**The Allocation of Criminal Jurisdiction – Again**

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The present courts system was established almost a century ago under the Courts of Justice Act 1924. Right now, we are in the midst of an era of centenaries which, by some reckoning, will end in 2022 when we mark the centenary of the foundation of the State. Yet, it would be a mistake to ignore what happened in the few years after 1922 and, in particular, the extraordinary legislative achievement of the Free State government in those early years. The Ministers and Secretaries Act 1924 set up the entire administrative structure of the State and the Courts of Justice Act of the same year established the courts system. Both proved to be remarkably enduring. The same indeed holds true of other legislation enacted during that same era.[[1]](#footnote-1)

In January 1923, the Executive Council established a 12-member Judiciary Committee, chaired by Lord Glenavy (James Campbell), to advise on the establishment of a new court system. There was admittedly some urgency about the matter because of serious problems with both the British courts and the Dáil courts which were then in competition with one another. Glenavy’s appointment was in some ways surprising because he had been such a establishment figure under the old regime, a staunch Unionist who had served as MP for various Dublin constituencies and a leading member of the Masonic Order. On the other hand, he had also accumulated considerable legal experience having been successively Attorney General, Lord Chief Justice and finally Lord Chancellor of Ireland, immediately before independence. He certainly found favour with the Free State government which also appointed him to the Senate of which, in fact, he became the first Chairman. None of this prevented him from showing occasional contempt for the new political order. He insisted on pronouncing Saorstat Eireann as “Sour State I Ran”.[[2]](#footnote-2) Incidentally, we can probably thank him for having saved the traditional wig and gown worn by judges and barristers. Hugh Kennedy (then Attorney General and later Chief Justice) wanted to replace this garb with a new uniform, and by all accounts a highly colourful one, modelled on what he believed Irish Brehon judges would have worn centuries earlier. Glenavy ridiculed this proposal, saying:

“Remember, this is a thing that can be altered and re-altered by each successive Minister for Home Affairs. The present Minister for Home Affairs might prefer a kilt. His successor might be a sporting man, and he might prefer a jockey’s costume. The next successor might have clerical tendencies, and he might prefer to see the judges robed in clerical costume. Where is this thing to end?”[[3]](#footnote-3)

The Judiciary Committee concluded its work within four months at the end of which it did not submit a report, but rather a short document incorporating a set of recommendations.[[4]](#footnote-4) It recommended the establishment of a court structure which was effectively implemented in the Courts of Justice Act 1924. That structure was to consist of a District Court, Circuit Court, High Court, Court of Criminal Appeal and Supreme Court. With few changes, that remains the essential structure today.

The most significant development in the meantime has probably been the establishment of the Special Criminal Court in 1939 for which general provision had been made in Article 38.3 of the Constitution which reads:

“Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.”

I do not propose to deal here in any detail with the Special Criminal Court (because I am concerned mainly with the ordinary courts), although there is much that could be said about it. Under the Offences Against the State Act 1939, which provides the necessary legislative framework, the Government decides on the composition of the court at any given time. Not only judges, but solicitors and barristers of a certain number of years standing, and senior army officers are eligible for appointment to it. In the past, the court has consisted entirely of military officers.[[5]](#footnote-5) Today, it invariably consists of serving judges, one each from the High Court, the Circuit Court and the District Court. I do not believe that it would be compatible with present-day constitutional values for the court to consist of anyone other than serving judges. They, after all, remain subject to the terms of the declaration which they made on assuming office.

There remains, however, one rather disturbing provision in the Constitution. Article 38.6 provides:

“The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under 3 or section 4 of this Article.”

It is section 3 of Article 38 that provides for the establishment of special courts. Yet they are exempted from the provisions of Articles 34 and 35. Bear in mind that it is in Article 35(2) that we find the provision:

“All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.”

This is one provision of the Constitution that is surely ripe for review and amendment, even though the High Court has occasionally emphasised the power and willingness of the superior courts to supervise the manner in which special courts exercise their jurisdiction.[[6]](#footnote-6) However, it is simply unacceptable in this day and age that a criminal court with virtually unlimited jurisdiction (which is effectively true of the Special Criminal Court) could consist of persons who are not expressly subject to a constitutional obligation to exercise judicial independence. Arguably, Art. 6(1) of the European Convention on Human Rights provides a sort of safety net as it provides that everyone charged with a criminal offence “is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The other major development since 1924, as far as criminal jurisdiction is concerned, was the abolition of the Court of Criminal Appeal and the transfer of its jurisdiction to a new Court of Appeal which was established by way of a constitutional amendment in 2013.

