



CONSULTATION PAPER
ON
PENALTIES FOR MINOR OFFENCES

(LRC – CP 18 – 2002)

IRELAND

The Law Reform Commission

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

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INTRODUCTION

1. In Ireland we have one of the lowest reported crime rates, yet send more people to prison every year than most other European countries.¹ For example, in 1992 Ireland sent to prison a greater proportion of its citizens than any other country in the Council of Europe.² In other words, the Irish courts used incarceration more than twice as much as the French and Italian courts and four times as much as the Greek and Turkish courts. However, the actual detention rate – that is, the number of people in prison at any one time - is moderate in comparison to international standards. The explanation for this apparent paradox is two-fold. The first reason is the practice in Ireland of early release. The other, and the one which is relevant to this Paper, is the heavy use of short sentences (arguably the sort of sentences which could be replaced by a stiff fine): in 1997, over 70% of all Irish sentences were for less than one year and over 50% were for under six months.³

2. This paper is only concerned with one particular aspect of imprisonment, but we have a continuing interest in the full range of sanctions for crimes because of the huge significance of this issue and due to the fact that the penal system is in considerable need of reform. Plainly, there are many different aspects of this area which require consideration. From the point of view of legal reforms, we have made our contribution by publishing papers on sentencing⁴ and the indexation of fines,⁵ and we are presently working on the issue of restorative justice.

3. The point hardly needs to be laboured that short prison sentences, whether or not coupled with a high executive release rate, are not a constructive form of punishment from the perspective of the prisoner or society. However, any responsible body which recommends their replacement must come up with a viable alternative. The Commission is of the view that fines should be a central element in any proposed alternative to imprisonment. At the moment, however, the law in relation to fines is not at all well designed to modern conditions.

1 Council of Europe, *Penological Information Bulletin No. 17* (Council of Europe, Strasbourg, 1992), and W. Young and M. Brown, "Cross-national comparisons of imprisonment" in *Crime and Justice: an Annual Review of Research* (University of Chicago Press, Chicago, 1993), Vol. 20.

2 Council of Europe, *Penological Information Bulletin No.17* (Council of Europe, Strasbourg, 1992).

3 *Ibid.* at 170.

4 The Law Reform Commission, *Report on Sentencing* (LRC 53 – 1996).

5 The Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991).

4. One facet of the law regarding fines concerns the jurisdiction of the District Court. Fines are mainly used in respect of the type of low-level offences which come before this court. However, the court's sentencing jurisdiction is controlled by Articles 38.2 and 5 of the Constitution, according to which the right to jury trial can be withdrawn where the offence for which a person is tried is a "minor offence". This control is to ensure that the right to trial by jury is maintained for appropriate cases. However, we consider that, because of the definition which has been given to the term "minor offence", the desired effect is not being achieved for two reasons, one concerning fines and the other concerning imprisonment:

(1) The District Court is prevented from imposing upon a company an adequate fine, bearing in mind the means of many companies. At a time when breaches of Health and Safety Regulations⁶ (to take one example) have led to the deaths of a number of building workers, this is a topic of urgency and importance.⁷

(2) On the other hand, we believe it is wrong that a person can be imprisoned for twelve months without the right to a jury trial.

5. In this Paper, we consider these two particular and somewhat contradictory defects. Chapter One considers the statutory and common law framework which sets the boundary between offences triable in the District and Circuit Courts. Chapter Two considers the impact of the Constitution on the issue of "minor offences" and examines definitions of the term in light of the maximum fine which the District Court may impose. Chapter Three examines the term "minor offence" in light of the maximum prison sentence that may be imposed. Chapter Four examines the law in other jurisdictions, and Chapter Five looks at a similar debate which has taken place in England and Wales in recent years. Chapter Six compares, from a policy point of view, the maxima in relation to fines and imprisonment set down by the courts in relation to minor offences. In so doing it considers a survey carried out in the US measuring public opinion concerning the correlation between certain fines and terms of imprisonment, the financial costs of a 12 month prison sentence and the effects of inflation on fines. Chapter Seven considers possible reforms of the law which would allow higher monetary fines for well-off offenders, from a general policy point of view, and Chapter Eight examines the constitutionality of higher maxima for corporations which are found guilty of a minor offence. Chapter Nine sets out a summary of the Commission's recommendations.

6. The law in relation to fines is a multi-faceted problem. One aspect of it concerns the fact that frequently fines are not collected. It appears from the most recent Government Legislative Programme⁸ that this is being considered by the Department of Justice, Equality and Law Reform with a view to drafting legislation concerning the enforcement of fines. Another aspect has already been considered

⁶ *Safety, Health and Welfare at Work Act, 1989.*

⁷ See also the Law Reform Commission's forthcoming Consultation Paper on Corporate Homicide.

⁸ *Government Legislative Programme, Spring Session, 2002 (29th January, 2002).*

by the Law Reform Commission - some ten years ago, the Commission published a report⁹ which addressed twin problems: first, that widely-differing fines may be permitted for offences of similar gravity, simply because the relevant legislation was enacted at different historical periods when the value of money varied significantly; and, secondly, that fines maxima, whenever they are fixed, are eroded each year by inflation. The net effect of these two factors is to reduce deterrence of crime and to give an impression of inconsistency and injustice.

7. This is an important subject and we have thought it right to update and strengthen our proposals in relation to the Indexation of Fines, which is to be published shortly after the present Paper. While the present Paper has slightly different objectives, it would nevertheless be appropriate and convenient, for users of the law, if the recommendations made here were implemented in tandem with any legislation on the indexation of fines. To the extent that the proposals or analysis made here intersect with those on indexation, they are referred to at appropriate points.

8. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations contained herein are provisional only. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. In order that the Commission's Final Report may be made available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission by 28th June 2002.

9. It should be noted that since most of the law dealt with in this Paper is expressed in punts, we follow this usage in the Paper, except where euro are used in the legislation.

10. It should also be noted that words such as "he" which import the masculine gender, should be construed throughout this Paper as also importing the feminine gender, and vice versa, unless the contrary intention appears. See s.11 of the *Interpretation Act, 1937* and s.33 of the *Interpretation (Amendment) Act, 1993*.

⁹ The Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991).

CHAPTER ONE: SUMMARY JURISDICTION AND INDICTABLE OFFENCES TRIABLE SUMMARILY

A. History of the Summary Trial¹⁰

1.01 The jurisdiction to try offences in a summary manner is a jurisdiction which depends entirely on statute. As O'Connor puts it, "[i]f a statute creates an offence, and does not expressly make it subject to the summary jurisdiction of justices, it will not be triable summarily".¹¹ According to most commentators,¹² the jurisdiction to try offences in a summary manner can be traced back to the fourteenth century reign of Edward III.¹³ According to O'Connor the statute *34 Ed 3, c.1* gave certain persons in every county assigned to keep the peace the power to hear and determine felonies and trespasses done in their county. The statute *36 Ed 3, c.12* styled such persons, for the first time, Justices of the Peace. In the years following the initial introduction of a statute-based summary jurisdiction vested in Justices of the Peace, this jurisdiction was extended to encompass a large variety of offences, both traditional common-law and statutory.

1.02 Throughout the nineteenth century the *Petty Sessions (Ireland) Act, 1851*, the *Fines Act (Ireland), 1851* and its *Amendment Act, 1874*, (in addition to other statutes specific to the Dublin area), regulated and prescribed the procedure for the exercise of summary jurisdiction by Justices of the Peace. These statutes became known collectively as the *Summary Jurisdiction Acts*. In the case of certain offences, these Acts provided that the defendant should have an option to be tried on indictment, or that Justices of the Peace could opt for this.¹⁴ In the absence of such a provision, if summary trial was directed there was no right to trial by jury. On the other hand, where an offence was not expressly made subject to summary jurisdiction, it could only be tried by a jury.¹⁵

1.03 On the establishment of the Irish Free State (Saorstát Éireann), the District Court of Justice became the court of summary jurisdiction in relation to criminal matters.¹⁶ Under s.77 of the *Courts of Justice Act, 1924* the jurisdiction formerly

¹⁰ O'Higgins CJ in *State (McEvitt) v. Delap* [1981] IR 125, 129 – 130.

¹¹ O'Connor, *The Irish Justice of the Peace* (E. Ponsonby, 1911), 40.

¹² See Woods, *District Court Practice and Procedure in Criminal Cases* (1994), v; O'Connor, *The Irish Justice of the Peace* (E. Ponsonby, 1911), 1.

¹³ Edward III reigned from 1327 – 1377.

¹⁴ Examples of such provisions are s.2 of the *Merchandise Marks Act, 1887* and s.46 of the *Offences Against the Person Act, 1861*.

¹⁵ See Russell, *Russell on Crime* (7th ed., London), 11 and *R v. Hall* [1891] 1 QB 747.

¹⁶ The present District Court was, in fact, brought into existence under s.5 of the *Courts*

exercisable by Justices of the Peace under the *Summary Jurisdiction Acts*, or otherwise, was transferred to the District Court, and the District Court now deals with approximately 90% of all criminal cases. In short, it can be said that a District Court can exercise its summary jurisdiction in three situations – in relation to summary offences, indictable offences which may be triable summarily, and guilty pleas. We will now elaborate on each of these heads of jurisdiction.

(a) Summary Offences

1.04 S.77 of the *Courts of Justice Act, 1924* states:

“77.—The District Court shall have and exercise all powers, jurisdictions, and authorities which immediately before the 6th day of December, 1922, were vested by statute or otherwise in Justices or a Justice of the Peace sitting at Petty Sessions.”

1.05 Subsequent statutes have gone on to add to the miscellaneous collection of summary offences over which the Court has jurisdiction.

(b) Indictable Offences Triable Summarily

1.06 In addition in the criminal sphere, s.77B of the 1924 Act conferred on the District Court jurisdiction in relation to specified offences which were traditionally triable on indictment, if the District Court Judge was of the opinion that the offence was minor and the accused did not object to its being so tried. This section was later repealed and replaced by s.2(2) of the *Criminal Justice Act, 1951* (as amended)¹⁷ which forms the current law and which, depending on the seriousness of the facts of the particular case, empowers the District Court to try summarily a number of relatively trivial indictable offences.

1.07 Under this provision:

“The District Court may try summarily a person charged with a scheduled offence if—

- (a) the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,
- (b) the accused, on being informed by the Court of his right to be tried with a jury, does not object to being tried summarily, and
- (c) the Director of Public Prosecutions consents to the accused being tried summarily for such offence.”

(Establishment and Constitution) Act, 1961. Under this Act all jurisdiction in criminal cases which was vested in the former District Court was transferred to the new District Court.

¹⁷ S.2 of the *Criminal Justice Act, 1951* was amended slightly by s.19 of the *Criminal Procedure Act, 1967*, ss. 21(6) and 22 of the *Criminal Law (Jurisdiction) Act, 1976* and s.8 of the *Criminal Justice (Miscellaneous Provisions) Act, 1997*.

