For 2016, the Third Study Commission, which focuses on Criminal Law, decided to study “The Sentencing of Criminal Offenders.”

That is, we decided to critically examine one of the most important and difficult tasks that a judge performs, namely the imposition of a sanction upon a person who has violated a criminal law.

Of course, the range of sanctions available is very broad, and is driven by many factors. These include, but are not limited to, the seriousness of the crime, the impact of the crime on victims, the need to promote respect for the Rule of Law, the personal characteristics of the perpetrator, and the goal of achieving justice.

In order to facilitate discussion, provoke thinking, and to assist us in learning from colleagues, we ask that each country answer the following general questions:

1. In your country, do judges have broad discretion in choosing a sanction, or are the available sanctions limited by law, guidelines or regulations such as mandatory minimum sentences?

The selection of sentence, where there is a selection to be made, is exclusively a judicial task. In the absence of a mandatory sentence, the selection of a punishment is always a matter for the judge or the court as the case may be. The seminal case which established this principle in Ireland is Deaton v. Attorney General and the Revenue Commissioners.¹ For most criminal offences, the Oireachtas (Parliament) provides for a range of sentences, from zero to a maximum, leaving the specific sentence to be imposed to the sentencing judge.

Examples of instances where the Oireachtas has prescribed mandatory or presumptive sentences² include:

¹ [1963] I.R. 170
² Presumptive sentencing sets up a legal presumption that a particular sentence will apply, while also providing for certain exceptional circumstances in which this presumption may not apply. Thus, a true
• The mandatory life sentence for murder (section 2 of the Criminal Justice Act 1990);

• The presumptive minimum sentence of 10 years’ imprisonment for the possession or importation of drugs with a certain market value, with intent to sell or supply (section 27 of the Misuse of Drugs Act 1977, as amended);

• The presumptive minimum sentences of five years’ imprisonment for certain offences under the Firearms Acts;

• The mandatory minimum sentence of 10 years’ imprisonment for a second or subsequent offence of possessing or importing drugs with a certain market value, with intent to sell or supply (section 27(3F) of the Misuse of Drugs Act 1977);

• The mandatory minimum sentences of five years’ imprisonment or 10 years’ imprisonment for second or subsequent specified offences under the Firearms Acts; and

• The presumptive minimum sentence of three-quarters of the maximum term provided by law or 10 years’ imprisonment where the maximum term is life imprisonment for a second or subsequent “serious” offence under the Criminal Justice Act 2007 (section 25 of the Criminal Justice Act 2007).

The mandatory sentence completely confines a judge’s discretion. This is not the case with presumptive sentencing, although a case will have to be made as to how the offender falls within the legislative exceptions permitted.

3 The offences which attract a five-year presumptive minimum sentence are: (i) possession of a firearm while taking a vehicle without authority (section 26 of the Firearms Act 1964, as substituted); (ii) possession of a firearm or ammunition in suspicious circumstances (section 27A of the Firearms Act 1964, as substituted); (iii) carrying a firearm or imitation firearm with intent to commit an indictable offence or resist arrest (section 27B of the Firearms Act 1964, as substituted); and (iv) shortening the barrel of a shotgun or rifle (section 12A of the Firearms and Offensive Weapons Act 1990, as substituted).

4 The offences which attract a 10-year presumptive minimum sentence are: (i) possession of firearms with intent to endanger life (section 15 of the Firearms Act 1925, as substituted by section 42 of the Criminal Justice Act 2006); and (ii) using a firearm to assist or aid in an escape (section 27 of the Firearms Act 1964, as substituted by section 58 of the Criminal Justice Act 2006).

5 The offences listed at note 3 attract a mandatory minimum five-year sentence where committed on a second or subsequent occasion.

6 The offences listed above at note 4 attract a mandatory minimum 10-year sentence where committed on a second or subsequent occasion.

7 A serious offence includes: murder, certain non-fatal offences against the person, specified firearms and explosives offences, and aggravated burglary.
2. Are practical considerations taken into account by the judge, such as the cost to the government of imprisoning a person or the fact that a foreign perpetrator will be expelled after having served a prison sentence? Or are these irrelevant?

These factors are not relevant in our system.

3. Are victims of the crime permitted any input in the sanction process? If yes, is such input required to be given any weight by the judge?

When imposing sentence on a person for an offence to which this section applies, a court shall, upon application by the person in respect of whom such offence was committed, hear the evidence of the person in respect of whom the offence was committed as to the effect of the offence on such person.\(^8\)

A judge is obliged to take into account and may, where necessary, receive evidence or submissions of the effect of the offence on the person in respect of whom the offence was committed.\(^9\) A person in respect of whom the offence was committed includes, where, as a result of the offence, that person has died, is ill or is otherwise incapacitated, a family member of that person.\(^10\)

Section 5 of the Criminal Justice Act 1993, as amended, applies to (a) sexual offences generally, (b) offences involving violence or the threat of violence to a person, (c) any offence under the Non-Fatal Offences against the Person Act, 1997, and (d) attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b) or (c).

Section 5 also provides that, where a person has been killed, a family member of the person may give evidence as to the effect of the offence concerned on the family members of the person who has died. It also provides that if a person who is ill or otherwise incapacitated as a result of that offence, a family member may give evidence as to the effect of the offence concerned. Where more than one family member seeks to avail of the right, the court may direct the family members to nominate one or more family members for the purpose.

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\(^8\) Section 5(3)(a) of the Criminal Justice Act 1993, as substituted by s. 4 of the Criminal Procedure Act 2010

\(^9\) Section 5(2)(a) of the Criminal Justice Act 1993, as amended.