**Summary Jurisdiction**

Although, as already noted, the Glenavy Committee did not submit a detailed report, it clearly rejected the idea of having a lay magistracy responsible for the administration of summary justice. Under the Courts of Justice Act 1924, which implemented the Committees’ recommendations, district justices, as they were known until 1991, were to be qualified lawyers who held office on a full-time basis until they reached retirement age, They could be removed from office only with cause, namely, incapacity, misbehaviour in office or misconduct.[[7]](#footnote-7) They were to be well paid, with salaries ranging from £1,000 to £1,200 a year, substantial figures in the early 1920s. In terms of qualification for office, the Act of 1924 (s. 69) provided:

“No person shall be appointed a Justice of the District Court who is not at the date of his appointment a practising barrister or solicitor of six years standing at least [or has already held certain judicial offices such as a judge of the Dáil Supreme Court]”

This remains a distinguishing feature of the Irish legal system today. Judges of all law courts are professionally qualified, with a specified minimum number of years’ experience in the practice of law, and all have security of tenure until they reach retirement age. In England and Wales on the other hand, summary jurisdiction is exercised in the main by a vast army of 21,500 unpaid lay magistrates who typically sit 13 days a year. There are also some full-time paid (and legally qualified) magistrates, nowadays known as District Judges.

The professional nature of our District Court has rendered it possible to assign it a very significant level of criminal jurisdiction. Indeed, the District Court’s criminal jurisdiction has expanded remarkably since 1924 because of a number of factors.[[8]](#footnote-8) It always had exclusive jurisdiction over summary offences. However, since the Criminal Justice Act 1951 in particular, it has also gained extensive powers to deal with indictable offences provided they are adjudged to be minor in nature. Furthermore, it has increasingly become legislative practice to define newly created offences in such a way that they are triable either summarily or on indictment at the option of the prosecution. Another very significant development occurred in 1984 when the Criminal Justice Act of that year increased to two years the total period of imprisonment which the District Court is empowered to impose for a combination of offences.

The District Court therefore has a crucial role within our legal system. It is there that virtually all criminal cases begin and also where the majority of them end. However, we probably need to invest more heavily in the District Court. A judge who is appointed to that court, irrespective of the nature of his or her previous practice and experience, must immediately begin applying a vast body of law, civil and criminal. He or she will also be expected to apply an ever-increasing and more complex set of rules relating to evidence and procedure. For that reason alone, there should be more investment in training, induction and continuing professional development. It is also essential that there should be adequate judicial support systems in place so that District Court judges (and, indeed, practitioners appearing before that court) can be made aware on a systematic basis of new developments, including relevant decisions of the Superior Courts in judicial review and case stated proceedings.

**Indictable Crime Courts**

The vast bulk of serious crime is dealt with by the Circuit Court. However, the High Court, in its guise as the Central Criminal Court, has been granted exclusive jurisdiction over a small number of the offences, the most important and prevalent being murder, rape and aggravated sexual assault. The division of jurisdiction between the two courts is somewhat arbitrary to put it mildly. We may take as our starting point the Courts (Supplemental Provisions) Act 1961 (s. 25) which effectively conferred jurisdiction on the Circuit Court over all indictable offences apart from treason, murder and a few offences under the Offences Against the State Act 1939.[[9]](#footnote-9) The next major development came with the Criminal Law (Rape) (Amendment) Act 1990 which provides that rape offences and aggravated sexual assault are to be tried in the Central Criminal Court. The Law Reform Commission had recommended this move, partly because of the inherent gravity of the offences in question and partly because it believed that more jurisdiction should be returned to the Central Criminal Court. However, when introducing the legislation in the Dáil, the Minister for Justice made clear that it was solely because of the gravity of those offences that jurisdiction over them was being returned to the Central Criminal Court. Supporters of the change cited additional reasons, including the hope that sentencing might become more consistent if it was being exercised by a small number of High Court judges who would henceforth be dealing with all such offences.