1.08 The preconditions, each of which must be satisfied before the District Court can try an indictable case under its summary jurisdiction¹⁸ are, first, that the catchment area be confined to offences listed in the First Schedule. These include an offence in the nature of public mischief, indecent assault and assault occasioning actual bodily harm or on police officers, perjury, gross indecency, offences under the *Larceny Acts, 1861 and 1916*, an offence under the *Forgery Act, 1913*, obtaining by false pretences, some minor offences under the *Malicious Damage Act, 1861*, any attempt to commit an indictable offence triable summarily and attempted carnal knowledge of young girls.

1.09 In addition, s.2(1)(b) of the 1951 Act provides for a mechanism whereby the Minister for Justice may make an order declaring an indictable offence to be a scheduled offence for the purposes of the Act. It should be noted, however, that the Minister for Justice has never yet made an order of this kind so that we shall not consider the matter further.

1.10 Even if an individual is accused of a scheduled offence within the meaning of the 1951 Act, the Court must be of the opinion that the facts proved or alleged constitute a minor offence fit to be so tried. O'Hanlon J pointed out in *State (O'Hagan) v. Delap*¹⁹ that the wording of s.2(2) of the *Criminal Justice Act, 1951* "permits the District Justice to make his initial decision to try a case summarily in reliance on a statement of the facts of the case given to him by the prosecution".²⁰ As a safeguard, therefore, if it transpires during the summary trial that the offence was not, in fact, minor in nature, the District Court Judge is obliged to send the case forward to the Circuit Court for trial by jury.

1.11 Furthermore, the accused, on being informed by the court of his right to be tried with a jury, must not object to being tried summarily. Finally, since the enactment of s.8 of the *Criminal Justice (Miscellaneous Provisions) Act, 1997* the DPP must also consent to the accused being tried summarily. Previously, under s.2(2)(b) of the 1951 Act, the consent of the Attorney General was required only in respect of three scheduled offences.²¹ Although this was somewhat extended by s.19 of the *Criminal Procedure Act, 1967*, it was an amendment under the 1997 Act

18 *State (Browne) v. Feran* [1967] IR 147, *State (Kiernan) v. Governor of Mountjoy Prison* High Court, 19 February 1973.

19 *State (O'Hagan) v. Delap* [1983] ILRM 241.

20 *Ibid.* at 244.

21 S.2(2) of the *Criminal Justice Act, 1951* states:

2(a) The District Court may try summarily a person charged with a scheduled offence if-

(i) the Court is of the opinion that the facts proved or alleged constitute a minor offence fit to be so tried, and

(ii) the accused, on being informed by the Court of his right to be tried with a jury, does not object to being tried summarily.

(b) A person shall not be tried summarily for an offence specified in the First Schedule at reference numbers 1, 2 or 3 or for an attempt to commit such an offence unless the Attorney General has consented to his being so tried.

that gave the DPP, like the accused, an absolute right to object to the summary trial of a scheduled offence. Such an amendment was suggested by the Supreme Court in *Feeney v. Clifford*.²²

1.12 S.4(1) of the *Criminal Justice Act, 1951* (as amended by s.17 of the *Criminal Justice Act, 1984*) sets out the maximum sentences for crimes of this kind as being a term of imprisonment not exceeding 12 months or a fine not exceeding IR£1,000 (€1,270) or both fine and imprisonment. It is clear that the legislature had to limit the sentence which could be handed down by the courts in these specific types of cases as it would be unfair if an accused, having waived his right to a jury trial, could still be given as severe a sentence as the maximum sentence he could have received if he had gone before a jury.

(c) **Guilty Pleas**

1.13 There is a further departure from the normal procedure, which need only be summarised here. If there is a plea of guilty, then in the case of most indictable offences, the case may, with the consent of the Attorney General, be referred to the District Court for sentencing.²³ In such a case the District Court's maximum

22 *Feeney v. District Justice Clifford* [1989] IR 668, 679 where McCarthy J stated "In short, an accused has an absolute statutory right to object and thereby obviate a summary trial when charged with a scheduled offence; consideration might well be given to amending the statute so as to give a like right to the prosecuting authority".

23 This is authorised by s.13 of the *Criminal Procedure Act, 1967*, which states:

13.(1) This section applies to all indictable offences except the following—an offence under the *Treason Act, 1939*, murder, attempt to murder, conspiracy to murder, piracy or a grave breach such as is referred to in s.3 (1) (i) of the *Geneva Conventions Act, 1962*, including an offence by an accessory before or after the fact.

(2) If at any time the District Court ascertains that a person charged with an offence to which this section applies wishes to plead guilty and the Court is satisfied that he understands the nature of the offence and the facts alleged, the Court may—

(a) with the consent of the Attorney General, deal with the offence summarily, in which case the accused shall be liable to the penalties provided for by subs. (3), or

(b) if the accused signs a plea of guilty, send him forward for sentence with that plea to a court to which, if he had pleaded not guilty, he could lawfully have been sent forward for trial.

(3) (a) *amended by s.17 of the Criminal Justice Act, 1984.*

(b) In the case, however, of an offence under s.11 of the *Wireless Telegraphy Act, 1926*, the District Court shall not impose a fine exceeding £10 [€12.70] or a term of imprisonment exceeding one month.

(4) (a) Where a person is sent forward for sentence under this section he may withdraw his written plea and plead not guilty to the charge.

