminal Damage Act 1991, judicial decisions are important as they interpret the meaning of the words used in the statute. These decisions are authoritative and binding in the same way as with common law rules.

In trying to interpret a particular legal rule, Irish courts may also look at the earlier decisions of courts in the other common law countries, especially England. References to precedents, both Irish and foreign, are therefore an essential part of any common law trial; it is necessary to demonstrate that one has legal authority for one's case. Unlike earlier Irish decisions, however, foreign decisions are not binding upon Irish courts; they are of persuasive value only and may be departed from. It is important to remember that while extensive reference will be made to foreign decisions, they do not necessarily represent Irish law unless they have been accepted by the Irish courts or have been incorporated by the Oireachtas into an Irish statute. In order to highlight this point, the names of Irish cases in this book are in bold italics, while foreign cases are in ordinary italics. Unless indicated otherwise, these foreign decisions are from the English courts.

One last point should be made concerning the common law criminal rules. Sometimes the courts will try to trace the development of these rules to discover their full extent. In doing so, they will often have regard to commentaries on the early common law. The most notable of these commentaries are Coke's *Third*

Institute (1642), Hale's *History of the Pleas of the Crown* (1736) and Blackstone's *Commentaries on the Laws of England* (1769, Book IV of which deals with criminal law). These classic works are accorded persuasive authority.

1.4 Statute

As the Constitution has removed the power of the courts to create new laws, the source of all innovation and reform is now the Oireachtas. This innovation and reform has not, however, proceeded with any degree of regularity or consistency, and has led to some judicial complaints. It must be recognised that the Oireachtas is a political institution, and its members are influenced by the vagaries of the political process. This can be beneficial in that popular pressure for reform can result in updated legislation. However, it can also result in hasty legislation that is merely responding to a particular incident that may not justify such a response. The creation of a new species of assault involving a syringe is a case in point. Throughout the mid-1990s, the media highlighted a number of robberies carried out with blood-filled syringes. As a result of this exposure, politicians became concerned with this particular form of robbery, and promised speedy measures to deal with it. The Opposition drafted a Bill specifically aimed at syringe attacks, while the government created new syringe offences in their reform of non-fatal offences against the person, which became law in 1997 (these offences are discussed in Chapter 19). It is debateable that such attacks required such a response, for two reasons. First, they could have been dealt with under the existing robbery laws which carry a maximum sentence of life imprisonment, and indeed this exceeds the maximum punishment for most of the new offences. Consequently, it is reasonable to wonder if the public has received any more protection than it had prior to 1997. Second, it is not clear whether syringe attacks were the beginning of a new trend in criminal activity in Ireland, or were merely a passing phase that had been seized upon by the media. If the former, then the new legislation was perhaps justified. If the latter, it is unlikely that any real benefits will accrue to Irish society in the long term. It is difficult to avoid the conclusion that the new offences were created in an attempt to be seen to be 'doing something' about a problem that the media had 'exposed', which is hardly a sound basis for penal reform. In *Gilligan v. Criminal Assets Bureau* (1998), McGuinness J. noted that 'certain elements of the media, both written and broadcast, tend to . . . create in regard to crime an undesirable form of hysteria which has its own dangers.' Principal among these dangers is the possibility of an overreaction to the perception of crime, and the syringe offences in the 1997 Act are arguably such an overreaction. In any case, the process by which these new syringe offences entered the statute books is illustrative of the essentially political character of some legislation. Students should bear in mind the unfortunate fact that criminal legislation is not always the result of sustained reasoning and research.

Criminal statutes tend to take one of three forms. First, they can create entirely new offences that were unknown to the common law. The new syringe offences under the Non-Fatal Offences Against the Person Act 1997 are a good example of this. Second, a statute might codify existing common law principles, as the Non-Fatal Offences Against the Person Act 1997 did with the defence of the lawful use of force. Third, a statute can add to existing common law offences and regularise them without affecting the substance of the offence. For example, manslaughter is entirely a common law offence, but is punishable by up to life imprisonment by section 5 of the Offences Against the Person Act 1861, a provision that does not alter the elements of the offence.

Special mention should also be made of the work done by the Law Reform Commission to update the law. The Commission was established by the Law Reform Commission Act 1975 as a body independent of the government to review different areas of the law and to suggest improvements. Since 1975, the Commission has reviewed a number of areas of criminal law: vagrancy, rape, child sexual abuse, handling stolen property, malicious damage, non-fatal offences, sentencing, intoxication, homicide and provocation. Most recently, the Commission has issued studies of the defences in criminal law, the inchoate offences and the capacity to consent to sexual acts. Many of the Commission's recommendations have now been incorporated by the Oireachtas into law. Reference will be made throughout this book, where appropriate, to such recommendations.

1.5 International Sources

Criminal law has traditionally been the preserve of sovereign authorities, and until recently there has been little external influence on the development of Ireland's domestic criminal jurisprudence. However, modern criminal activity such as terrorism, drug trafficking and the trafficking of people are transnational enterprises that cannot be dealt with adequately by individual jurisdictions, but instead require concerted action. Ireland is a member of several international organisations that have drafted legislative responses to these and other criminal activities, responses that are increasingly being incorporated into domestic law. These international organisations consequently form a new source of Ireland's criminal law, albeit still a relatively small one. The two most influential of these organisations are the European Union and the Council of Europe. By virtue of Article 29.4.6° of the Constitution, nothing in the Constitution can be used to invalidate any measure necessitated by Ireland's membership of the EU; in effect, such measures supersede any domestic instrument, including the Constitution itself. Further, in matters covered by the Treaties, the institutions of the EU are entitled to legislate directly for Member States, and some such legislation can take direct effect in the same way as legislation enacted by national legislatures. Accordingly, the EU is potentially a powerful influence on criminal law in this country. Some of this potential has been realised.

First, some parts of European law have a distinctly penal character in terms of the sanctions that can be imposed for breaches of that law. European competition law, for example, allows for the imposition of very large fines for engaging in anti-competitive behaviour. Although these fines are described as ‘administrative’ in nature, they have a punitive effect. As will be seen later (section 1.12), the presence of penal, as opposed to compensatory, sanctions is one of the prime indicia used by the Irish courts to determine whether a legislative measure has a penal character. Second, European law can act as a restraint on domestic legislatures in crafting national criminal laws. For example, in *Conegate Ltd v. HM Customs* (1986), a British legislative prohibition on the import of German-made erotic inflatable dolls was invalidated by European law. Restrictions on the grounds of public morality could be placed legitimately on imports from other Member States, but the measure in question only applied to foreign-made dolls, not to those manufactured in the UK, and it was therefore discriminatory. The restriction therefore could not be justified on the grounds of public morality, and it was declared invalid. Third, the EU is becoming increasingly interested in what might be termed real criminal matters. The Maastricht Treaty, which came into effect in 1992, created a so-called Third Pillar of the EU which was concerned with justice and home affairs (later re-designated as Police and Judicial Cooperation in Criminal Matters). This pillar created a framework within which the governments of the EU Member States could cooperate on justice-related issues on a Union-wide basis. Most of the measures initiated under the Third Pillar (known as Framework Decisions) had to be incorporated into domestic law by national legislatures: for examples of such legislation in Ireland, see the Child Trafficking and Pornography Act 1999, the European Arrest Warrant Act 2003 and the Criminal Justice (Terrorist Offences) Act 2005.

The Lisbon Treaty, which came into force in 2009, substantially altered this framework. This Treaty abolished the Third Pillar, setting for the EU the objective of developing itself as an ‘area of freedom, security and justice’ (Article 3(2) TEU). This development permits the EU institutions to exercise direct control over EU measures in respect of several issues, including police cooperation and judicial cooperation in criminal matters. Ireland is not bound automatically by such measures but, under Protocol No. 21, is free to adopt any such measures on a case-by-case basis. Ireland has exercised this power in respect of most such measures introduced by the EU to date.

Ireland is also a member of other international organisations that have had some influence on criminal law in this jurisdiction. The Council of Europe was formed in the aftermath of World War II to establish some degree of unity among European countries and to allow a forum in which members could discuss matters of common concern. Perhaps its most important instrument is the European Convention on Human Rights, which Ireland signed in 1953. Signatory States are

Introductory Matters

required to ensure that their domestic laws are compatible with the Convention, and a European Court of Human Rights was established under the Convention with the power to declare the incompatibility of national laws and to award damages. The court does not, however, have the power to strike down the domestic law in question. Thus, in *Norris v. Ireland* (1991), the Court declared Irish statutory provisions that punished consensual anal sexual intercourse to be incompatible with the Convention and awarded damages against Ireland. The provisions in question, however, remained in force until 1993, when they were repealed by the Criminal Justice (Sexual Offences) Act of that year. In an attempt to increase the influence of the Convention, the Oireachtas enacted the European Convention on Human Rights Act 2003, which places a general obligation on the Irish courts to interpret Irish laws in a manner compatible with the Convention, in so far as it is possible, and in so doing to take account of decisions of the European Court of Human Rights. If such an interpretation is not possible, the Irish courts have the power to declare provisions of Irish law to be incompatible with the Convention. Such declarations will not affect the validity of the provisions in question, nor will any right to compensation exist. However, a person in whose favour such a declaration has been made may petition the government for an *ex gratia* payment, and may also seek redress before the European Court of Human Rights. Since the Treaty of Lisbon came into force in 2009, the standing of the Convention has increased. In particular, the EU has committed itself to acceding to the Convention in its own right, and now legally regards the rights protected by the Convention as part of the general principles of EU law (Article 6 TEU). It seems likely that the areas of substantive Irish criminal law most likely to be open to challenge under the Convention are the imprecise definitions of offences like manslaughter under Article 7, the lawful use of lethal force under Article 2 and the insanity defence under Article 6. These issues will be discussed at the appropriate points in the book.

