

## THE PRINCIPLE DEFICIT IN NON-CUSTODIAL SANCTIONS

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### INTRODUCTION

My basic premise is that custody should be used as a punishment only when necessary to protect the public or as a last resort. Non-custodial sanctions should be the norm. In my view, however, we have been unreasonably slow in developing a broad range of non-custodial sanctions and in promulgating transparent principles for the application of those currently available.

There is a broad trend from brutal to more enlightened penal policies in these islands over the past few centuries. In the 18<sup>th</sup> century the death penalty and extreme forms of corporal punishment were still the norm. In the latter part of that century deportation emerged as a 'less severe' alternative to the death penalty with the opening up of the penal colonies in Australia and Tasmania. The 19<sup>th</sup> century ushered in new and more progressive thinking on punishment with the realisation that imprisonment could and should be used not just as a form of retributive punishment but also as an opportunity to reform and rehabilitate the offender. This is reflected in the development of new prison regimes. The twentieth century carried this progress a step further with the realisation that retribution, reform and rehabilitation did not have to be pursued solely within the confines of the prison. They could be pursued effectively in the community; thus the rise of non-custodial sanctions such as probation and, much later, community service orders.

It would appear, however, that the progressive march from brutal to enlightened penal policies stalled in the twentieth century, at least as far as Ireland is concerned. Our embrace of non-custodial sanctions as a means of dealing with serious offences or repeat offenders has been sporadic, uncertain, half-hearted and lacking in any clear and cohesive policy. We have not yet accepted the basic principle that imprisonment is only necessary and should only be

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used where the incarceration of the offender is necessary to protect the public or as a last resort. This can be seen as both a cause and a consequence of the fact that our non-custodial sanctions have developed little beyond what they were a century ago. A contributory factor, and one that I want to focus on in this paper, is our failure to develop policies and principles governing the use of non-custodial sanctions.

### PRINCIPLES

The choice of punishment to impose in an individual case is clearly of huge import for the rights of the offender and for the victim and community at large. In a democracy based on the rule of law it would be reasonable to suppose that the principles governing the choice of sentence would, at a minimum, include:

- Transparency
- Accountability
- Inclusiveness
- Coherence
- Fairness

The first four relate to the form that the principles take and the medium through which they are promulgated. So, for example, they include the requirement that the principles themselves should be publicly promulgated in an accessible form by a democratically accountable legislature and executive. The fifth, fairness, relates to the substance of the principles and includes the manner in which a sentence is selected in individual cases. So, for example, it includes issues such as: the objectives of punishment; criteria governing the use of individual sanction types; proportionality; treating like cases alike and taking account of differences between cases; and fair procedures in the application of a sentence. This last element encompasses requirements such as: sentences to be imposed in a transparent and equitable manner by an independent judiciary; the right of the accused and, where appropriate, the victim to be heard; and the promulgation of reasons for the choice of sentence in

individual cases. Transparency is also important here not just in the selection of sentence in an individual case but in what that sentence entails.

#### THE CURRENT POSITION IN IRELAND

I would argue that the record in Ireland to date shows that we have a long way to go to achieve these goals, at least with respect to non-custodial sanctions. Even more disturbing is the fact that our poor record relates not just to the substance of the principles but to the much more basic issue of how these principles are formulated and promulgated.

We do not have codes setting out general sentencing principles or principles applicable to specific sanctions. We do not even have a single statute dealing specifically with sentencing principles. For the most part the legislature has confined itself to providing for a range of sentencing options and the specification of maximum and minimum tariffs. With the possible exception in the case of children, it has avoided a declaration of anything that can reasonably be described as general sentencing principles. In only a very few situations has it specified principles or procedures applicable to particular offences. In the absence of primary legislation in the area there is very little scope for the executive to adopt further, more detailed, implementing rules.

This legislative and executive deficit is left to be filled by the judiciary. The judiciary, however, are not the most appropriate body for this task. Their role is to administer justice within the framework of the law. They lack the information, resources, methods and democratic mandate necessary to formulate and promulgate State policy on penal sanctions. Nevertheless, they have responded in the only way they can to the challenge foisted upon them. They have developed a body of sentencing principles over a period of time on a case-by-case basis. These, however, are not and can never be interpreted as a comprehensive and coherent set of principles governing all aspects of penal sanctions. For the most part they are confined to matters such as: the general objectives of punishment, the need for proportionality between the offence and the sanction

imposed and the aggravating and mitigating factors that may be taken into account on the facts of individual cases. Moreover, the case law is concerned primarily with custodial sentences. The principles governing resort to non-custodial sentences, including factors such as the choice of sentence and the form that any particular sentence should take, have attracted relatively little direct attention.