(b) In that event, the court shall enter a plea of not guilty, which shall have the same operation and effect in all respects as an order of a justice of the District Court sending the accused forward for trial to that court on that charge, and the Attorney General shall cause to be served on him any documents required to be supplied to the accused and not already served.

(5) This section shall not affect the jurisdiction of the Court under s. 2 of the *Criminal*

power of sentence is a fine not exceeding IR£1,000 (€1,270) and/or imprisonment for a term not exceeding 12 months.²⁴

B. “Hybrid” Offences

1.14 In order to complete the picture, one ought to note the increasing practice by which, when a statute creates an offence, it goes on to stipulate that the offence may be triable either summarily or on indictment at the discretion of the DPP. The provision would then provide for either a lesser or greater maximum punishment, depending on which way the offence is being tried. A typical example is s.4 of the *Criminal Damage Act, 1991*, which states:

“a person...who has anything in his custody...intending without lawful excuse to use it...

a) to damage any property belonging to some other person... shall be guilty of an offence and shall be liable –

(i) on summary conviction, to a fine not exceeding £1,000 [€1,270] or imprisonment for a term not exceeding 12 months or both, and

(ii) on conviction on indictment, to a fine not exceeding £10,000 [€12,700] or imprisonment for a term not exceeding 10 years or both.”

1.15 The difference between this provision and s.2 of the *Criminal Justice Act, 1951* is the fact that it is a cardinal feature of the 1951 Act that the accused, in addition to the DPP, has a right of veto. In other words, he may insist on being tried on indictment. If he is tried summarily, the maximum punishment is confined to IR£1,000 (€1,270) fine and/or 12 months imprisonment. This is in contrast with the *Criminal Damage Act, 1991*, where the choice is exclusively that of the DPP. However, the maximum punishment in a summary trial is confined to €3,000 (or IR£2,362.69).²⁵

1.16 Commenting on this development, Woods remarks:

“Modern statutes have greatly expanded the number of offences for which an offender may be liable to punishment on summary conviction or on indictment with the Act not indicating the circumstances in which the charge should be prosecuted summarily rather than on indictment or on

Justice Act, 1951.

²⁴ S.13(3)(a) of the *Criminal Procedure Act, 1967* originally set out the maximum penalty which may be imposed by a District Justice in such cases, but this was amended by s.17 of the *Criminal Justice Act, 1967* which confines the District Judge’s sentencing power to 12 months’ imprisonment and a fine of IR£1,000 (€1,270).

²⁵ This has been recently increased from IR£2,000 (€2,540) by the Department of Justice in the *Prevention of Corruption (Amendment) Act, 2001*

indictment rather than summarily. Such offences are sometimes referred to as 'hybrid offences'".²⁶

²⁶ Woods, *District Court Practice and Procedure in Criminal Cases* (James Woods, 1994), 268.

CHAPTER TWO: IMPACT OF ARTICLE 38.2 OF THE CONSTITUTION ON MINOR OFFENCES

A. Introduction

2.01 Under Article 38 of the Constitution²⁷ no one can be tried on a criminal offence without a jury, save in three exceptional circumstances, one of which is the subject of this Paper, namely in the case of “minor offences”.²⁸ “Minor offences” may be tried, without a jury, in the District Court. The distinction between the constitutional concepts of minor and non-minor offences relates to the statutory distinction drawn between summary and indictable offences, the subject matter of the previous chapter. As a general rule, summary offences are also minor offences, so that the Constitution is satisfied. However, in this chapter, we are concerned with the exceptional and problematic question of non-minor offences which are, nevertheless, triable without a jury. If a statute proscribes an offence with a penalty which is non-minor, but which is triable in the District Court without a jury, then as a result of Article 38, the statute is susceptible to a claim of unconstitutionality.

B. Definition of Minor Offence

2.02 The term “minor offence” is not defined in the Constitution. Therefore, it has fallen to the judiciary, in its role as interpreter of the Constitution, to give body to the term. For the initial two decades or so after the coming into existence of the Constitution, the issue attracted little attention from the courts. Since the beginning of the 1960s, however, the test for whether an offence is minor or non-minor has been developed through a series of cases challenging various statutes which provide for the summary prosecution of allegedly non-minor offences. The courts have been obliged to consider the nature of minor offences, and they have pointed to various factors which should be examined in order to decide whether an offence is minor or non-minor.

2.03 The leading case is *Melling v. Ó Mathghamhna*²⁹ in which the Supreme Court laid down a set of criteria to be considered when deciding whether or not a

²⁷ Article 38.2 states that “Minor offences may be tried by courts of summary jurisdiction”. Article 38.5 states that: “Save in the case of the trial of offences under s.2, s.3 or s.4 of this Article no person shall be tried on any criminal charge without a jury”.

²⁸ The other two exceptions are Article 38.3 which states that special courts may be established by law for the trial of offences in cases where the ordinary courts may be inadequate to secure the effective administration of justice and the preservation of public peace and order, and Article 38.4 which states that military courts may be established for the trial of offences against military law in certain circumstances.

²⁹ *Melling v. O Mathghamhna* [1962] IR 1.

particular offence is minor or non-minor.³⁰ These criteria are the severity of the penalty, the moral quality of the act, the state of the law at the time of enactment of the statute in question or the Constitution and the state of public opinion at that time.