CRIMINALISATION

1.6 Introduction

The criminalisation process is concerned with deciding which actions should be deemed to be crimes and hence subject to criminal sanction. The process is heavily influenced by several competing philosophies, each of which has a different view of what the criminal law should be trying to achieve. However, as noted earlier (see section 1.4), the lawmaking process, and hence the criminalisation process, is now inherently political, and politics is an intensely practical arena. The importance of this aspect cannot be overestimated: legislators are apt to ignore fine philosophical approaches to criminalisation in order to satisfy the perceived concerns of the electorate and their own views of the public interest. Nevertheless, an introduction to the main intellectual currents

that underpin the criminalisation process is useful as an aid to understanding the criminal law.

1.7 Moralism

Using morality as a basis for the criminal law involves a consideration of the inherent qualities of actions: immoral actions are prohibited because they are immoral, not because they are harmful to others. Traditionally, there has been a close connection between the criminal law and the morality taught by Christianity, and much of the early common law development of criminal law derived from Christian doctrines. Indeed, as recently as 1984, the majority of the Supreme Court in *Norris v. Attorney General (1984)* drew heavily upon Christian moral teachings and the Christian nature of the State, as exemplified by the Preamble to the Constitution, to deny the plaintiff's claim that the criminalisation of homosexual relations was unconstitutional. Thus, the consent of individuals engaged in such relations was overridden at least partly on the basis of a moral teaching (although it is interesting that the majority also felt the need to refer to evidence that homosexual relations could have damaging effects on the community). Few legal moralists would today attempt to use specifically Christian doctrines as a basis for the criminal law, and doing so would almost certainly contravene the European Convention on Human Rights. However, in a famous argument, Lord Devlin argued strongly in favour of a more general sense of morality as a basis for criminal prohibition.² Devlin asserted that societies require common moral bonds in order to survive and that society therefore had a legitimate interest in overriding private decisions in order to secure its moral code: 'The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.' Thus, society has a right to use the law to prohibit immoral behaviour, even that which is committed in private. However, there are two major difficulties in using morality as a basis for criminal law. First, morality is such a wide concept that using it as a basis for criminalisation could remove any practical limits on the criminal law. Moralists generally recognise the force of this point and do not suggest that morality and the criminal law should be synonymous. Lord Devlin himself accepted that even though the State may be justified in criminalising immoral acts, in many cases the State should not do so. There are other values of concern to society besides its own continuation, such as privacy and tolerance. To effectively prevent immoral conduct committed in private would require police powers so intrusive that the loss in terms of privacy and tolerance, and other values, would negate any advantage gained from the suppression of the activity in question.

Second, there is no single definition of morality, and there are obvious

2 Devlin, *The Enforcement of Morals*, Oxford: Oxford University Press, 1965.

difficulties with adopting a definition derived from one theological source, especially in a multicultural society. As Lord Devlin explained, the ‘law can no longer rely on [Christian] doctrines in which citizens are entitled to disbelieve.’ Devlin used the word ‘morality’ in a more general, populist sense: that which ‘every right-minded person is presumed to consider to be immoral’. Feelings of disgust that are deeply felt and not manufactured could be taken as an indication that the limits of tolerance were being reached. If an activity is generally regarded as being ‘so abominable that its mere presence is an offense’, society should not be denied the right to try to eradicate it. Undoubtedly, there are benefits to ensuring that the criminal law is broadly in line with popular sentiment. As Herbert Packer has argued, a prohibitive law that is in line with popular sentiment is likely to be widely obeyed, and if it is broken, the efforts of law enforcement agencies will be all the more zealous.³ However, there are obvious difficulties in determining whether an activity does in fact create a sufficiently deep sense of disgust, and the danger is that legislators would be able to substitute their own private view of the act in question for that of ‘right-minded’ people. More fundamentally, basing morality on popular notions of what is acceptable carries a significant risk of incorporating into the criminal law attitudes of blatant prejudice, a risk that seems out of place in a modern society that prides itself on its pluralism and tolerance.

1.8 Liberalism

Liberal legal theory came of age during the nineteenth century and overtook moralism as the dominant basis of law. The core liberal value is the autonomy of the individual, and liberalism is primarily concerned with restraining the State as far as possible so as to maximise that autonomy. For liberals, the proper extent of the criminal law is defined by the so-called ‘harm principle’, which is traditionally associated with the work of John Stuart Mill.⁴ Mill asserted that ‘the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is ... to prevent harm to others.’ Thus, the consequence of an action rather than its inherent moral quality is the crucial factor in determining whether an act should be criminalised. Acts that cause harm only to the actor himself should not be criminalised; the concept of autonomy that underpins the harm principle requires the State to respect an individual’s decisions about how he lives his own life because he knows his own circumstances better than anyone else. This is the general approach of the criminal law in Ireland today. Many of the most important offences require the prosecution to prove absence of consent as a constituent element of the charge – rape, assault, theft, robbery, burglary. Note that in these offences, consent is not a defence; rather, the absence of consent is an

3 Packer, *The Limits of the Criminal Sanction*, San Francisco: Stanford University Press, 1969.

4 Mill, *On Liberty* (1859), London: Everyman, 1993.

element of the offence. This approach is more consistent with liberal theory than consent being a defence. If consent was a defence to charges of rape, assault, etc., the defendant would have an evidential burden to raise the issue and a failure to do so could result in a conviction despite the defendant's consent. By requiring the prosecution to prove absence of consent, no burden at all is placed on the defendant and this reflects modern society's view that the criminal law should not extend to sexual intercourse, the infliction of physical injury and the transfer of property, when these activities are done consensually. However, on some occasions, the law does treat consent as a defence: a defendant charged with the infliction of serious harm under section 4 of the Non-Fatal Offences Against the Person Act 1997, for example, can raise a defence of consent if the injuries were inflicted in the course of certain activities (see section 19.12). The difference in this approach reflects society's concern with the infliction of serious injury, and grants a defence only where that serious injury arose from conduct deemed socially acceptable.

The harm principle is immediately attractive primarily because of its apparent simplicity. However, the principle is not as simple as it appears, not least because of the difficulty in defining 'harm'. Conceptually, 'harm' could encompass anything from a direct physical assault to moral offense. A Jewish person could plausibly argue that his outrage at the flying of a Nazi swastika constituted harm, as could a Christian moralist at the idea of pre-marital sexual intercourse. Similarly, it is plausible that harm can be caused indirectly by private actions; for example, the private viewing of pornography is arguably harmful in that it contributes to a demeaning societal view of women. However, basing criminalisation decisions on such a wide view of harm would essentially remove any limitation on the proper extent of the criminal law, thereby undermining the whole point of the harm principle. Mill himself offered only a vague definition of harm; he explicitly denounced any attempt to criminalise actions that either caused no direct harm to anyone or harmed only the actor himself. Later theorists have similarly struggled with a definition of harm; the best known is that offered by Joel Feinberg.⁵ Feinberg argued that in addition to harm as defined by Mill, offensive conduct could be criminalised, but Feinberg included many caveats, i.e. the offence caused must be serious, there must be no reasonable alternative means of countering the conduct and the risk of offence was not assumed by the victim. Thus, even Feinberg's expansion of the basis of criminalisation remains tightly restricted. Other liberal theorists have argued that if respect for autonomy is truly the basis for the law, the law must consider what true autonomy entails. Autonomy involves individuals making choices for themselves, but some individuals have few choices to make in how they live due to their social circumstances. Accordingly, Joseph Raz⁶ argued that the State has an obligation to assist in the creation of the conditions necessary for true

5 Feinberg, *Offense to Others*, Oxford: Oxford University Press, 1985.

6 Raz, *The Morality of Freedom*, Oxford: Oxford University Press, 1986.

autonomy, and this obligation forms another legitimate basis for interfering with private decisions.

1.9 Paternalism

Paternalistic legislation is that which imposes an obligation upon an individual for his own good, regardless of his wishes. The best example of such legislation is the requirement that seatbelts be worn in cars; this is done primarily for the benefit of the individuals themselves. The fact that an individual does not want to wear a seatbelt is irrelevant. On its face, paternalistic legislation seems to contravene the harm principle, and indeed, Mill specifically argued against paternalism except in the case of children and the mentally ill. Mill assumed that individuals are better placed to know their own circumstances and needs than anyone else. However, some modern liberal theorists, who are generally within the Millian tradition, have argued that the harm principle can accommodate paternalism. H.L.A. Hart⁷ pointed out that Mill's rejection of paternalistic legislation was based on 'a conception of what a normal human being is like which now seems not to correspond to the facts.' Individuals may not, in fact, know what is best for them due to a lack of knowledge. Government has the resources to call on experts in a wide variety of fields, resources that are beyond those of most individuals. The decisions made by governments on foot of such expertise are therefore likely to be qualitatively better than any decisions made in relative ignorance by an individual. Further, some people may be incapable of rational decision-making due to factors such as mental disability or addiction. We might, for example, wonder about the ability of a heroin addict to make decisions in his own interests. Clearly there are situations in which the government might know better than the individual, and imposing a good decision might well result in the creation of more good than harm. Gerald Dworkin⁸ explicitly located his defence of paternalism within Mill's work. Mill had suggested that an autonomous individual could not be permitted to voluntarily sell himself into slavery because slavery is the antithesis of autonomy; therefore, if voluntary slavery was permitted and enforced, the law would be assisting in a diminution of the core liberal value of autonomy. Dworkin suggests that this argument allows for a limited degree of paternalism, and that the State may restrict the short-term choices available to individuals in order to ensure their ability to exercise autonomy in the future. However, the problem with this argument is that even this 'limited' paternalism is in fact potentially unlimited. Most self-harming actions carry at least some risk of future limitations on the exercise of autonomy, either through death, permanent injury or addiction. As the UK Law Commission put it in its *Consultation Paper on Consent in the Criminal Law* (1995), paternalism could be used to turn 'us all into super-fit, clean-living "Spartans" whether we like it or not.'