\(^10\) Section 5(2)(b) of the Criminal Justice Act 1993, as amended.
4. Please describe what information is provided to the judge regarding the crime, the victims, and the perpetrator. Specifically, whether the judge receives information before imposing a sanction on:

A) The details of the crime, including the circumstances, the investigation and the harm done.

B) The personal characteristics of the perpetrator, including education, family background, health, financial resources, prior crimes, etc.

A court should be informed as fully and accurately as possible about the offence and the offender. Where there has been a contested trial, the facts connected with the offence will have been teased out in detail. In the even of a guilty plea, police evidence is usually led on the circumstances of the offence, the degree of cooperation given by the offender and the offender’s previous convictions. The accused must be given the opportunity to admit or deny each previous conviction before the information is put to the court. Failure to hear the accused or his representative on any substantial matter pertinent to sentence is a breach of natural justice.\textsuperscript{11} A statute may specify a higher maximum sentence for a second or subsequent conviction for a particular offence. In such cases, previous convictions must be clearly and unambiguously proved because of their obvious impact on the quantum of punishment to which the accused is liable. The Irish Court still accept some degree of informality in the information provided to a court where the accused has pleaded guilty.\textsuperscript{12} As outlined in \textit{People (DPP) v. K(D)}\textsuperscript{13}, the purpose of all the information is to give the judge the best possible picture of the offender, the circumstances of the offence and the impact on the victim. This is an acceptable policy as long as any contested facts are properly proved.

In respect of the personal circumstances of the offender, a judge may be provided with any or all of the following information: age (youth/old age), background, family, home, employment, education, financial, dependents (particularly where offender is sole supporter, dependents of a young age, family rights and personal rights of children), health, addiction, any additional hardship (social disgrace, illnesses, worries), future plans, apology, contrite, confession, remorse, loss of job, effect of employability, unemployable on release, getting into (further) debt, possible homelessness (i.e. removal from local authority housing list), effect on family.


\textsuperscript{12} O’Malley, \textit{Sentencing Law and Practice} (2\textsuperscript{nd} ed.)(Thomson Round Hall, 2006), p. 567.

\textsuperscript{13} [2002] 3 I.R. 534, p. 538.
In respect of previous convictions, information should be provided on whether they were of a similar or different character and if of a different character: the date committed, whether sentence was actually served, whether fine was paid, the date the accused was released, whether on pleas of guilty, prior and post good or bad character, if any.

C) The characteristics of the victim or victims, if any, including the effects of the crime on them and the nature and extent of any injury caused by the crime.

On this issue, see also the response to question three.

A Victim Impact Report may include the following:

- Impact on physical, psychological and social development
- Victim feeling that s/he is being punished because of the crime
- Guilt arising from the anxiety suffered by his/her parents because of the crime
- Difficulties maintaining an appropriate functional communication status, rather than a manipulative or aggressive presentation.
- Losses which the victim grieves and which s/he attributes to the crime include:
  - Loss of a close relationship.
  - Loss of family life and ability to live within his/her family.
  - Loss of an appropriate son or daughter relationship.
  - Loss of sibling relationships.
  - Loss of a normal adolescent psycho-sexual development.
  - Loss of his/her childhood.
  - Loss of schooling for a significant period of time.
  - Loss of ability to engage fully in the school system.
  - Loss of bodily integrity.
  - Loss of ability to trust.
  - Feeling of shame, guilt and/or self-blame.
5. What may a judge NOT consider in crafting a sanction?
A judge may not punish a person for criminal behaviour for which he has never been formally accused nor convicted.

6. Indicate whether the judge is required to give the reasons for the sanction which is imposed either in writing or orally.
A judge is required to give reasons for the sanction imposed either in writing or orally.

7. If your country has mandatory sentences, or mandatory minimum sentences, are such sentences more or less common than previously? Please explain.
As discussed by the Irish Penal Reform Trust in its position paper on mandatory sentencing in Ireland, there were few mandatory sentences in Ireland until relatively recently, namely, the life sentence for murder, aggravated murder and treason, and disqualification from driving for the offence of drunk driving. More recently, presumptive sentences have gained political currency examples of which are set out above. The Criminal Justice Acts 2006 and 2007 represented a major shift towards presumptive and mandatory sentencing in this jurisdiction.

8. Please identify the country providing these answers.
Ireland

FURTHER DISCUSSION TOPICS

What are the rights of the victims? Can a victim speak in court? Can the victim address the perpetrator, or only the judge?
See, in this regard, the response to question three.

Can family of the victim and/or the perpetrator speak?
In respect of the family of the victim, see response to question three.

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14 Irish Penal Reform Trust, Position Paper 3 on Mandatory Sentencing (November 2009)
A convicted person has the right to put forward evidence and submissions to the court which, in turn, must consider the evidence and submissions before reaching a decision on the sanction to be imposed.

**Can police, friends, politicians or religious leaders speak?**

Police evidence is usually led on the circumstances of the offence, the degree of cooperation given by the offender and the offender’s previous convictions.

**Is information given to the judge confidential, or open to the public or the media?**

Information before the court is open to the public and media unless an order is made that a hearing is required to be held otherwise than in public. The Constitution of Ireland requires that justice be administered in public “save in such special and limited cases as may be prescribed by law.”15 Thus, the public administration of justice is the norm and only in limited circumstances will the public and press be excluded. An order may be made, however, restricting the media from reporting certain information until the conclusion of the proceedings.

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15 Article 34.1 of Bunreacht na hÉireann.