The courts are also hamstrung in the discharge of the sentencing function that is appropriately theirs; namely equity in the application of sentencing principles to the facts of individual cases. The nub of the problem here is that there is no body of published guidelines on the type or level of sentence that is appropriate to particular sets of facts, nor is there a database of sentencing decisions which any judge can access to see what sort of sentence is typically being handed down in similar cases by his or her colleagues around the country. This situation is felt acutely at District Court level where the use of non-custodial sanctions is most frequent.

I will focus on two major non-custodial sanctions, fines and community service orders, in order to sketch out the contours of this principle deficit. Before doing so it is worth emphasising the general lack of legislative and executive guidelines on when it is appropriate to resort to custodial or non-custodial sentences. Contrast that with the U.K., for example, where there are clear legislative criteria on the approach that the courts should take when choosing from the range of options open to them. In addition they have the benefit of a Sentencing Advisory Panel which offers updated and more detailed guidance on sentencing for individual offences.

#### FINES

A fine is probably the most common punishment handed down by the criminal courts, and especially by the District Court. It also happens to be the sanction which suffers most from a principle deficit.

A combination of statute and common law provides authority for courts to impose a fine on conviction for any criminal offence, subject to very limited exceptions. Frequently legislation prescribes

the maximum amounts that can be imposed for particular offences and makes provision for the possibility of combining a fine with other punishments. Apart from that, however, the legislature has generally refrained from laying down policy on the use of fines. Similarly, there is a distinct lack of case law on when a fine is an appropriate punishment and on what levels of fine are appropriate to particular sets of facts. This relative silence means that judges, particularly District Court judges, have little concrete guidance on whether to impose a fine in an individual case and, if so, what level of fine to impose. That, in turn, is a recipe for serious inequity.

An obvious legislative intervention that seems long overdue in this context is a facility for linking the level of a fine to an offender's ability to pay. It is easy to see, for example, that a one hundred euro fine imposed on the head of a single income household earning the minimum wage is of a totally different magnitude to a one hundred euro fine imposed on an executive director with an annual income in seven figures.

Legislation was enacted in 1991 in England and Wales to equate the level of fines to ability to pay. Initially, it appeared to be operating effectively. It was very quickly abandoned, however, in the face of intense opposition from affluent interests spearheaded by a particularly vicious campaign by certain sections of the tabloid press. Their cause célèbre was an unemployed man on welfare benefits who was fined the maximum amount of £1000 for dropping chewing gum paper. They quietly ignored the fact that this was the result of the offender failing to inform the court of his economic status. It was clear that all that was needed was some slight tuning to the procedure to avoid such anomalies. It buckled, however, under the weight of the tabloid campaign and lack of support from the government.

In Ireland, the District Court Rules require the judge to take the means of the offender into account when assessing the amount of a penalty. That, however, is not quite the same thing as providing the judge with detailed guidelines on how to relate the level of a penalty to means. Moreover, the judge does not have access to a database of fines handed down in similar cases to similar defendants by his or her colleagues around the country. It would hardly be surprising, therefore, if penalties handed down continued to discriminate much

more heavily against low income offenders and differed significantly in similar cases around the country.

It is important to point out that this whole issue has not been totally ignored in this jurisdiction. In 2003 the Law Reform Commission published a report on fines for minor offences. It recommended, *inter alia*, the adjustment of fines to reflect the financial means of offenders. It also offers some very valuable discussion on how such a system can be put into effect.

Closely associated with the subject of fines is that of donations to the court poor box. This refers to the situation where the offender's guilt is accepted and the Court (usually the District Court) holds out the prospect of not recording a conviction if the offender makes a suitable donation to the court poor box. The proceeds of the poor box are donated to charities. This is a 'disposal option' which is not provided for in law, is not regulated by legislative, executive or judicial guidelines and is, in my view, a very serious blot on our system of justice. It flies in the face of legality, transparency and equity. Almost inevitably, it will operate disproportionately in favour of the more affluent offenders.