7 Hart, *Law, Liberty and Morality*, Oxford: Oxford University Press, 1963.

8 Dworkin, 'Paternalism', (1972) 56 *The Monist* 64.

1.10 Feminism

Feminism is a comparative newcomer to legal theory and holds that the law is inherently male biased, both in terms of its substantive content and in the operation of the machinery of the criminal law. Female perspectives have been excluded because those who hold power within the criminal law – lawmakers, policymakers, judges, prosecutors, lawyers – are, and have always been, predominantly male. As a result, even principles that seem ostensibly gender neutral, such as *mens rea*, are in fact built on male standards, an argument neatly summed up in the use of the phrase ‘men’s rea’ in place of *mens rea*.⁹ This kind of argument has been made frequently in murder cases in which abused women killed their husbands in circumstances that seem to indicate cold-blooded decision-making which precludes a plea of provocation (see section 18.15). It is argued that the instant ‘heat of the moment’ retaliation required by the law is based on male types of behaviour; that women are more likely to have a ‘slow-burn’ reaction that will erupt in violence some time later. Thus, women’s interests are directly harmed by ostensibly gender-neutral legal principles. However, on many occasions women benefit from the male-driven assumptions that underlie the criminal law. A good example is the old defence of marital coercion; the law presumed that if a married woman committed an offence in the presence of her husband, she did so under his duress. Similarly, Hilary Allen has argued that convicted female offenders are dealt with differently, and generally more leniently, than male offenders.¹⁰ Feminists argue that even in situations such as these, in which women receive an apparent concession from the criminal law, women’s interests are harmed because these concessions assume a lack of rational ability on the part of women. Consequently, the ‘concession’ is in reality an example of the subordination of women and a disregard for female autonomy. However, in countering such discrimination, a sharp divergence has emerged between so-called liberal and radical feminists. Liberal feminists, such as Jennifer Temkin,¹¹ seek to establish the autonomy of women through legislative and policy changes to the existing law, and they have achieved some notable successes, especially in the area of sexual offences. For example, the abolition of the so-called marital rape exemption by the Criminal Law (Rape) (Amendment) Act 1990 ended the immunity from rape prosecution enjoyed by a husband who had sexual intercourse with his wife without her

9 Mark Cousins, ‘Men’s rea: a note on sexual difference, criminology and the law’, in P. Carlen and M. Collison (eds), *Radical Issues in Criminology*, Oxford: Martin Robertson, 1980; Nicola Lacey, ‘General Principles of Criminal Law? A Feminist View’, in D. Nicolson and L. Bibbings (eds), *Feminist Perspectives on Criminal Law*, London: Cavendish, 2000.

10 Hilary Allen, *Justice Unbalanced*, Milton Keynes: Open University Press, 1987.

11 Jennifer Temkin, *Rape and the Legal Process*, 2nd ed., Oxford: Oxford University Press, 2002; ‘Rape and Criminal Justice at the Millennium’, in D. Nicolson and L. Bibbings (eds), *Feminist Perspectives on Criminal Law*, London: Cavendish, 2000.

consent. In so doing, the law explicitly recognised the sexual autonomy of married women. The 1990 Act also made clear that absence of consent is all that is required for a rape charge, and that the absence of resistance by a woman does not equate with consent. Radical feminists such as Catherine MacKinnon,¹² however, assert that the existing law and legal system are inherently patriarchal and cannot be reformed through mere tinkering. They assert that the liberal approach represents at best a mere accommodation of female interests. Consequently, traditional notions of law must be abandoned and a new system of law must be developed that respects the differences between the genders. Merely using apparently gender-neutral words such as ‘person’ in place of ‘men’ accomplishes nothing because, as MacKinnon famously commented, the law must accept that there are ‘women and men because you don’t see many persons around’. Demands for such a widespread reconstruction of the law have met with little success.

CRIME

1.11 Introduction

It goes without saying that the criminal justice system exists to deal with crime. The number of crimes known to the criminal law is enormous: Ashworth estimated in 2000 that there were about 8,000 offences known to English law,¹³ and it is likely that the number in Irish law was at a similar level. Since then, the creation of new criminal offences has not abated. A recent study on criminalisation in Britain found that the current coalition government had overseen the creation of 1760 new offences in its first twelve months.¹⁴ Indeed, the British Ministry of Justice instituted a new *Criminal Offences Gateway* procedure in 2011 in an attempt to reduce the frequency with which new offences are created. Arguably, there has been an overreliance on the machinery of the criminal justice system to deal with social problems, some of which had previously been left to more informal mechanisms. As a result, the reach of the criminal law has grown considerably, perhaps beyond our ability to effectively enforce it. But what is a crime? How do we tell criminal conduct and criminal legislation apart from mere anti-social conduct and regulatory legislation? These questions are not merely of academic interest: if conduct has been rendered criminal, then it must be dealt with within a strict constitutional framework.

12 MacKinnon, *Feminism Unmodified*, Cambridge, MA: Harvard University Press, 1987; *Toward a Feminist Theory of the State*, Cambridge, MA: Harvard University Press, 1991.

13 Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 *Law Quarterly Review* 225.

14 Chalmers and Leverick, ‘Tracking the Creation of Criminal Offences’, [2013] *Crim LR* 543.

1.12 Definition of Crime

Modern Irish cases in which definitions of crime have been attempted have tended to avoid references to the immorality and harmful consequences of the prohibited actions. Instead, the courts have focused on the characteristics of crime and the nature of the proceedings in issue. The leading authority is the Supreme Court decision in *Melling v. O'Mathghamhna (1962)*. The defendant had been charged in the District Court with fifteen counts of smuggling butter, the importation of which could be done only under licence. The charges were brought under section 186 of the Customs Consolidation Act 1876, which provided as follows:

Every person who shall . . . be in any way knowingly concerned in carrying, removing . . . concealing, or in any manner dealing with goods with intent . . . to evade any prohibition or restriction of or applicable to such goods . . . shall for each offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the [Revenue Commissioners]; and the offender may either be detained or proceeded against by summons.

Additionally, section 232 provided that in default of paying the fine, the defendant must be sentenced to prison for up to twelve months, depending on the amount involved. The defendant argued that the charges related to criminal offences that were not minor and therefore could not be tried in the District Court. The first issue to be decided was the nature of the charges. Were they criminal? Kingsmill Moore J. noted the problem:

What is a crime? The anomalies which still exist in the criminal law and the diversity of expression in statutes make a comprehensive definition all but impossible to frame. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: 'Is the act prohibited with penal consequences?' said Lord Atkin in *Proprietary Articles Trade Association v. Attorney General for Canada [(1931)]*.

He then identified several factors which, if present, would indicate the existence of a criminal offence:

- (a) It should be an offence against society at large;
- (b) The sanction should be of a punitive nature rather than restitutionary;
- (c) The action should generally require proof of *mens rea* (or culpability).

These factors are the principal ones to be used in identifying a criminal charge. However, there are others. In the same case, Lavery J. noted that the procedure to be followed bore all the hallmarks of a criminal prosecution – detention in a garda station, the proffering of a charge, searching the defendant, examination before a District Judge, admission to bail and the imposition of a financial penalty backed by the threat of imprisonment in the event of default. Additionally, O Dálaigh C.J. also took note of the language of the provision, which he described as being the 'vocabulary of the criminal law'.

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These factors have formed the basis in the Irish courts of the definition of a crime ever since, as the following examples demonstrate. In ***DPP v. Boyle (1993)***, for example, the High Court considered section 24 of the Finance Act 1926, as amended by section 69(1) of the Finance Act 1982. Section 24(1) required all bookmakers to pay a duty on every bet entered into. Failure to do so would result, on summary conviction under section 24(5), in an excise penalty of up to £500. The court held, following ***Melling***, that the provision was a criminal offence. Of particular importance was the language used, especially the words ‘offence’ and ‘summary conviction’. Indeed, the court noted that it was the absence of similar words in ***Melling*** that resulted in the discussion in that case on the constitution of a crime. In ***McLoughlin v. Tuite (1986)***, the High Court considered section 500 of the Income Tax Act 1967, which provided a penalty of £500 for failing to produce certain documents. Holding that this provision was civil in character, Carroll J. specifically noted that the penalty was non-criminal and recoverable in civil proceedings, and remarked on the absence of criminal vocabulary. On appeal to the Supreme Court (1989), Finlay C.J. adopted the indicia of a crime set out by Kingsmill Moore J. in ***Melling***, and noted that, while the penalty in question was not compensatory, this factor on its own was insufficient to classify section 500 as a criminal provision. In a more recent decision, ***Registrar of Companies v. Anderson (2004)***, Murray C.J. held that there was a difference between financial punishments and fixed penalties ‘designed to encourage timely filing [of annual corporate returns] and discourage the dilatory’. Such a fixed penalty would not generally indicate a criminal offence unless, perhaps, it was ‘so excessive and disproportionate to the administrative objective to be achieved’ as to constitute a criminal punishment.

Finally, in ***Murphy v. GM (2001)***, the issue arose as to the nature of the forfeiture proceedings allowed by the Proceeds of Crime Act 1996. The Act allows for the forfeiture of property that the High Court believes on a balance of probabilities to be derived directly or indirectly from criminal activity. This power can be exercised even when the property owner has not been charged with, much less convicted of, any criminal offence. The plaintiff argued that this power was criminal in nature, and that as the High Court proceedings were civil in nature, he would suffer a criminal sanction without the protection of due process of law required by the Constitution in all criminal trials. The Supreme Court held that an action under the Proceeds of Crime Act was of a civil character, principally as there was no provision in the Act for the indicia of criminal proceedings. In the High Court (***Gilligan v. Criminal Assets Bureau (1998)***), McGuinness J. had made a similar finding, noting also that proceedings under the 1996 Act were *in rem* (against property) rather than *in personam* (against a person), as would be usual in a criminal trial.