2.04 In the *Melling* case, the Supreme Court agreed that the severity of the penalty is the most important factor for consideration.³¹ This principle of severity of punishment set out by the Supreme Court in the *Melling* case has been followed in many cases in this jurisdiction.³²

C. Fines

2.05 Before dealing with the question of the maximum amount which may be imposed as a fine for a minor offence, we ought to mention two matters which are usually discussed in general constitutional texts dealing with this area. These are first, whether the severity of a penalty should be appraised in light of the value of money at the time the statutory provision was enacted or in light of present day values, or in other words, whether inflation is to be taken into account, and secondly whether the severity of the penalty should be gauged by the maximum penalty which can be prescribed by a statute or by the penalty actually imposed in a particular case.

(a) *Value of Money at Time Statute Enacted or at Time of Trial?*

2.06 The first question takes on great significance where an offence was established by statute at a time when the value of money was such that the fine would render the offence non-minor, but when an offence under the statute is being tried in court, the change in the value of money over the years is such that the amount of the fine now renders the offence minor. The law seems to have been settled by the Supreme Court in *State (Rollinson) v. Kelly*,³³ in which the Court said that, for the purpose of assessing the severity of the penalty in a given case, the relevant time for calculating the monetary value of the fine is the time when the fine was imposed, rather than the date when the statute was passed.

(b) *Maximum or Actual Fine?*

2.07 As regards the second question, the Supreme Court at first took the view that the relevant factor to be assessed was the maximum possible penalty prescribed

30 Kelly, *The Irish Constitution* (3rd ed. Butterworths, 1994), 628 – 638.

31 *Melling v. Ó Mathghamhna* [1962] IR 1, 14, 17, 34.

32 *Conroy v. Attorney General* [1965] IR 411, *State (Sheerin) v. Kennedy* [1966] IR 379, *In Re Haughey* [1971] IR 217, *Cullen v. AG* [1979] IR 394, *Kostan v. Ireland* [1978] ILRM 12, *L'Henryenat v. Ireland* [1983] IR 193.

33 *State (Rollinson) v. Kelly* [1984] IR 248, 260.

by law. This test was first laid down in *Conroy v. Attorney General*³⁴ where the Supreme Court held that the Act in question, the *Road Traffic Act, 1961*, was not unconstitutional in prescribing a penalty of six months imprisonment and/or a €127 (IR£100) fine. The court examined the nature of the offence by looking at the severity of the maximum possible penalty as set out by the Act, and not by examining the penalty imposed in the particular case. This approach was approved in *In Re Haughey*³⁵ where Ó Dálaigh CJ quoted the test laid down in *Conroy*, and went on to say: “Of the relevant criteria, the most important is the severity of the penalty which is authorised to be imposed for commission of the offence”.³⁶ He further states that: “This Court sees no reason for departing from the test it laid down in *Conroy’s Case*...To apply the test of the penalty actually imposed would, in effect, be to deny to an accused the substance of the right to trial by jury”.³⁷ Presumably this is because by the time a penalty is actually imposed by a court, the trial has already been heard and the defendant’s right to a trial by jury, if he is so entitled, has already been violated.

2.08 However, there is the other view that the relevant factor is the penalty actually imposed. It should be emphasised, moreover, that in practical terms the approach in the District Court is to consider the actual fine imposed, rather than the maximum possible amount. In practice, the prosecutor indicates to the court that, on the basis of the prosecution case, he anticipates that the punishment will not be such as to take the offence beyond the minor offence category. A Judge of the District Court must decline jurisdiction to try an offence summarily if he is of the opinion that on conviction the punishment could go beyond what is permitted for minor offences, rendering the offence non-minor in nature. The District Court Judge may base his decision on the facts as proved in evidence or as alleged by the prosecution. If, however, at some point later in the trial he comes to the conclusion that the matter is, in fact, not fit to be tried summarily, he should discontinue the trial, notwithstanding the fact that he had previously been of the opinion that the offence was fit to be tried summarily. According to O’Hanlon J in *State (O’Hagan) v. Delap*:

“when a District Justice has elected to try a case summarily, and has embarked on the trial, circumstances may arise which entitle him, or may even make it necessary for him, to reverse his previous decision and allow the case to go forward to the Circuit Court where a higher range of sentence may be imposed...if a District Justice embarks upon a summary trial, and is then led to believe by the evidence he hears that the facts disclose a major rather than a minor offence, he would find himself in a situation where it would be constitutionally impossible for him to exercise jurisdiction in trying the case summarily, and he would be bound in my opinion to discontinue the summary trial and allow the matter to be dealt

34 *Conroy v. Attorney General* [1965] IR 411.

35 *In Re Haughey* [1971] IR 217.

36 *Ibid.* at 247.

37 *Ibid.* at 248.

with on the basis of a preliminary hearing intended to lead in due course to trial on indictment.”³⁸

2.09 The next relevant authority, *Melling v. Ó Mathghamhna*,³⁹ was a case in which the penalty was prescribed by law in indefinite terms⁴⁰ which could have led to large penalties being imposed in specific cases. As pointed out by Lavery J, however, who gave the majority judgment in a three-to-two decision, this does not mean that the offence is non-minor.⁴¹ In such cases, the District Court Judge has a discretion to decide, having regard to the facts of the case, whether the offence is minor or non-minor. On the facts of the *Melling* case itself, Lavery J held that “where the Revenue Commissioners have elected to claim a penalty of £100 [€127] or treble the duty-paid value of the goods, being less than £100” the offence is minor. However, he continued: “If the Revenue Commissioners should elect to claim treble the value of the goods involved duty-paid exceeding £100 [€127] it would be, in my opinion, for the District Justice to consider whether the offence was or was not a minor offence”.⁴²