In the meantime, the Competition Act 2002 made certain competition offences triable in the Central Criminal Court only. Various other statutes have made genocide, torture, certain maritime offences and offences contrary to the Geneva Convention triable in that court also. The allocation of competition offences to the Central Criminal Court shows how haphazard this exercise can be. Sure enough, competition can cause their share of difficulties, but mainly at the level of investigation and prosecution. Some are punishable with very significant fines, running to millions of Euro, with the possibility of imprisonment for individual offenders. However, most cases dealt with so far have resulted in very modest fines and a few suspended prison sentences have been imposed. Contrast this with health and safety offences contrary to the Safety, Health and Welfare at Work Act 2005 for which, again, very high maximum fines are available with the possibility of imprisonment for individual offenders. These offences are dealt with in the Circuit Court and, unlike competition offences, they have often attracted very high penalties, Bus Eireann, for example, was fined €2 million in respect of a collision in which five people died. More recently, a transport company was fined €1 million Euro in respect of an incident in which two people died and a number of others were injured. The latter fine was upheld by the Court of Appeal.[[10]](#footnote-10) In terms of complexity, it is difficult, if not impossible, to argue that competition cases are inherently more complex than some health and safety offences, not to mention complex frauds, all of which are within the exclusive jurisdiction of the Circuit Court. Indeed, the observations made by health and safety offences apply with equal strength to environmental offences such as those created by the Waste Management Act 1996 some of which are punishable with maximum fines as high as €15 million.

Mention of competition offences brings to mind one possible defence of having them tried in the Central Criminal Court. Mr Justice McKechnie who presided over a number of such trials delivered two significant sentencing judgments, one of which has been formally reported (*People (DPP) v Duffy* [2009] 3 I.R. 613). This was, and remains, a very valuable judgment which closely analyses the principles governing the sentencing of such offences. If the delivery of such judgments were the norm, there might be some case to be made for assigning more jurisdiction to the Central Criminal Court. Sadly, it is not. The judgments data base on the Courts Service website contains no more than 16 written judgments delivered in the Central Criminal Court since 2007, and half of these were delivered by one judge, Sheehan J. They deal with a number of aspects of criminal procedure and sentencing. It is to be regretted that judges of that court have not delivered more sentencing judgments as, by so doing, they could demonstrate how they were applying certain principles and, in the process, promote a valuable debate on key sentencing issues.

There is currently neither rhyme nor reason to the allocation of criminal jurisdiction over serious sexual offences. Provided the indictment includes a rape or aggravated sexual assault charge, the case must be tried in the Central Criminal Court. Otherwise, it will be tried in the Circuit Court. So, if a person were accused of serial child abuse, but all the offences charged involved sexual assault, incest and/or so-called defilement (sexual intercourse with an underage person), he will be tried in the Circuit Court. On the other hand, a person charged with a single offence of rape must be tried in the Central Criminal Court. The Criminal Law (Sexual Offences) Act 2017 introduces many new sexual offences against children and persons with mental disabilities, and it amends the definitions of many others. Yet, all of these offences, despite the complexity of some of their definitions, will be triable in the Circuit Court. To the best of my knowledge, the possibility of allocating any of them to the Central Criminal Court was not even discussed as the Bill was making its way through the Oireachtas.

A similar observation might be made about homicide offences. Murder must be tried in the Central Criminal Court, although the ultimate verdict (if not an acquittal) may be one of manslaughter. Yet, a person who is charged with manslaughter from the outset will be tried in the Circuit Court. Murder cases are sometimes complex, but sometimes not. The very same can be said of manslaughter. When one considers some recent cases that have come before the English Court of Appeal on manslaughter by gross negligence[[11]](#footnote-11) and manslaughter by an unlawful and dangerous act, it becomes clear that manslaughter trials can be just as legally complicated as murder, and sometimes more so. In fact, it can be even more difficult to sentence; murder, which carries a mandatory sentence of life imprisonment, causes no such difficulty. [[12]](#footnote-12)

We therefore need to give serious consideration to what the proper role of the Central Criminal Court, if it is to remain in existence at all, should be, bearing in mind that in all contested criminal trials, it is the jury who decide on the guilt or otherwise of the accused. Juries are drawn from the same population, irrespective of whether they are called upon to serve in the Circuit Court or the Central Criminal Court. Indeed, since the latter court sits almost exclusively in Dublin, one must ask if it is appropriate that virtually all murder and rape cases should be decided by a jury drawn from the same limited geographical area, irrespective of where the alleged crime occurred. Further, appeals from both courts, whether against conviction, sentence or both, are decided by the same Court of Appeal. We have, by any standards, a remarkably good criminal legal aid system in this country and it is available to persons facing trial in any court, including the District Court.