1.13 Classification of Crimes

Common Law

The law recognises that some crimes are more serious than others, and has accordingly adopted a number of classification systems. At common law, there were three types of offences: treasons, felonies and misdemeanours. Originally, all crimes were classified as felonies, with treason being a specific type of felony. They all attracted the death penalty and forfeiture of all property. However, the judges recognised that there was a need for a lesser category of offences, and created misdemeanours, which attracted only terms of imprisonment or fines. The title of felony was kept for the more serious offences, such as murder, rape and kidnapping, with misdemeanours being less serious offences, such as perjury.

The old common law distinction carried some important consequences. First, a person suspected of committing a felony could be arrested without a warrant,¹⁵ a power that did not exist in relation to misdemeanours. Second, felonies attracted two related offences that did not apply to misdemeanours. It was a misdemeanour not to report a felony. This offence, called misprision of felony, was defined by the Supreme Court in *Heaney and McGuinness v. Ireland (1997)* as ‘conceal[ing] or procur[ing] the concealment of a felony known to have been committed. It is the duty of all citizens to disclose to the proper authorities all material facts as to the commission of a felony of which the citizen has definite knowledge.’ It was also a misdemeanour, called compounding a felony, for a person to agree not to prosecute a felony in return for a reward of any kind.

Statute

The distinction between felonies and misdemeanours has been abolished by section 3 of the Criminal Law Act 1997. However, as many statutes still refer to offences in these terms, section 3(2) provides that for the purposes of these statutes, all offences will be treated as misdemeanours, thus effectively abolishing the consequences of the distinction noted above. The Act goes on to create a new category of offences to replace felonies, called arrestable offences. Arrestable offences, or attempts to commit any such offences, are those that carry a penalty of at least five years’ imprisonment. Where a person has committed or is in the process of committing an arrestable offence, that person may be arrested without a warrant by either a garda or a private citizen (sections 4(1) and (2)). A ‘citizen’s arrest’ may, however, only be made to prevent the offender avoiding arrest by the gardaí. It is an offence to impede the arrest of anyone who has committed an arrestable offence (section 7(2)). Finally, it is also an offence to accept a reward (other than fair compensation for any harm done) in return for concealing the commission of an arrestable offence (section 8(1)).

15 An arrest warrant is a written authority allowing the apprehension of a specified person for a specified offence. It is usually given by a District Court judge on the application of the gardaí.

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It is the practice in modern statutes to distinguish between offences on the basis of the manner in which they will be tried: summary offences and indictable offences. Summary offences are of a minor nature and are tried in the District Court, without a jury. They are usually prosecuted by the gardaí or some other State agency, such as the Environmental Protection Agency in the case of some environmental offences. Indictable offences are more serious, and are usually tried in the Circuit or Central Criminal Courts before a jury. Indictable offences of a subversive nature may be tried without a jury in the Special Criminal Court, as may any other offence that the DPP decides is unsuitable to be tried in the ordinary criminal courts. Additionally, many indictable offences may be tried in the District Court if it is just to do so and the defendant agrees.

Constitution

The Constitution also contains a classification system, namely minor and non-minor offences. The importance of this distinction can be seen from Article 38.5, which requires that anyone charged with a criminal offence, other than a minor offence or one to be tried before a special or military court, is entitled to a trial before a jury. As the Constitution contains no definition of a minor offence, this task has fallen to the courts. In *Melling v. O'Mathghamhna (1962)*, the Supreme Court laid down the following criteria by which an offence could be classified as minor or non-minor:

- (a) how the law stood when the statute was passed;
- (b) the severity of the penalty;
- (c) the moral quality of the alleged offence; and
- (d) the relationship between the alleged offence and common law offences.

However, it is clear from the judgment that the severity of the punishment is the single most important consideration. Later cases, such as *Mallon v. Minister for Agriculture, Food and Forestry (1996)*, have indicated that a maximum sentence of up to twelve months' imprisonment can be considered minor. A maximum sentence of two years' imprisonment would render the offence non-minor. Furthermore, following the acceptance of the Sixteenth Amendment to the Constitution (the Bail Referendum), Article 40.4.6^o now refers to a further category of offences, namely serious offences. This provision allows for the refusal of bail to a person charged with a serious offence if doing so is reasonably considered necessary to prevent the commission of a serious offence by that person. There is no constitutional definition of this category, but the Bail Act 1997 defines a serious offence as a scheduled offence that attracts a possible sentence of imprisonment of five years or more. The Schedule to the Act includes murder, manslaughter, assault and aggravated assault, rape, incest, and various drugs and explosives offences. Whether the courts will accept this statutory definition for the purposes of interpreting Article 40.4.6^o remains to be seen.

PUNISHMENT

1.14 Introduction

The real function of the criminal law is a matter of some debate. Its formal function is to establish a code of acceptable behaviour, and by so doing to allow a peaceful and ordered society to exist. As Lord Hailsham said in *R v. Howe* (1987), the ‘overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.’ As such, criminal law is a means of social control. However, whether this control is benign or something more sinister depends on one’s perspective. Some commentators, especially those writing from a Marxist perspective, see criminal law as a reflection of the interests of the ruling class, and as a means of ensuring the continuation of that class’s power. Others see it simply as a reflection of the will of society; it lays down the standards of behaviour expected of members of that society and outlaws anti-social behaviour. There are probably elements of truth in both views: legislation does reflect the view and ideology of the group that holds power, but the prohibition of seriously anti-social behaviour, such as killing and rape, also represents the will and needs of society. This is an ongoing debate that will not be resolved any time soon, if ever. For the purposes of this book, however, it is sufficient to note that the criminal law is an agent of social control and is designed to curb people’s behaviour.

Criminal law is far from being the only agent of social control. Most branches of law fulfil a similar role. Contract law, for example, requires those who make contracts to honour them, while tort tries to ensure that people do not injure others through negligent behaviour. There are also other means of controlling behaviour that fall outside the law altogether. Religion and social norms are obvious examples of such non-legal methods of control: religion holds it to be a sin to tell a lie, while skipping a queue is a breach of social convention. Neither action, however, is illegal and neither will ordinarily attract any legal sanction. Thus, criminal law is but one of the methods used by society to order itself. It differs from the others by the sanctions attaching to it; only a breach of the criminal law will attract a State-imposed punishment. Society has deemed such breaches to be sufficiently serious to the common good as to warrant direct intervention by the State. A breach of contract can be left to the injured party to pursue, but a killing requires some formal punishment to be imposed by the State. There can be little objection to this when the matter is as serious as killing. However, not all criminal actions are as serious, or affect the common good as much as killing; some offences are very minor, such as dropping litter. It might be felt that such minor actions could be prevented by some other means, such as a civil action. Nevertheless, society has decided that even some relatively minor

actions should be policed by the State, and result in a punishment directed by the State. It is to this punishment that the discussion now turns.

1.15 Objectives of Punishment

Traditionally, four objectives of punishment have been put forward: incapacitation, retribution, deterrence and rehabilitation. Which of the four is the most important is a matter of opinion, and those opinions tend to vary over time. In the 1950s and 1960s, the major concern seemed to be rehabilitation. However, since the 1970s, there has been a trend towards retribution, particularly in political circles. As will be seen later, this trend has apparently been resisted by the Irish courts.

Incapacitation

Where a criminal offence has been committed, especially a serious offence, it is obviously important that its perpetrator is not free to commit a similar offence, at least for the duration of the punishment. The law therefore seeks to incapacitate the offender, and thereby to prevent him from causing any more harm. This objective is particularly important when dealing with persistent offenders – in the English case of *R v. Sargent* (1975), it was noted that when dealing with such offenders, ‘the only protection which the public has is that such persons should be locked up for a long period.’ However, such an approach to punishment can be unjustifiably harsh. In the first place, it would require that the only punishments on offer should be those that prevent the offender from committing other offences, which in practice would mean either imprisonment or execution. Yet the imposition of either penalty may not be appropriate for the actual offence committed. Most people would consider a long jail sentence to be somewhat harsh for the offence of dropping litter, even where it is done repeatedly. Second, even where a custodial sentence is warranted, the incapacitation approach would require that sentences be considerably longer than the actual offence committed deserves. It may, of course, be argued that persistent offenders deserve longer sentences because, having been in trouble before, they know full well what they are doing and risking. Be that as it may, the incapacitation approach can be used as a form of preventative justice which, as will be seen later (see section 1.17), is not tolerated by the Irish Constitution.

Retribution

The retributive theory of punishment has had a long history and various revisions. For a time it lost ground to rehabilitation, but it seems that it is again the dominant theory, at least in the political arena. In earlier times, the theory of retribution meant what its name suggests: vengeance. It operated almost according to the biblical ‘eye for an eye’ standard. Through the public process of the trial and the imposition of a punishment in the name of society, the law was said to demonstrate the revulsion felt by society for the offender’s actions. The offender

had attacked society, so society felt justified in attacking the offender. By doing so through the medium of the law, moreover, the chances of a private citizen seeking personal retribution were minimised. The law was thus seen as a social safety valve. This view of retribution now has little academic or judicial support, although one feels that it might have greater following in the general populace.

In its next guise, retribution was seen to be a form of expiation of guilt – the offender had committed an offence against society which had to be made good by serving a punishment. In so doing, the offender accepted his guilt, paid for it and then re-entered society with a clean slate. The language of expiation is still prevalent today – it is common to speak of a criminal ‘paying his debt to society’. However, true expiation works in much the same way as the Roman Catholic rite of Confession – the penitent confesses his sins and receives absolution. Likewise, a criminal may accept his guilt and seek redemption. Unfortunately, society cannot force this on the offender, and can do no more than to provide, through punishment, an opportunity for expiation. Society can accept the punishment as payment for the crime, even though the offender accepts no remorse for his actions.