2.10 This line of reasoning was followed by the Supreme Court in *O’Sullivan v. Hartnett*.⁴³ In his judgment Henchy J stated the opinion of the court:

“It may be necessary in an appropriate case to review the criteria laid down in the decided cases for deciding whether an offence is minor or not. For example, *the penalty laid down by the statute can scarcely be held to be a primary consideration in all cases...* Whatever the applicable criteria may be or the priority of those criteria *inter se* where a statute lays down a fixed penalty or a minimum penalty, in cases such as the present where the extent of the penalty depends on the circumstances of the case the line of demarcation between minor and non-minor offences must be drawn in the light of those circumstances”.⁴⁴

2.11 In *State (Rollinson) v. Kelly*,⁴⁵ however, the Supreme Court gave divergent opinions as to the proper test to be used. O’Higgins and Hederman JJ took the traditional view that “it is the penalty prescribed by the legislation which must be considered”,⁴⁶ whereas Henchy and Griffin JJ felt that what was important was “the

38 *State (O’Hagan) v. Delap* [1983] ILRM 241, 244.

39 *Melling v. Ó Mathghamhna* [1962] IR 1.

40 The penalty prescribed was IR€100 (€127) or treble the value of the goods smuggled, at the option of the Revenue Commissioners.

41 *Melling v. Ó Mathghamhna* [1962] IR 1, 17 – 18.

42 *Ibid.* at 18.

43 *O’Sullivan v. Hartnett* [1983] ILRM 79.

44 *Ibid.* at 80. Emphasis added.

45 *State (Rollinson) v. Kelly* [1984] IR 248.

46 *Ibid.* at 257, per O’Higgins J.

penalty actually imposed on conviction”.⁴⁷ The fifth judge, McCarthy J, did not address this issue. Therefore, it would seem that the law is still somewhat undecided on this particular point. James Woods, however, an authority on practice and procedure in the District Court, and an experienced District Court Clerk, has stated that the deciding criterion is the penalty actually imposed, in other words following the line taken by Henchy and Griffin JJ in *State (Rollinson) v. Kelly*.⁴⁸

2.12 It should, however, be noted that for present purposes - giving advice as to making law - we are not concerned with any particular case and hence must focus on the maximum amount which is to be fixed by that law. Accordingly this divergence is not of significance in devising our recommendations.

(c) **Maximum Fine**

2.13 Since the term “minor offence” is part of the Constitution, in order to formulate a definition of it, one must look to the case law. Let us start with the straightforward case of *In re Haughey*⁴⁹ where a possible “imprisonment and fine at discretion, ie without a statutory limit”⁵⁰ meant that an offence could not be considered minor. It must be remembered, however, in relation to the discussion in the preceding paragraphs, that the court deciding *In re Haughey* took the view that the maximum penalty that may be imposed is what should be considered when deciding whether an offence is minor, and it is in this context that the court concluded that a unlimited penalty removed an offence from the minor category. This case was followed in *Cullen v. Attorney General*.⁵¹ In *Melling v. Ó Mathghamhna*, Lavery J stated that regarding “a penalty of £1,000 [€1,270] or, indeed, much less...it would be open for the Justice to decline jurisdiction on the ground that the offence was not a minor offence”.⁵² However, it must be remembered that *Melling* was decided in 1962 and at this time IR£1,000 (€1,270) was the equivalent of around €19,363.51 (IR£15,250) in today’s values.

2.14 In *State (Rollinson) v. Kelly*,⁵³ Griffin J outlined what he took to be the accepted penalty for a summarily triable offence, in the early 1980s:

“...in respect of the three years 1980 - 82, being the latest years in respect of which the bound volumes of the Acts of the Oireachtas as promulgated

47 *State (Rollinson) v. Kelly* [1984] IR 248, 260, per Henchy J.

48 James Woods, *District Court Practice and Procedure in Criminal Cases* (1st ed., James Woods, 1994), 20.

49 *In Re Haughey* [1971] IR 217.

50 *Ibid.* at 247 - per Ó'Dálaigh CJ. This situation is to be distinguished from that discussed in para.2.09 above where a statute sets out a monetarily indefinite but specifically calculable penalty like, for example, the penalty imposed in the *Melling Case*.

51 *Cullen v. AG* [1979] IR 394.

52 *Melling v. Ó Mathghamhna* [1962] IR 1, 18.

53 *State (Rollinson) v. Kelly* [1984] IR 248.

are available, a high proportion of the Acts in each year made provision for offences and for the penalties for such offences. With the exception of the *Family Law (Protection of Spouses and Children) Act, 1981*, in the case of every such Act in those three years there is provision for a fine not exceeding £500 [€634.87] on summary conviction, and under the *Litter Act, 1982*, a person guilty of an offence is by s.15 liable on summary conviction to a fine not exceeding £800 [€1015.79]”.⁵⁴

2.15 The majority of the Supreme Court in *Rollinson* held that a fine of €634.87 (IR£500) is minor, and Griffin J went so far as to say that in his opinion:

“...at the present time, a fine of £500 (or indeed a sum fairly considerably in excess of that sum) would not be sufficient to take an offence out of the category of those which are minor offences, and which are therefore triable in the District Court”.⁵⁵

2.16 About the same date, in a case involving rather more extreme figures, McWilliam J in *Kostan v. Ireland*⁵⁶ ruled that an offence carrying a financial penalty of over €129,513.28 (IR£102,000) could not be tried summarily. Somewhat similarly, in *O’Sullivan v. Hartnett*⁵⁷ the plaintiff faced charges of unlawful capture of salmon. Under the relevant legislation⁵⁸ the penalty was set out as a fine not exceeding €31.74 (IR£25) plus an additional €2.54 (IR£2) for every fish caught. The plaintiff was charged with capturing 900 salmon and thus faced a possible fine of €12,697.38 (IR£10,000). The Supreme Court held that this could not constitute a minor offence.