Since the economic crisis of 2008, there has been strong pressure to for more enforcement of white-collar and corporate crime, and to create new offences to capture various forms of commercial misconduct. There is, it must be said, a great deal of such law in place already but it is seldom enforced largely because of difficulties in detection and prosecution. Also, apart from a few specialists, very few of us are familiar with the content of most of it. Yet, we are constantly being told that we need more of it.

The criminal law works best when it is economical in the sense of containing no more offences than are strictly necessary. Those offences, in turn, should be well-focused in the sense of concentrating on behaviour that needs, as a matter of practicality, to be outlawed, and they should also be clearly defined. In fact, they must be clearly defined in order to remain compatible with the Constitution and the European Convention on Human Rights (Art. 7). Creating a multiplicity of offences with overlapping definitions, particularly if enacted in legislation where one would not expect to find such offences, serves nobody’s interests. The present impulse to create more and more offences to regulate commercial behaviour risks making the criminal law resemble the proverbial garden shed – we keep putting stuff in, but never think of clearing it out. The creation of any new offence should be preceded by a need assessment. Do we need it to begin with, and can the creation of this offence mean that one or more others can be repealed?

Furthermore, there is little point in creating criminal offences of any description unless they are well promulgated and publicised, something we are generally bad at doing. Some years ago, Professor Andrew Ashworth raised important questions about the continuing legitimacy of the maxim that ignorance of the law is no excuse.[[13]](#footnote-13) He did so in the context of the ever-increasing number of new criminal offences being created in England and Wales. His recommendations regarding the obligations that should rest on government and parliament to ensure that new offences are properly publicised (and, I would add, explained) deserve serious consideration, here as well as elsewhere.

All of this is a digression from my main topic which deals with the allocation of criminal jurisdiction, but it is relevant because there have apparently been calls (though I have not personally heard any) for serious white-collar and corporate offences to be tried in “the highest court in the land.” That, of course, is the Supreme Court but presumably they meant the highest trial court. For reasons outlined earlier, I do not think there would be any principled justification for such a move. Such offences can be tried just as fairly and efficiently in the Circuit Court as in the Central Criminal Court. Transferring them to the latter court could be justified only by some kind of expressive argument, the idea being that having the High Court as the trial court would signify their inherent gravity. Of course, the law itself and particular decisions of the courts, especially convictions and sentencing decisions, can have an important expressive dimension, as Joel Feinberg argued in his classic article on the topic.[[14]](#footnote-14) Whether the status of court in which a particular issue is decided has a similar expressive quality or effect is more questionable, and a topic to which further serious consideration should be given.

There would scarcely be any constitutional impediment to removing all criminal jurisdiction, in so far as the trial of offences is concerned, from the High Court. In *Tormey v Attorney General* [1985] I.R. 289, the plaintiff challenged the constitutionality of s. 32(1) of the Courts Act 1981. This section had repealed a provision enacted in 1964 which allowed for criminal trials to be transferred, quite easily, from the Circuit Court to the Central Criminal Court.[[15]](#footnote-15) As a result, the plaintiff, who had been returned for trial to the Dublin Circuit Court on a charge of fraudulent conversion, could not have his trial transferred to either the Central Criminal Court or to a Circuit Court outside Dublin. The plaintiff relied mainly on Art. 34.3.1 of the Constitution which provides:

“The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.”

 The Supreme Court dismissed the challenge. Henchy J who delivered the Court’s judgment (at a time when the one-judgment rule applied to such case) said:

“Article 34(3)(4) [of the Constitution] amounts to a recognition of the fact that the High Court is not expected to be a suitable forum for hearing and determining at first instance all justiciable matters. Apart from practical considerations, it would seem not to be in accordance with the due administration of justice underlying the Constitution that every justiciable matter or question could, at the instance of one of the parties, be diverted into the High Court for trial.”