The general impression conveyed by reports in the newspapers is that it is used most frequently to deal with less serious public order or property offences committed by offenders from a commercial, professional, administrative or student background. This conveys the impression, whether accurate or not, that money and status can earn the offender not just lenient treatment in sentencing matters, but also a diversion from the criminal justice system altogether. From this perspective the 'real' criminal justice system is reserved for offenders from the wrong side of town.

I am not suggesting that there is no role for a court poor box type system. The current practice has resulted from the judges attempting to deal with serious inadequacies in our law which should have been addressed by the executive and legislature long ago. The problem is that our law has no express facility for dealing with individuals who have committed criminal offences which are normally deserving of punishment, but where the circumstances of the offender are such that the mere fact of conviction will carry grave consequences which are out of all proportion to the harm caused.

The poor box facility is being used to remedy this deficit. It is being used, however, on an ad hoc basis and without any clearly prescribed and transparent principles. While there will be constitutional implications to be addressed in any substitute statutory scheme, these are hardly insuperable. In any event, it is submitted that no scheme would be preferable to the current arrangement.

The Law Reform Commission recently published a report on the use of the court poor box. It identified the major pitfalls in the current practice and proposed major reforms which would retain aspects of that process but place them on a statutory basis in the context of a revised Probation of Offenders Act 1907.

### COMMUNITY SERVICE ORDERS

Ireland was relatively late in coming to community service orders. The necessary legislation was enacted in 1983 and came into force in December 1984.<sup>1</sup> The first community service order (“CSO”) was issued 20 years ago in February 1985. The CSO concept opens up a whole new generation of non-custodial sanctions, with its potential to fashion a sanction which responds to the individual circumstances of the offender as well as the needs of the victim and the community.

The CSO benefits from a degree of legislative and executive regulation that is unparalleled in any other criminal justice sanction in Ireland. The legislation stipulates, *inter alia*, that it can be used only in respect of an offender who is at least 16 years of age, who has been convicted of a criminal offence and who has consented to the making of the order. Moreover, the order can be made in any individual case only as an alternative to imprisonment and where the court, having considered a community service report, is satisfied of the offender’s suitability for community service and the availability of a suitable community service project. Any order imposed must be for at least 40 hours and not more than 240 hours of community service which must normally be completed within a continuous period of 12 months. All of this is stated expressly in the legislation. The regulations add some detail (albeit very sparse) on the work projects.

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<sup>1</sup> Criminal Justice (Community Service) Act 1983; Criminal Justice (Community Service) Regulations 1984; Criminal Justice (Community Service) Act, 1983 (Commencement) Order 1984.

The legislature's and executive's prescription of this level of principle for CSOs is a welcome contrast to their approach to other sanctions. It offers the courts a framework within which to fashion punishments which are more likely to be transparent and equitable. Nevertheless, it is submitted that at one level the prescription is too restrictive and on another level it is not sufficiently detailed. I will start with the former.

The legislation offers only one type of CSO; and that is tied expressly to a substitute for imprisonment. It is available, therefore, only where the judge is otherwise disposed to imposing a prison sentence. It cannot be used in a case where a prison sentence is not appropriate, but where a certain particular form of community service might be particularly suitable on the facts of the case for the purposes of reparation and rehabilitation. Equally, there is no provision for the conversion of other sanctions such as a fine, suspended sentence, disqualification etc into community service.

It is also likely, but by no means certain, that a CSO cannot be combined with some other form of punishment such as: a fine; a suspended sentence or a requirement to undergo an alcohol or drug rehabilitation programme. There is no provision for a suspended CSO or a reduction in the length of a CSO for exemplary performance of the community service.

The limits on the length of a CSO are restrictive. It is easy to see why there must be a minimum length - and 40 hours is not at all unreasonable in this context. But why is the maximum set at 240 hours? If there is an inbuilt assumption that 240 hours CSO equates to  $x$  months imprisonment, then the CSO will not be available for an offender who might be sentenced to a term in excess of  $x$ , even though in the circumstances of the case he or she would be a suitable case for community service. If it is assumed that it would be unreasonable to require an offender to do more than 8 hours community service per week, it would be feasible for an offender to work off a total of about 400 hours over a year. So why is the maximum total not at least 400 hours? At least that would have the merit of making community service available for offenders who would otherwise be locked up needlessly for very long periods of time.