The modern theory of retribution is better known as the ‘just deserts’ theory. According to this theory, offenders receive punishment simply because they deserve it. Central to the theory is the belief that human beings are free, autonomous beings who act as they choose to act. Those who choose to break the law do so out of free will, and therefore morally deserve to be punished. The focus of this approach is exclusively on the past criminal conduct of the offender. It follows that the future misconduct of the offender, or indeed his rehabilitation, is irrelevant. Furthermore, as deserts theorists believe that the offender’s conduct alone is justification for the punishment, the possibility of deterrence is also irrelevant, although such theorists are quite willing to accept deterrence as a useful by-product of retribution. All that is of concern to the deserts theorist is the moral blame attaching to the offender due to his criminal action. He must ‘get what he deserves’. This in turn places a limit on the punishment that can be imposed. Unlike the theory of incapacitation, which might attract a heavier punishment than the actual offence deserves, the deserts judge will try to measure the harm done and the guilt of the offender, and impose a sentence that visits a proportionate amount of harm on the offender. In other words, deserts theory holds that the punishment must be proportionate to the crime. This is the proportionality principle. It is this principle that distinguishes a just deserts approach from that of pure vengeance, which held that the punishment should equal the crime.

Deterrence

Theories of deterrence operate on the basis of ‘prevention is better than cure’. The hope is that by imposing a punishment, there will be less crime in the future. Hence, the deterrent effect of a criminal punishment assumes great importance,

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and works in two ways. First, it is hoped that the individual offender will be taught that 'crime does not pay' and that he will not reoffend. This is known as individual deterrence. The court must look at the individual offender and impose a sentence that is likely to make a lasting impression on him. This necessarily involves the court in making a prediction as to the offender's likelihood of committing further offences. If the court feels that there is little such likelihood, then a lenient sentence such as probation might be justified. If, however, the likelihood is high, then a lengthy prison sentence may be required. The necessity for such predictions, however, is also the greatest weakness of the individual deterrent approach. Predicting the future behaviour of a person can never be an exact science. Additionally, this approach could lead to sentences that bear little or no relation to the severity of the crime. If X, a young man with an unblemished record, kills his wealthy father in order to receive his inheritance, the court may have no reason to believe that X will commit another offence in the future. On a strict individual deterrent basis, the court should therefore impose a lenient sentence. Indeed, if there is no chance of X committing other offences, theories of deterrence would suggest that there is no point in imposing any punishment at all. The opposite is also true: if Y is a persistent litterbug, individual deterrent theory would suggest a severe sentence in order to deter his littering habits. It is likely that the disparity in the treatment of X and Y would result in considerable public concern.

The second form of deterrence focuses on criminal punishments that encourage others to avoid becoming involved in criminal activity, thus reducing the overall level of crime in the community. This is known as general deterrence. Under this form of deterrence, the offender's guilt is not the central issue; rather, it is the public perception of his conduct that will decide his sentence. So, if the offender commits a crime that is on the increase, he might receive a punishment that would ordinarily be considered excessive. If, for example, the courts believe that there are too many burglaries, and X is convicted of burglary, the courts may decide to make an example of him by imposing a sentence of life imprisonment. Alternatively, if X commits a rare offence, the courts might be justified in imposing a very light sentence as to do otherwise would be superfluous because no one else is committing that kind of offence anyway. Such an approach attracts the same criticism as individual deterrence: there is no necessary connection between the offence and the punishment imposed. Furthermore, there is little real evidence that other criminals will be deterred from their intended conduct. General deterrence is dependent in part on the perceived ability of the gardaí to catch criminals. If the gardaí are perceived to have a low rate of success against criminals, potential criminals may be more willing to take the chance of committing a crime. The greater confidence the criminal has in his own law-breaking skill, the less thought he will give to being caught, and therefore to the possibility of severe punishment.

Rehabilitation

The law is also concerned that an offender be given a chance to rehabilitate himself to become a useful member of society. In this respect, crime can be seen as a form of illness, and punishment as a form of therapy or cure. It should be stressed that this is not entirely for the benefit of the offender alone, but also for that of society as well. It is obviously in society's best interests that offenders turn away from crime, thereby contributing to the overall well-being of society. However, while rehabilitation is a noble and ambitious goal, it does have certain difficulties. First, it requires a high level of State intervention, which in turn requires a high level of resources. Second, in common with deterrence, rehabilitative measures have no necessary connection with the crime committed. From a rehabilitation perspective, the sentence imposed should be the one most likely to rehabilitate the offender, not the one that his crime actually deserves. Indeed, the more serious the offence, the more 'ill' the offender, and therefore the greater the necessity for him to be rehabilitated instead of punished. Finally, the evidence that rehabilitative schemes accomplish their goals – as measured by recidivism rates – is spotty at best.

1.16 Modes of Punishment

Until 1990, the most severe punishment that could be imposed was the death penalty, given in cases of capital murder, treason or some offences against military law. However, the Criminal Justice Act 1990 formally abolished the death penalty (sentences for which were, as a matter of policy, commuted anyway since the 1950s). The imposition of the death penalty is now unconstitutional by virtue of the 21st Amendment of the Constitution 2001; further, the constitutional prohibition on the death penalty has been removed from the ambit of the emergency powers provisions of Article 28. Consequently, the death penalty cannot be lawfully reinstated in Ireland even if the Constitution is suspended due to an emergency. Additionally, the use of corporal punishment is expressly prohibited by section 12 of the Criminal Law Act 1997. It might also be noted that, in line with the recommendations of the Law Reform Commission (*Report on Non-Fatal Offences Against the Person* (1994)), the immunity from prosecution that a teacher once had in respect of corporal punishment imposed upon a student has been abolished by section 24 of the Non-Fatal Offences Against the Person Act 1997.

The sanctions available today are imprisonment, fines, forfeiture, community service orders, probation, compensation orders and supervisory measures.

Imprisonment

The most severe punishment available is imprisonment. Until 1997, there were technically three types of imprisonment: imprisonment, imprisonment with hard

labour, and penal servitude. There was, however, little practical difference between them. In any case, section 11 of the Criminal Law Act 1997 has now formally abolished penal servitude and hard labour. Sentences of imprisonment may be suspended if the court feels it is appropriate in the circumstances to do so. Where a person is convicted of a number of offences, he may receive a number of sentences which will usually run concurrently. However, sentences in respect of offences committed while on bail must run consecutively to any sentence imposed in respect of the previous offence (Criminal Justice Act 1984, section 11, as substituted by section 22, Criminal Justice Act 2007). The Law Reform Commission, in its *Report on Sentencing* (1996), recommended that imprisonment be viewed as the sanction of last resort.

Fines

Financial penalties account for the bulk of criminal sanctions imposed by the courts. They may be imposed either as a penalty in themselves or in addition to another penalty and represent a source of revenue that helps to defray some of the cost of the criminal justice system. The amount of the fine will depend on the relevant statute, which will usually specify the maximum amount that can be imposed. For summary offences, the Fines Act 2010 now classifies fines into five categories: Classes A (up to €5,000) to E (up to €500). Fines for indictable offences are not subject to this classification scheme. To counter the effect of inflation, the 2010 Act introduced a multiplier scheme to be applied to maximum fines for indictable offences set by legislation enacted prior to 1997. The Act also made provision for increasing summary fines set by legislation enacted before 2011. In imposing a fine, the 2010 Act requires the sentencing court to take account of the offender's ability to pay, and makes provision for various enforcement options, including installment payments, receivership and imprisonment in default. Aside from the multiplier provisions, much of the 2010 Act will be superseded by the Fines (Payment and Recovery) Act 2014 when that Act is brought into force. This latter Act makes provision for recovery orders, attachment orders and the imposition of community service orders or imprisonment in default of payment.

Forfeiture

In modern Irish law, the most important forfeiture provisions are found in the Proceeds of Crime Act 1996 as amended by the Proceeds of Crime (Amendment) Act 2005, both of which are enforced by the Criminal Assets Bureau (CAB). These Acts permit the courts to order the forfeiture of property in Ireland and, under certain conditions, property outside Ireland with a value in excess of €13,000 where such property directly or indirectly represents the proceeds of criminal conduct. The CAB was established under the Criminal Assets Bureau

Act 1996 for the purpose of identifying assets that have been gained directly or indirectly from criminal activity and to initiate any necessary legal steps required to seize such property. The staff of the CAB is drawn mainly from the gardaí, but it also contains personnel from the Revenue Commissioners and the Department of Social Welfare. Orders under the 1996 Act can be granted even where the respondent has not been convicted of any criminal offence. In *Murphy v. GM (2001)*, the appellants argued that the absence of the protections granted by Article 38 of the Constitution to criminal defendants rendered the 1996 Act unconstitutional. The Supreme Court held, however, that the proceedings were civil in nature. The 1996 Act does not contain the indicia typical of criminal proceedings, such as powers of arrest and detention, the provision of bail, the imposition of punishment in default of payment, or the initiation of proceedings by summons or indictment. Further, the Court ruled that forfeiture of the proceeds of crime had historically been considered a civil matter.

The Criminal Justice Act 1994, as amended by the Criminal Justice Act 1999, also contains some forfeiture provisions, the most important of which are aimed specifically at drug traffickers. Section 4 of the 1994 Act, as substituted by section 25 of the 1999 Act, requires that a court that has convicted a person of drug trafficking offences (supplying, transporting, storing, importing or exporting drugs) must also make a determination as to whether that person has benefited from drug trafficking, unless it is clear that the person has insufficient means to make forfeiture worthwhile. That determination will then form the basis of a confiscation order. The court is entitled to assume that any property gained by the offender during the period of six years prior to the institution of the proceedings in question was gained in connection with such offences. This assumption may, however, be rebutted. If not, the court may then order the offender to pay the full value of the property to the State.