He went on to say that the constitutional expression “full original jurisdiction” in respect of the High Court must means that all justiciable matters and questions shall be within the jurisdiction of the High Court “in one form or another.” He also drew attention to Art. 36 of the Constitution which expressly permits certain matters to be regulated by law, and these include:

“the constitution and organisation of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.”

This is obviously a very significant provision for our purposes. Essentially, the Supreme Court’s reasoning in *Tormey* was that certain matters, indeed, a significant number of matters, both civil and criminal, could be assigned exclusively to other courts, and that the provision in regard to the full original jurisdiction of the High Court was adequately implemented though the availability of remedies such as judicial review, appeals by way of case stated and habeas corpus which allow the High Court to ensure that both the hearings and determinations of the lower courts are in accordance with law. The Supreme Court reached this conclusion by applying a principle of harmonious interpretation for which *Tormey* is now best remembered.

**Sentencing Reform**

Ireland retains a highly discretionary sentencing system, although it is by no means alone in that regard. We are apt to forget that, apart from England and Wales, Scotland (which is in the process of developing guidelines) and some (though not all) jurisdictions in the United States, most Western countries have discretionary systems not at all unlike our own. Discretionary sentencing and, for that matter, discretionary decision-making generally is, of course, defensible philosophically and otherwise. In his *Nicomachean Ethics*, dating from the fourth century B.C., Aristotle listed among the intellectual virtues a quality he described as “phronesis”, usually translated as practical wisdom or prudence.[[16]](#footnote-16) According to this view, sentencing, like other routine judicial tasks, must remain an exercise in practical reasoning which, as described and defended by Aristotle and his heirs, calls for discernment, attention to particulars and a prioritisation of the immediate and concrete facts over adherence to universal principles. By this account, practical reasoning is not scientific in the sense of requiring the routine and methodical application of unalterable principles to the resolution of specific problems. Instead, it calls for an ability, acquired through insight, temperament and experience, “to recognise the salient features of a complex situation.”[[17]](#footnote-17) It is only through this kind of discernment of all the relevant particulars that a good choice can be made. Aristotle, incidentally, did not discount the value of external aids (such as guidelines) for good decision-making.[[18]](#footnote-18)

The Aristotelian vision remains attractive as long as sentencing is seen as being essentially or, at least, primarily an exercise in individualised justice. In other words, if the sole concern is to impose a sentence which is deemed fitting in light of the circumstances of the particular offence and the particular offender, then judicial discretion should be preserved with as few constraints as possible. Of course, this form of individualised justice will always remain important, with or without guidelines. One of the most respected statements on sentencing in this country is that of Mr Justice Barron on behalf of the Court of Criminal Appeal in *People (DPP) v McCormack[[19]](#footnote-19)* where he said:

“Each case must depend upon its own special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused. The range of possible penalties is dependent upon those two factors.”[[20]](#footnote-20)

However, in light of present-day values, regard must also be had to distributive justice by which I mean, in the present context, a set of principles (with appropriate implementing provisions) to ensure that, as far as possible, similar cases are treated similarly. Or, to phrase it more precisely in relation to sentencing, we must try to ensure that similarly situated offenders convicted of similar offences do not receive markedly dissimilar punishments. The sentence a person receives should not depend solely or largely on the court before which he or she appears or on the personal ideas, preferences or values of a particular judge. This is the core of the argument in favour of structured sentencing, whether through the adoption of guidelines or by some other means.

In a democratic polity, the law should made by a legislature consisting of elected representatives of the people. It is the legislature’s role to decide which conduct should be treated as criminal and also to specify a mandatory, minimum or maximum sentence for each offence. In most common-law countries, including Ireland, the vast majority of criminal offences are governed by maximum rather than mandatory sentences. It is also widely agreed that, in a constitutional democracy, the selection of punishment in each individual case should be exclusively a judicial task.

 But, in between, there is another crucially important function, and that is the task of deciding on the principles according to which sentences should be selected in specific cases. Since the mid-nineteenth century, when sentencing in these islands became largely discretionary, this intermediary role has also been discharged by the judiciary. Sentencing principles have been developed gradually by the courts, so that they effectively form part of the common law. Leading examples include the principle that a guilty plea or a previous good record should ordinarily be rewarded with a discount on what would otherwise be the appropriate sentence. The significance of having formal sentencing guidelines developed by a sentencing commission or some similar body is that this intermediary role is, to a greater or lesser extent, removed from the judiciary and allocated to another body. The judiciary is still charged with selecting an appropriate sentence in each case, but it must do so in accordance with guidelines that either recommend or mandate the sentence range that is appropriate for such a case.