Closely related to the restrictions on CSOs is the issue of lack of choice in community-based sanctions generally. Basically, there is only one type of CSO, and that generally takes the form of unpaid manual work for a charity, a retirement home, a youth club, a sporting organisation, a community project or environmental work in the local community. This conveys a very limited and unimaginative approach to the use of community based sanctions as a tool of reparation and rehabilitation. A huge untapped potential could be released if the scheme was extended to include the possibility of individuals and companies using their knowledge, skills, expertise and resources for the benefit of community groups. Equally, if the State was to provide the necessary insurance cover there could be a significant growth in the number and range of suitable community service projects. Such expansion would, of course, demand a commensurate increase in the number of probation officers engaged in community service. In other words the State would have to divert some of its investment away from prisons and towards community-based sanctions.

Another aspect of the lack of choice is our failure to make more formal provision for self-improvement sanctions, not unlike that associated with the Drug Court idea. In addition to the detoxification programmes these would include options such as: anger-management programmes; relationship skills; parenting skills; etc. The Bridge Project and the Nenagh Restorative Justice Project are further examples of initiatives which should be resourced and promoted as models for adoption elsewhere.

The extension of CSOs and community based sanctions along these lines will require a substantial increase in legislative and/or regulatory prescription in order to ensure equity and transparency in their application. Even as things stand, however, there is surely a lack of detailed prescription. This is most noticeable in the equivalence between CSO hours and months of imprisonment and in the comparability of work projects.

The legislation gives no indication of what a 40 hour CSO (or a 240 hour CSO) is equivalent to in terms of months of imprisonment. It is likely, therefore, that different judges sitting in different parts of the country will be using CSOs differently. Some

will be using CSOs in situations where others would not; some will hand down long CSOs for relatively short prison sentences; and others will do the reverse. When it is considered that there is no database of decisions which each judge can tap into before handing down a sentence, it can be expected that there will be gross disparities across the country.

Research carried out in 1999 confirmed such disparities. Limerick, for example, was a relatively heavy user of CSOs for larceny and public order offences; Cork was a relatively heavy user for less serious assaults; and Wexford used it almost exclusively for driving offences. Judges sitting in rural areas were more inclined to hand down CSOs for public order violations and driving offences than their urban counterparts.

Such differences were even more pronounced with respect to average length of CSOs and equivalences between CSO length and term of imprisonment. Courts in rural areas tended to hand down shorter CSOs than their urban counterparts (127 hours as against 147 hours). Only 3 out of 20 District Court areas had the same CSO equivalent for prison term (i.e. 28 hours equivalent to 1 month of prison). The others ranged from a high of 63 hours to a low of 11 hours.

These disparities can be attributed to a combination of factors. One of these, of course, is a lack of principled guidance in the legislation on the use of CSOs. It is not enough simply to state that they are to be used as a substitute for prison terms. Judges need more detailed guidance on when a CSO is appropriate, how long a CSO should be and what form it should take.

Closely related to this is the relative lack of community-based options. It seems that some judges may be responding to this deficit by resorting to CSOs in situations where they would not otherwise have imposed a prison sentence. There is an urgent need for the development not just of a whole new range of CSOs, but also of community sanctions generally. Such a development will also need to be accompanied with detailed guidance on the appropriate application of each.

Another contributing factor is the absence of a database of decisions which can be accessed by a judge on a case-by-case basis to

ensure that his or her decision in that case is in line with general practice throughout the country. The need for this resource is surely self evident and urgent.

Finally, it must be acknowledged that the judges themselves have a role to play in this. There has been a tendency, particularly at District Court level, to pass sentence without explaining fully the reasons why that particular sentence has been chosen as opposed to some alternative. Not only does a failure to give reasons fly in the face of fairness, but it also fuels the perception that our sentencing policies and practices are lacking in principle. To move meaningfully in this direction will require more judicial resources.

### CONCLUSION

The conclusion can be stated quiet succinctly. Our record in formulating and promulgating policies on sentencing is woefully inadequate relative to the standards that can reasonably be expected in a mature and wealthy democracy based on respect for the rule of law and human rights. This record is particularly poor in the area of non-custodial sanctions. The inevitable consequence is to undermine public confidence in the administration of justice and, indeed, to bring the administration of justice into disrepute.