Community Service Orders

Community service orders were introduced into Irish law by the Criminal Justice (Community Service) Act 1983, as amended by the Criminal Justice (Community Service) (Amendment) Act 2011. Any court other than the Special Criminal Court may impose a community service order on an offender in lieu of a sentence of imprisonment. If the appropriate sentence is less than twelve months' imprisonment, the sentencing court is obligated to consider the alternative of a community service order. The court should seek a probation report on the offender, and assess his suitability for the order. Such an order can be imposed only on offenders aged over sixteen and requires that the offender perform unpaid work for between 40 and 240 hours in total under the supervision of a probation officer. The offender must consent to the order, and a failure to perform the service is an offence itself under the 1983 Act.

Probation

Probation is an option that has a long history in Ireland, and is now governed by the Probation of Offenders Act 1907. It may be applied to any offender who has been convicted of an offence punishable by imprisonment. There are two forms of probation: one that operates only in the District Court and one that operates in all courts. The former, sometimes called an absolute discharge, allows the District Court, despite having concluded that the offence has been proven, to order the release of the defendant without formally proceeding to a conviction. This decision should be made according to the District Court's assessment of the defendant's character and circumstances, the trivial nature of the offence, the presence of extenuating circumstances or expediency. The other form of probation, sometimes called a conditional discharge, allows any court to release the defendant following conviction, subject to the defendant entering into a recognisance to be of good behaviour for a period of up to three years.¹⁶ If during the probation period the defendant breaches his recognisance, he must appear in court to be sentenced for the original offence. During probation, the defendant will be under the supervision of a probation officer. Further, the District Court has the power to bind a defendant over to keep the peace under the Courts (Supplemental Provisions) Act 1961. Such an order operates in much the same way as a conditional discharge.

Finally, the District and Circuit Courts have the option, apparently unique to Ireland, of requiring a defendant to make a contribution to the Poor Box in lieu of conviction. In *Kennedy v. Gibbons (2014)*, the High Court held that the Poor Box was 'so widespread and inveterate throughout the State both before and after 1922, that it must accordingly be regarded as part of the common law which was carried over into our modern legal system by Article 50.1 of the Constitution'. The court indicated, however, that the Oireachtas could alter or abolish the practice if it so desired. The Law Reform Commission, in its *Report on the Court Poor Box (LRC 75-2005)*, found that the Poor Box option is exercised most frequently in connection with breaches of the peace. Approximately €1 million is paid into the Poor Boxes throughout the country each year, with the vast majority coming from District Courts.

Compensation

Since 1974, a Criminal Injuries Compensation Tribunal has existed to provide State compensation in respect of injuries incurred as a result of criminal activity. Since 1986, however, the Tribunal has been limited to making payments in respect of quantifiable losses, such as medical bills. The primary general compensation scheme now in force in respect of criminal acts is provided for by section 6 of the Criminal Justice Act 1993. This provision requires a sentencing

16 A recognisance is a formal agreement entered into by a defendant to keep the peace.

court to impose a compensation order on offenders unless the court has good reason not to do so. In making this order, the court should consider the financial means and obligations of the offender. On conviction, a court should order the offender to pay compensation to his victim in respect of personal injuries or losses arising from the offence, unless the judge has good reason not to do so. The amount of the compensation is a matter for the trial judge, but should not exceed the compensation that would be ordered by a civil court for similar injuries. In *The People (DPP) v. McLaughlin (2005)*, the Court of Criminal Appeal confirmed that payment of compensation does not preclude the imposition of a sentence of imprisonment. In that case, the defendant pleaded guilty to a charge of rape, and had offered the complainant €10,000 in compensation. The Court of Criminal Appeal ruled that there is 'no jurisprudence, principle or practice which renders the payment of compensation to a rape victim inconsistent with the imposition of a custodial sentence'. The court confirmed that the selection of the appropriate sentence was a matter for the trial judge's discretion, and the payment of compensation was only one factor to be considered.

Injunctive and Supervisory Measures

Irish law recognises a number of post-conviction measures designed to reduce opportunities for reoffending. The Sex Offenders Act 2001 and the Criminal Justice Act 2006 impose certain notification requirements upon most persons convicted of sexual offences and drug-trafficking offences, respectively. These offenders must notify the gardaí of their names and addresses, and any change in their addresses. This requirement, often referred to as creating a 'Register', allows the gardaí to track the whereabouts of these offenders.

Other statutes have introduced orders that have the effect of restricting offenders' movements, especially those convicted of the main public order offences. The Criminal Justice (Public Order) Act 2003 permits a court to issue an exclusion order that prohibits the subject of the order from entering or being in the vicinity of specified catering premises. These premises are defined to include both licensed and food premises. The Criminal Justice Act 2006 empowers courts to issue restriction on movement orders. These orders can be imposed on offenders aged over eighteen who have received custodial sentences of at least three months in respect of certain public order and non-fatal offences against the person. As the name suggests, the order restricts the movement of the subject by, for example, requiring him to be at home at certain times or to avoid certain places. Finally, the Sex Offenders Act 2001 allows a District Court to issue sex offender orders in respect of persons convicted of certain sexual offences. This order restricts the offender's movement by ordering him to avoid certain specified places at specified times.

The Sex Offenders Act 2001 also contains provisions that allow a sentencing court to impose a period of post-release supervision on persons convicted of

sexual offences. The supervision will be conducted by the Probation Service. This supervision is designed to assist in the rehabilitation of the offender as well as to improve public safety.

1.17 Sentencing in Ireland

The imposition of sentences, and in particular the perceived disparity in sentencing, is an area of criminal justice that has caused considerable public concern, with regular calls for the introduction of sentencing guidelines. The policies followed by the courts in choosing an appropriate sentence can be difficult to discern, as sentencing policy does not always figure prominently in judicial decisions. Additionally, there is a virtual absence of guidance on sentencing from either the Constitution or from statutes. Any such attempt must extract policies piecemeal from various judgments, sometimes leading to the appearance of incoherence. Nevertheless, there are some general points that may be made.

Constitutional Guidance

The Constitution does establish some general principles upon which sentencing should be based. In *Deaton v. Attorney General (1963)*, the Supreme Court held that sentencing forms an integral part of the administration of justice. As a result, sentencing must follow the constitutional requirements of justice, fairness and independence that apply to all other aspects of a criminal trial. In *The State (Healy) v. Donoghue (1976)*, Henchy J. held that these constitutional requirements created

[A] guarantee that a citizen shall not be deprived of his liberty as a result of a criminal trial conducted in a manner or in circumstances calculated to shut him out from a reasonable opportunity of establishing his innocence, or where his guilt has been established or admitted, of receiving a sentence appropriate to his degree of guilt and his relevant personal circumstances.

This statement suggests that the Irish courts are constitutionally prohibited from imposing sentences that are excessive in relation to the crime and the degree of blameworthiness of the offender. In effect, the Irish courts must exercise proportionality in their sentencing practices. This was the attitude of Flood J. in *The People (DPP) v. WC (1994)*, when he stated that:

The selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality. By this I mean that the imposition of a particular sentence must strike a balance between the particular circumstances of the commission of the relevant offence and the relevant personal circumstances of the person sentenced.

More recently, in *The People (DPP) v. Kelly (2005)*, Hardiman J. said that ‘sentences must be proportionate not only to the crime but to the individual offender.’ This principle is now well entrenched and forms the foundation of

sentencing practice in Ireland. However, in *Lynch and Whelan v. Minister for Justice, Equality and Law Reform (2010)*, the Supreme Court indicated that the principle of proportionality applicable to sentencing is not a constitutional principle.

Second, in *The People (Attorney General) v. O'Callaghan (1966)*, Walsh J. held that the concept of personal liberty protected by the Constitution prevents the punishment of any person in respect of any matter of which he has not been convicted. The only exceptions to this general rule would have to be carefully spelled out by the Oireachtas, and would in any event have to be limited to the 'most extraordinary circumstances' where the preservation of public peace, order or safety, or the safety of the State was at stake.

Third, in *O'Callaghan*, the Supreme Court made it clear that the Constitution will not allow any form of preventative justice. Therefore, an offender cannot receive a sentence that is excessive in relation to the crime he committed and to his degree of guilt. Consequently, the incapacitation approach to punishment could run into serious constitutional problems. So, in *The People (DPP) v. McMahon (2011)*, the defendant had been convicted of causing serious harm to a psychiatrist who was treating him. The trial court sentenced him to ten years' imprisonment, but the DPP appealed on the basis that the defendant was so dangerous that he should have received a life sentence. The Court of Criminal Appeal accepted that the protection of the public is a legitimate concern for a sentencing judge, and may justify a more severe sentence. However, sentencing an offender inappropriately to life imprisonment, as requested by the DPP, would constitute preventative detention and was also an 'inappropriately indirect and crude way of dealing with' a mentally ill offender.

Statutory Guidance

Statutory influence on sentencing is comparatively light. In *The People (DPP) v. WC (1994)*, Flood J. made the following observation:

The role of legislation, subject to some exceptions, has been to provide a power to sentence an accused person, and to set the outer limit of its use. The sentence to be imposed on an accused person in a particular case is solely a matter for a trial judge in the independent and impartial exercise of judicial discretion.