Sentencing guidelines take many forms. For many years in England and Wales they were judicially developed, beginning in earnest in the early 1980s when the Court of Appeal (Criminal Division) began to identify appropriate sentence ranges for certain offences. A leading example would *R v Billam*[[21]](#footnote-21) where the Court established sentencing ranges for rape. Here in Ireland, in 2014, the former Court of Criminal Appeal recommended somewhat similar sentence ranges for two offences, causing serious harm and possession of a firearm in suspicious circumstances.[[22]](#footnote-22) These two judgments have proved very useful and have been applied by both trial courts and the Court of Appeal which replaced the Court of Criminal Appeal in late 2014. However, since its establishment the Court of Appeal has not delivered any guideline judgment of this kind although, in its defence, it must be said that it has been snowed under with cases (civil and criminal), and it has delivered judgments in an enormous number of appeals since its establishment. It is widely agreed that the Court of Appeal generally is in need of several more judges.

Pressure is now growing for the introduction of some kind of sentencing guidance in Ireland. Indeed, there has been quite an attitudinal shift in this regard over the years. When I first started working in this area, more than 30 years ago now, the idea of sentencing guidelines was regarded as nothing short of heretical by judges and lawyers. There is now a great deal more receptiveness to the idea and it is fair to predict that we will see some kind of guidelines developed in the years ahead.

But here too I would enter a note of caution. Some of the present media commentary and political observations might suggest that the development of sentencing guidelines is a fairly simple and straightforward task. Nothing could be further from the truth. Sentencing is inherently a difficult and complicated task, and no guideline system can make it any different. Unless one were to have some crude system of mandatory sentencing, which would scarcely be fair or constitutional, guidelines must be sufficiently detailed and fine-tuned to reflect and accommodate the many different circumstances in which particular offences can be committed, varying levels of gravity and culpability, and variations in the personal circumstances of offenders. What guidelines can most realistically do is promote consistency of approach, by helping to ensure that all judges apply the same criteria when assessing the gravity of an offence and – though this is more difficult – when assessing the weight to be attributed to factors that are personal to the offender. One particularly difficult question is the priority to accorded to any one of the standard purposes of punishment, namely retribution, deterrence and so forth. In a judgment delivered yesterday, the Court of Appeal addressed this question, saying:

“We prefer an approach in which the correct prioritisation of penal objectives is to be determined by the circumstances of the particular case based on the evidence, [and] we readily accept that in many cases it may be appropriate to prioritise the penal objective of rehabilitation. There will, however, be other cases where it may be appropriate to deterrence or retribution and incapacitation.”[[23]](#footnote-23)

I agree with this observation, but would add that it would also be desirable to have some general principles or guidance as to when one or other of the penal objectives mentioned is most appropriate.

The development of sentencing guidance or guidelines involves a two-stage process: the descriptive and the normative. At the first stage, a process needs to be established whereby reliable information can be gathered about sentencing practice and in particular about the sentences that are upheld or varied on appeal. This has to be an ongoing exercise and, in light of the resources that are likely to be available, it will have to be selective in the sense of concentrating on certain commonly prosecuted offences and, perhaps, others that are viewed as possible particular sentencing difficulties.

When that kind of information is available, one can then progress to the normative stage which involves developing guidelines that indicate the appropriate sentence ranges for commonly prosecuted offences. One of the great sentencing scholars of the twentieth century, Norval Morris, used to say that there is no such thing as the right sentence for any offence. Rather, the objective must be to ensure that a court does not impose a wrong sentence, in the sense of a penalty that is beyond acceptable norms for the offence in question. Sentence ranges, provided they are kept within reasonably tight parameters, should be an adequate form of guidance.

The final question then is: who should develop this guidance? Essentially, there are two choices: appeal courts or a specialised agency established for this purpose. England and Wales provides experience of both of these strategies. At this point, I would favour judicially developed guidance for serious offences, developed by the Court of Appeal, though the Court will need additional resources if it is to fulfil this task adequately. At least, this strategy should be tried first. If, for whatever reason, it appears not to be working, a specialised agency could then be established.