2.17 It is worth noting, furthermore, that in the High Court, McWilliam J had been of the opinion that even a possible fine of €2,317.27 (IR£1,825) was above the constitutional limit:⁵⁹

“In my opinion, even taking present inflation into account, a fine of £1,825 [€2,317.27] is substantial and this, taken in conjunction with what I consider to be the grave moral guilt in catching or receiving such a large

54 *State (Rollinson) v. Kelly* [1984] IR 248, 263 – 264.

55 *Ibid.* at 263.

56 *Kostan v. Ireland* [1978] ILRM 12.

57 *O’Sullivan v. Hartnett* [1983] ILRM 79.

58 *Fisheries (Consolidation) Act, 1959*.

59 McWilliam J discussed this figure in the High Court because he did not take the value of the forfeited fish into account as he was of the opinion that a person who has property in his possession unlawfully could not be said to be being penalised by having that property taken away from him in the course of enforcing the law. It seems that this point was not even argued before the Supreme Court as they did not discuss it at all in their judgment. The figure considered by the Supreme Court constituted the forfeiture of the salmon plus a fine of up to €12,700 (IR£10,000). The mathematics of the Supreme Court, referred to as “mysterious mathematics” by Casey, are unclear as the sum of €12,700 (IR£10,000) actually includes the value of the forfeited salmon – see Casey, *Constitutional Law in Ireland* (3rd ed., Sweet & Maxwell, 2000), 321 – 322.

number of salmon unlawfully seems to me to remove the offence from the category of minor offences”.⁶⁰

2.18 By 1994, Kelly, Hogan and Whyte stated: “to judge from a miscellaneous variety of recently enacted legislation, the Oireachtas appears to be of the view that a fine of £1,000 [€1,270] is the maximum which may be imposed following summary conviction”.⁶¹ This authority goes on to mention as examples s.15(5)(a) of the *Merchant Shipping Act, 1992*, the Table to the *Environmental Protection Agency Act, 1992* and s.9(2) of the *Control of Dogs (Amendment) Act, 1992*.

2.19 The *Planning and Development Act, 2000*, allows for a maximum fine of €1,904.61 (IR£1,500) on summary conviction for certain offences.⁶² However, even more recently in the *Prevention of Corruption (Amendment) Act, 2001*, the figure has crept up to €3,000 (IR£2,362.69). This figure reflects a small increase in the amount of the maximum fine in addition to taking inflation into account.

⁶⁰ *O’Sullivan v. Hartnett* [1981] ILRM 469, 472.

⁶¹ Kelly, *The Irish Constitution* (3rd ed., Butterworths, 1994), 632.

⁶² See ss.97(18) and 156(1)(a) of the *Planning and Development Act, 2000*.

CHAPTER THREE: IMPACT OF ARTICLE 38.2 OF THE CONSTITUTION AND PRISON SENTENCES

3.01 For many years there had been no judicial statement giving a precise length of imprisonment which would remove an offence from the category of minor offences. Even today, despite the fact that in some more recent case law one can pinpoint a number of statements which come closer to specifying the acceptable maximum sentence for minor offences, the question still remains, to some extent, open. Statements in this regard tend to be either very general, giving vague outlines, or refer only to the particular circumstances of the case in question.

3.02 The first relevant case, *Melling v. Ó Mathghamhna*,⁶³ concerned an offence of smuggling. The court focused on the question of whether imprisonment for up to nine months in default of payment of a fine took offences under s.186 of the *Customs Consolidation Act, 1876* outside the “minor offence” category (though it was not suggested that the accused had actually defaulted). In that case Lavery J, giving a rather troubled judgment on behalf of the majority, in a three-to-two decision, stated, in relation to the penalty involved, that in his opinion, “If the penalty may be twelve months’ imprisonment no one would regard it as other than a serious penalty”.⁶⁴ However, he continues:

“With some doubt, and after full consideration, I have come to the conclusion that as such a sentence [nine months] was recognised at the time of the enactment of the Constitution of 1922 and again of the Constitution as appropriate in some cases triable in a Court of summary jurisdiction this cannot be considered as sufficient to remove all prosecutions under s.186 of the *Customs Consolidation Act, 1876*, in the District Court from the category of minor offences”.⁶⁵

3.03 However, the dissenting judges, Kingsmill Moore and Ó Dálaigh JJ, took the view that the provision for nine months took the offence out of the minor category. Ó Dálaigh J stated that “A standard is found not by seeking out the extremes but looking to the mean”⁶⁶ – referring to the list of statutes covering minor offences quoted by counsel. In his opinion, one can find guidance as to what type of offence is covered by Article 38.2 of the Constitution by looking at “the standard which prevailed at the time of the adoption of the Constitution...A general

⁶³ *Melling v. O Mathghamhna* [1962] IR 1.