The central role in sentencing is therefore occupied by the courts. Nevertheless, there is some general guidance given in legislation. First, as noted by Flood J. in *WC*, the primary role of the legislature in sentencing is to decide on the maximum sentence that can be imposed. This legislative decision is inevitably based on the Oireachtas's view of the seriousness of the offence and is generally unreviewable by the courts. In some cases, the Oireachtas has imposed mandatory sentences, most importantly the mandatory sentence of life imprisonment in respect of murder (Criminal Justice Act 1990). The Oireachtas has also enacted presumptive sentences in respect of drug-trafficking offences. So, anyone convicted of possession of

controlled drugs with intent to supply under section 15A of the Misuse of Drugs Act 1977, as amended by the Criminal Justice Act 1999, should receive a minimum sentence of ten years' imprisonment, unless there are specific and exceptional circumstances in the case that would make such a sentence unjust. A study commissioned by the Department of Justice in 2005 shows that this caveat has allowed the judiciary to avoid imposing the minimum sentence in many cases: out of fifty-five cases studied, the minimum sentence was imposed only three times.¹⁷

Second, section 8 of the Criminal Justice Act 1951, substituted by section 9 of the Criminal Justice (Miscellaneous Provisions) Act 1997, allows courts to take into account offences admitted to by a defendant who has been convicted of another offence. The advantage to the defendant of doing this is set out in section 8(2), which prohibits any subsequent prosecution for the offences so taken into account. However, in *DPP v. Gray (1987)*, Henchy J. stated that section 8 only applied to offences that were within the jurisdiction of the court that convicted the defendant. Therefore, the District Court cannot take an admission of murder into account. If the court agrees to take these other offences into account, a higher sentence may be imposed, but it may not exceed the maximum sentence allowed for the offence for which the defendant has been convicted.

Third, the Criminal Justice Act 1993 contains two provisions that can have an effect on sentencing. First, section 2 allows the DPP to appeal to the Court of Appeal any sentence that he feels is unduly lenient. The Court of Appeal has the power to substitute a new sentence or to refuse the appeal. The Law Reform Commission, in its *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC CP33–2004), provisionally recommended that this power of appeal be extended to sentences in summary cases heard in the District Court. In its *Report on Prosecution Appeals and Pre-Trial Hearings* (LRC 81-2006), the Commission maintained this view in principle but felt that, in the absence of information about sentencing practices in the District Court, it would be inappropriate to implement such a power. The Commission indicated, however, that the situation should be kept under review.

Fourth, section 5(2) of the Criminal Justice Act 1993, as substituted by section 4 of the Criminal Procedure Act 2010, provides that, when sentencing a person for certain violent offences, the court must take into account the effect of the offence on the victim. The offences in question are sexual offences, offences involving violence or threats, offences under the Non-Fatal Offences Against the Person Act 1997 and offences under the Criminal Justice (Female Genital Mutilation) Act 2012 (as inserted by section 13b of that Act). The court is empowered to receive evidence or submissions as to the effect of the offence on the victim, including from the victim, who has a statutory right to be heard under

¹⁷ Patrick McEvoy, B.L., *Research for the Department of Justice on the Criteria Applied by the Courts in Sentencing under s.15A of the Misuse of Drugs Act 1977 (as amended)*, 2005, available at www.justice.ie.

section 5(3). Further, section 5(4) provides that if the victim does not exercise his or her right under section 5(3), the court shall not infer that the offence had little or no effect upon the victim.

Finally, some attempt at encouraging consistency in sentencing was made by the Criminal Law Act 1997. Section 10(1) provides that if a person is convicted on indictment of a statutory offence, the penalty for which is imprisonment, but the term is neither specified nor expressed to be up to life imprisonment, then that person should be sentenced to no more than two years. In the case of an attempt to commit an indictable offence for which a maximum penalty is specified, section 10(2) provides that the sentence should not be greater than that which would be imposed for the commission of the complete offence. For example, if the penalty for the full offence is ten years' imprisonment, the penalty for an attempt should be less than ten years. The courts are also given the general power, in section 10(3), to impose a fine either in addition to some other punishment or in lieu thereof. This power is, however, subject to any other statute under which the offence must be dealt with.

Aside from these statutory measures and the constitutional framework mentioned above, a judge has almost absolute discretion in imposing sentences. This independence has been perceived as leading to a wide disparity in the sentences imposed in seemingly similar cases, and has provoked calls for the introduction in Ireland of sentencing guidelines to control judicial discretion. In England, the Court of Appeal issued guidelines on sentencing for many years, such as those for the crime of rape in *R v. Billam* (1986). The Crime and Disorder Act 1998 established a Sentencing Advisory Panel to produce draft guidelines which would then be sent to the Court of Appeal for consideration. The Panel's membership was drawn from the judiciary, academia and criminal justice practitioners. The Criminal Justice Act 2003 then transferred the Court of Appeal's guidelines function to a newly created Sentencing Guidelines Council. Finally, the Coroners and Justice Act 2009 created a Sentencing Council, which combines the functions of the other two bodies. The 2009 Act requires the Council to promote a clear, fair and consistent approach to sentencing, to produce analysis and research on sentencing, and to work towards improving public confidence in sentencing.

The Irish courts have until very recently taken a different approach, endorsing the principle of judicial independence in sentencing. The justification for this principle was given by the Supreme Court in *Deaton v. Attorney General* (1963), per O Dálaigh C.J.:

Where the legislature has prescribed a range of penalties the individual citizen who has committed an offence is safeguarded from the executive's displeasure by the choice of penalty being in the determination of an independent judge. The individual citizen needs the safeguard of the courts in the assessment of punishment as well as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty; and it is inconceivable

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to my mind that a constitution which is broadly based on the doctrine of separation of powers . . . could have intended to place in the hands of the executive the power to select the punishment to be undergone by citizens.

The development of sentencing guidelines does not necessarily breach the separation of powers, however. The Sentencing Council of England and Wales consists of fourteen members, eight of whom are judges. Arguably, therefore, the Council could be located within the judicial branch of government. Hence, any guidelines it issues would come from the judicial branch and therefore would not contradict the separation of powers. This was the conclusion of the United States Supreme Court in *Mistretta v. US* (1989) in respect of the creation of the United States Sentencing Commission, which was charged with the creation of sentencing guidelines for federal courts in the US. Consequently, an arrangement in Ireland similar to that established in England could overcome the objections set out in *Deaton*. In *The People (DPP) v. Tiernan* (1988), however, the Supreme Court indicated its hostility to judicially created sentencing guidelines. The Court had been asked specifically by the Attorney General for guidelines in rape cases, but the Court endorsed the ‘fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case.’ Because of this, the court felt it inappropriate to ‘appear to be laying down any standardisation or tariff of penalty for cases.’ The most that the court would do was to state that rape should be punished with an immediate and substantial custodial sentence unless there were some exceptional reasons for not doing so.

In March 2014, however, the Court of Criminal Appeal issued judgments in three cases that indicate a substantial move away from *Tiernan: The People (DPP) v. Ryan, The People (DPP) v. Fitzgibbon* and *The People (DPP) v. Z*. The court noted that one of the practical problems identified by the Supreme Court in *Tiernan* – the absence of reliable statistical data – has been overcome to some extent through better reporting and, especially, the work of the Irish Sentencing Information System (ISIS). Further, the court in *Ryan* decided that *Tiernan* did not preclude ‘some broad level of guidance being given by this court as to the range of sentences which may be appropriate for an offence under consideration’. The trial judge would still retain discretion as to the actual sentence to be imposed, bearing in mind the aggravating and mitigating factors that arose in each individual case. Furthermore, in *Z*, the court stressed the need for counsel, especially prosecuting counsel, to assist the trial judge by indicating any relevant information or surveys from ISIS. This represented a substantial change in practice: traditionally, counsel did not offer an opinion on the appropriate sentence, seeing that as an exclusively judicial function.

Objectives

In *The People (Attorney General) v. O'Driscoll (1972)*, Walsh J. set out the objectives of criminal punishment in this country:

The objects in passing sentence are not merely to deter the particular criminal from committing a crime again but to induce him in so far as possible to turn from a criminal to an honest life and indeed the public interest would best be served if the criminal could be induced to take the latter course. It is therefore the duty of the courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal.

In a similar vein, in *The State (Stanbridge) v. Mahon (1979)*, Gannon J. had this to say:

The first consideration in determining sentence is the public interest, which is served not merely by punishing the offender and showing a deterrent to others but also by affording a compelling inducement and an opportunity to the offender to reform. The punishment should be appropriate not only to the offence committed but also to the particular offender.

These passages indicate that the Irish courts follow an amalgamation of three punishment theories: retribution (of the deserts kind), deterrence and rehabilitation. The sentence passed must take account of the particular crime and the degree of guilt of the defendant. In *The People (DPP) v. M (1994)*, the Supreme Court indicated that once the trial judge has decided the seriousness of the crime, 'it is the duty of the court to consider ... the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered' (*per* Denham J.). However, in passing sentence, the courts must also bear in mind the possibility of rehabilitation. Accordingly, even if the circumstances warrant it, a sentence should not be so harsh as to prevent the possibility of reform by the offender. Finally, the importance of deterrence, both individual and general, to the public interest is recognised. As noted above, deterrence of either kind could in theory result in excessive or lenient sentences being imposed, but the possibility of this is minimised by the requirement that the sentence reflect the crime committed and take account of the possibility of reform. Thus, each of these principles acts as a check on the others.

Guilty Pleas

In *The People (DPP) v. Tiernan (1988)*, the Supreme Court specifically recognised that an early guilty plea was a relevant factor to be taken into account when sentencing an offender. The facts of that case were as follows: the complainant had been sitting with her boyfriend in her boyfriend's car when the defendant and two others forced their way into the car and drove it some distance away. The boyfriend was assaulted and locked in the boot of the car. The

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complainant was then raped on more than one occasion by two of the men, suffered violence and was forced to engage in acts of sexual perversion. The complainant suffered severe psychiatric trauma resulting in a serious nervous disorder which rendered her unfit for work for six months. The defendant himself had a number of prior convictions for violent offences. He had, however, pleaded guilty from the outset, and argued that the trial court's sentence of twenty-one years' imprisonment was excessive and did not reflect the guilty plea. The Supreme Court accepted that an early guilty plea was an important and relevant factor in determining a proper sentence for any offence. How relevant it is would depend on the circumstances of the case in question. In this case, the Supreme Court accepted that it was important because it had spared the complainant from giving evidence – Finlay C.J. specifically stated that had the defendant forced the complainant to testify, he would have had little hesitation in affirming a sentence of twenty-one years' imprisonment. As it was, however, the complainant had been spared and, bearing in mind the 'desirability of contemplating that the accused should some day be rehabilitated into society', the sentence was reduced to seventeen years' imprisonment.