Of course, the Court of Appeal never has the opportunity to adjudicate upon sentences imposed at District Court level and, as noted already, that is where the vast majority of offences, including most road traffic offences, are disposed of. More general guidelines may have to be introduced for offences dealt with by the District Court, something similar to the Magistrates Court guidelines in England and Wales. The District Court judiciary might be asked to take the initiative in this regard in the first instance, and they might concentrate in the first instance on the question of custody thresholds.

Either way, all the omens suggest that guidelines are on the way, but we must be very careful as to how we go about developing them.

1. E.g. the Criminal Justice (Administration) Act 1924 and Criminal Justice (Evidence) Act 1924. [↑](#footnote-ref-1)
2. Patrick Maume, “Campbell, James Henry Mussen” in *Dictionary of Irish Biography* (Cambridge University Press, 2009). [↑](#footnote-ref-2)
3. Quoted in Donal O’Sullivan, *The Irish Free State and the Senate: A Study in Contemporary Politics* (London: Faber and Faber, 1940), 533-534. See also Tom Garvin, *1922: The Birth of Irish Democracy* (Dublin: Gill and Macmillan, 1996), pp. 169-173. [↑](#footnote-ref-3)
4. *Report of the Judiciary Committee* (Dublin: The Stationery Office, 1923). [↑](#footnote-ref-4)
5. See, for example, *Re MacCurtain* [1941] I.R. 83. [↑](#footnote-ref-5)
6. *Kavanagh v Government of Ireland* [1996] 1 I.R. 321. [↑](#footnote-ref-6)
7. Courts of Justice Act 1924, s. 69. [↑](#footnote-ref-7)
8. See Supreme Court’s observations in *Carmody v Minister for Justice* [2010] 1 I.R. 635. [↑](#footnote-ref-8)
9. It still remained possible for trials to be transferred fairly easily from the Circuit Court to the Central Criminal Court, until this facility was abolished under the Courts Act 1981. [↑](#footnote-ref-9)
10. *People (DPP) v Roadteam Logistic Solutions* [2016] IECA 38. [↑](#footnote-ref-10)
11. See, for example, *R v Rose* [2017] EWCA Crim. 1168. [↑](#footnote-ref-11)
12. See, for example, *Attorney General’s Reference (R v Burgess)* [2017] EWCA Crim. 495; [2017] Crim. L.R. 899 on sentencing for manslaughter by unlawful and dangerous act. [↑](#footnote-ref-12)
13. Ashworth, “Ignorance of the law, and the duties to avoid it” (2011) 74 *Modern Law Review* 1. [↑](#footnote-ref-13)
14. Feinberg, “The expressive function of punishment” (1965) 49 *The Monist* 397. [↑](#footnote-ref-14)
15. Courts Act 1964, s. 6. [↑](#footnote-ref-15)
16. Aristotle, *Nicomachean Ethics,* translated by Thomson (London: Penguin Books, 1976), esp. Bk 6. An excellent analysis of the Aristotelian concept of practical reasoning (*phronesis*) is provided by Nussbaum, *Love’s Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1992), Ch. 2. [↑](#footnote-ref-16)
17. Nussbaum, fn. 22above, p. 74. [↑](#footnote-ref-17)
18. On the application of practical wisdom to sentencing, see O’Malley, *Sentencing: Towards a Coherent System* (Dublin: Round Hall, 2009), ch. 2; Brown, *Criminal Sentencing as Practical Wisdom* (Oxford: Hart Publishing, 2017); O’Malley, “Judgment and Calculation in the Selection of Sentence” (2017) 28:3 *Criminal Law Forum* 361. [↑](#footnote-ref-18)
19. [2000] 4 I.R. 356. [↑](#footnote-ref-19)
20. *People (DPP) v McCormack* [2000] 4 I.R. 356 at 359. [↑](#footnote-ref-20)
21. (1986) 82 Cr. App. R. 347. [↑](#footnote-ref-21)
22. *People (DPP) v Fitzgibbon* [2014] 2 I.L.R.M. 116; *People (DPP) v Ryan* [2014] 2 I.L.R.M. 98. [↑](#footnote-ref-22)
23. *People (DPP) v O’Brien,* Court of Appeal, 16 January 2018. [↑](#footnote-ref-23)