Three justifications are usually put forward for allowing a discount for an early guilty plea. First, a guilty plea may be an expression of genuine remorse. In *The People (DPP) v. WC (1994)*, one of the factors that influenced Flood J. in deciding to impose a nine-year suspended sentence on the defendant for rape was the fact that the defendant had 'shown real and convincing remorse virtually from the moment of commission of the crime'. Second, by admitting the charge, the defendant spares the victim the ordeal of testifying in court and having to suffer cross-examination. This is particularly important in sexual offences, where the victim's evidence would be especially distressing. The Supreme Court placed special emphasis on this justification in *Tiernan*, in which the plea was made at an early stage of the investigation and was followed by a guilty plea in court. Third, if the defendant pleads guilty at an early stage, the trial will be considerably shorter, and the criminal justice system will be able to proceed more efficiently. In *WC*, Flood J. acknowledged that the defendant's guilty plea had 'saved the State the expense of what could have been a lengthy trial'. However, this is one of the few instances where efficiency has been accepted by the Irish courts as a justification for allowing a reduced sentence for a guilty plea. The principal justifications therefore are remorse and sparing the victim.

It must be stressed that a guilty plea is not automatically followed by a discount in the sentence. Section 29 of the Criminal Justice Act 1999 requires the courts, if appropriate, to take into account both the stage at which the guilty plea is entered and the circumstances in which it was entered. Further, section 29(2) specifically permits the imposition of the maximum sentence available for the offence in question despite a guilty plea if there are exceptional circumstances which warrant the maximum. This provision essentially deals with situations

such as that which arose in *The People (DPP) v. FB (1997)*, in which the trial judge indicated that he was obliged by precedent not to impose the maximum sentence because a guilty plea had been entered. Finally, where a defendant does not plead guilty, he may not be punished for not doing so through the imposition of a heavier sentence.

Other Factors

Given the Irish courts' commitment to handing down individualised sentences, it is difficult to summarise the kind of factors that they will take into account in determining a sentence. Typically, the courts are quite lenient to young offenders, on the basis that such offenders should be given a chance to mend their ways. Indeed, section 96(3) of the Children Act 2001 specifically empowers a sentencing court to treat a child's age and level of maturity as mitigating factors. Further, section 96(2) requires a court to impose the least restrictive appropriate penalty, and in particular to treat detention as a measure of last resort.

The courts may also occasionally exercise leniency in respect of defendants who might find prison life exceptionally difficult. In *DPP v. Clarke (1997)*, the defendant was a Jamaican national who had been sentenced to seven years' imprisonment for possession of crack cocaine with intent to supply. The Court of Criminal Appeal accepted that his nationality made prison life more difficult in that he was a target for other prisoners. On this basis, coupled with the fact that he was young and of previously good character, the court reduced the sentence to five years' imprisonment. Similarly, in *The People (DPP) v. Malric (2011)*, the Court of Criminal Appeal reduced the French offender's sentence substantially, having noted that imprisonment in Ireland was more onerous on her, especially as she had only limited contact with her family.

Particular hardship to a defendant's family may also result in leniency. A good support network is another factor that will be taken into account, on the understanding that such support will increase the chances of successful rehabilitation. Thus, in *The People (DPP) v. M (1994)*, the Court of Criminal Appeal reduced a sentence passed on a member of a religious order for sexual offences against children on the basis that on his release, he would return to his order where he would receive treatment and would never again have access to children. Similarly, in *The People (DPP) v. G (1994)*, the religious defendant's seven-and-a-half-year sentence for buggery was reduced to eighteen months in prison with the balance suspended provided that he spent the rest of the sentence at a secure religious institution.

Finally, co-operation with the gardaí in an investigation will usually also warrant a discount. The defendant's complete co-operation with the gardaí in *The People (DPP) v. G (1994)* was one of the factors, in tandem with his early guilty plea, that influenced the Supreme Court to reduce twelve concurrent life sentences to fifteen years' imprisonment on each count. Similarly, in *The People*

(DPP) v. Cleary and Brown (2012), the Court of Criminal Appeal reduced a ten-year sentence for drug trafficking to a suspended four-year sentence, pointing in particular to a letter from the gardaí that detailed the appellants' material cooperation.

It should also be stressed that the courts are not limited to looking at mitigating factors. As was made clear in *O'Driscoll* and *Stanbridge*, the courts must pass a sentence that is appropriate to the crime and to the criminal. Accordingly, they must also consider any aggravating factors. What precisely constitutes an aggravating factor will depend on the facts of the case and the nature of the offence committed. In *Tiernan*, the Supreme Court described the following factors as aggravating the rape: the fact that it was a gang rape; it was accompanied by violence and abduction; the rape was repeated; there were accompanying acts of perversion; the effect of the experience on the victim was severe; and the defendant had prior convictions for violent offences. More recently, in *The People (DPP) v. Keane (2008)*, the Court of Criminal Appeal accepted as an aggravating factor the fact that the defendant had raped the complainant, having broken into her home. Such an act violated not only the complainant but also the 'sense of security which citizens feel they have for themselves and their children in the safety of their home'.

Consecutive and Concurrent Sentences

If a defendant is charged with multiple offences or with multiple counts of the same offence and is convicted, he will be sentenced for each offence or count of offence for which he has been convicted. The question then arises as to whether those sentences should run concurrently or consecutively. The main statutory authority that exists applies to offences committed while on bail; in such cases, the sentences are to run consecutively (Criminal Justice Act 1984, section 11(1), as substituted by section 22 of the Criminal Justice Act 2007). In other cases, the courts have discretion although there is a clear preference for concurrency. The leading authority on this point of sentencing principle is *The People (DPP) v. McC (2003)*. The Court of Criminal Appeal was dealing with a serial child abuser who had pleaded guilty to a variety of sexual offences including rape, sexual assault and possession of child pornography. There were six young victims and the acts in question occurred on different occasions. The trial Court imposed concurrent sentences in order to take account of the defendant's guilty plea and the absence of previous convictions. The Court of Criminal Appeal accepted that if there are several unconnected offences involving different victims, the trial judge has discretion to impose consecutive sentences. However, the court went on to point out that 'it has long been the sentencing practice in this jurisdiction that a discretion in favour of consecutive sentences is exercised sparingly.' Further, the court indicated that one of the factors that should influence a trial judge in his discretion is the maximum sentences available for the offences in question. If they are quite short, then the totality of the sentence might be inadequate and consecutive

sentences might be required. If, as in this case, the maximum sentences are long (rape, for example, carries a maximum sentence of life imprisonment), then the need for consecutive sentences should recede.

Law Reform Commission Recommendations

The Law Reform Commission has reviewed the whole area of sentencing (*Consultation Paper 12* (1993) and *Report on Sentencing* (1996)). However, the discussion on the objectives of sentencing caused a division in the Commission. The majority set out five statements of principle in relation to sentencing:

- (1) Society requires a system that will demonstrate a rejection of anti-social behaviour, and by so doing, will create and reinforce a sense of social values;
- (2) Punishment must be proportionate to the harm done or risked, and to that end, the law must publicly create a hierarchy of wrongs that roughly accords to the damage or potential damage involved;
- (3) The criminal justice system exists to provide protection to the community, and the imposition of punishments is one of the main methods of securing this objective;
- (4) Punishment must not be inflicted for its own sake, but should have a purpose such as to demonstrate society's rejection of criminal behaviour; and
- (5) Punishment must bear some relationship to the offender's capacity to control his behaviour, and therefore to his degree of guilt.

The majority recommended that, on the basis of these statements of principle, when imposing a sentence, the judge should completely disregard deterrence, and should also disregard rehabilitation if the sentence is to be imprisonment. Instead, the judge should be guided solely by the 'just deserts principle'. In other words, the offender should receive the sentence that his crime and his culpability deserves. The majority felt that this was the best way to introduce some degree of uniformity and consistency into sentencing policy.

The Commission felt that the best way to implement its proposals would be to introduce non-statutory guidelines which would provide that:

- (a) The severity of the sentence should be measured solely by the seriousness of the offence;
- (b) The seriousness of the offence should be measured by the harm caused or risked by the defendant, and his degree of guilt;
- (c) Deterrence and rehabilitation (when the sentence was for imprisonment) should be irrelevant in determining the severity of the sentence; and
- (d) Possible mitigating and aggravating factors should be specified.

Aggravating factors include the use or threat of violence or a weapon, the fact that the victim was a law enforcement officer, the use or threat of excessive cruelty, or the abuse of a position of confidence or trust. Mitigating factors

included provocation, the absence of serious injury, the fact that the offence was committed through strong temptation or was motivated out of compassion or sympathy, or that the defendant was suffering from reduced mental capacity at the time of the commission of the offence.

More recently, in its *Report on Mandatory Sentences* (LRC 108-2013), the Commission recommended that a Judicial Council be established to develop sentencing guidance and guidelines in a more structured manner. The Council should have regard to the guidance provided by decisions from the Supreme Court and Court of Criminal Appeal, and also to the aggravating and mitigating factors identified by the Commission in 1996. The Commission further recommended (by a majority) that the mandatory sentence of life imprisonment for murder be retained. In murder cases, the sentencing judge should have the power to recommend a minimum term to be served. Finally, the Commission recommended that many of the existing presumptive and mandatory minimum sentences be repealed, and that this approach to sentencing should not be extended to other offences.

1.18 Further Reading

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