⁶⁴ *Ibid.* at 14.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* at 45.

scrutiny of the statute roll will confirm that throughout the existence of Saorstát Éireann six months was considered a proper standard not to be exceeded”.⁶⁷

3.04 In *Conroy v. Attorney General*⁶⁸ in the High Court Kenny J had said that 12 months imprisonment, in addition to a disqualification from driving for life, was a very severe punishment and the offence could not, therefore, be minor. This was in response to the argument made in the case by counsel for the Attorney General that the majority in *Melling v. Ó Mathghamhna*⁶⁹ had decided that every offence for which a District Court Judge could impose a sentence of 12 months imprisonment could be classified as a minor offence. Responding to Lavery J’s conclusion in *Melling v. Ó Mathghamhna* (quoted at para.3.02 above) regarding the severity of a penalty of 12 months imprisonment, Kenny J in the High Court stated:

“It seems to me that the passage does not lay down a general rule in relation to prosecutions in the District Court but is dealing with prosecutions under s.186 of the *Customs Consolidation Act, 1876*, only. I do not accept the proposition that every offence in which a District Justice is authorised to impose a sentence which may amount to twelve months’ imprisonment is a minor offence in so far as the criterion of the punishment which may be imposed is relevant”.⁷⁰

3.05 In any case, this remark of Kenny J was *obiter* since *Conroy v. Attorney General* concerned an offence for which the maximum punishment was six months imprisonment or a €127 (IR£100) fine or both, which was held to be minor. This still seems to say, however, that Kenny J did feel that in some cases, 12 months *may* be given as punishment for a minor offence. In the Supreme Court Walsh J, who gave the court’s unanimous judgment, said that “the primary consideration in determining whether an offence be a minor one or not is the punishment which it may attract”.⁷¹ The court concluded that the penalty in that case, six months imprisonment and a €127 (IR£100) fine, was suitable for a minor offence.

3.06 However, a year later in *State (Sheerin) v. Kennedy*⁷² Walsh J stated:

“It is unnecessary to determine what precise period in excess of the period of six months would constitute the boundary line between minor offences and other offences. However, I have no doubt that an offence which attracts as a punishment the deprivation of liberty for a period of up to three years cannot be regarded as a minor offence”.⁷³

⁶⁷ *Melling v. Ó Mathghamhna* [1962] IR 1, 46 – 47.

⁶⁸ *Conroy v. Attorney General* [1965] IR 411.

⁶⁹ *Melling v. Ó Mathghamhna* [1962] IR 1.

⁷⁰ *Conroy v. Attorney General* [1965] IR 411, 418.

⁷¹ *Ibid.* at 436.

⁷² *State (Sheerin) v. Kennedy* [1966] IR 379.

⁷³ *Ibid.* at 394. This view was followed by Barr J in *J v. Delap* [1989] IR 167, and, in fact, counsel for the Attorney General conceded in that case that “an offence punishable by imprisonment or

3.07 This view left the law in this area rather uncertain. In fact, the first Supreme Court *dictum* specifically stating that one year was an acceptable penalty for a minor offence was in *Mallon v. Minister for Agriculture, Food and Forestry*.⁷⁴ In that case the applicant applied for orders of prohibition in respect of prosecutions for alleged contraventions of the *European Communities (Control of Oestrogenic, Androgenic, Gestagenic and Thyrostratic Substances) Regulations, 1988* and the *European Communities (Control of Veterinary Medical Products and their Residues) Regulations, 1990*. One of the applicant's arguments was based on the contention that imprisonment for a term "not exceeding two years" for a summary offence, as provided for by the 1990 regulations, was repugnant to the Constitution.

3.08 In the High Court, Costello J accepted this submission of repugnancy. On appeal, this point was conceded by the respondents, so it was not argued before the court that the sentence set out in the regulations of 1988 - one year - was unconstitutional. Although the Supreme Court did not expressly rule on this point, as it was not relevant to the appeal, it seems to have been implicitly accepted by the Supreme Court and the parties to the action that a penalty of two years imprisonment for a minor offence was unconstitutional, and that one year was not. The only judicial comment expressly on this issue, however, was an *obiter dictum* by Barron J where he said, "a penalty of one year's imprisonment would not have infringed the provisions of Article 38 of the Constitution".⁷⁵ In the circumstances, the most one can say for certain is that the Supreme Court in *Mallon v. Minister for Agriculture, Food and Forestry* seems to have been of the opinion that one year's imprisonment is a valid sentence for minor offences.⁷⁶

3.09 This view was supported (though again the point was not argued) by Moriarty J in *Meagher v. O'Leary*⁷⁷ (where the charges were brought under the same regulations as in *Mallon*) where he stated:

"it is uncontested in argument, and indeed was set forth in the Supreme Court judgments in the *Mallon* case *supra*, that a maximum penalty of two years' imprisonment for a single offence takes that offence beyond the category of a minor one, whereas a maximum penalty of one year's imprisonment does not..."⁷⁸

3.10 As to legislative practice, one should note that two of the most recent pieces of legislation to come from the Oireachtas containing provisions for summary conviction, the *Illegal Immigrants (Trafficking) Act, 2000* and the *Prevention of Corruption (Amendment) Act, 2001*, provide that the maximum

detention for a period of three years or more cannot be regarded as minor in nature".

⁷⁴ *Mallon v. Minister for Agriculture, Food and Forestry* [1996] 1 IR 517.

⁷⁵ *Ibid.* at 542.

⁷⁶ See Casey, *Constitutional Law in Ireland* (3rd ed., Sweet & Maxwell, 2000), 320.

⁷⁷ *Meagher v. O'Leary* [1998] 1 ILRM 211.

⁷⁸ *Ibid.* at 218.

sentence which may be given on a summary conviction for an offence under the Acts is 12 months.

3.11 In conclusion, then, the conventional view seems to be that the maximum sentence permissible for a minor offence is 12 months.

CHAPTER FOUR: THE LAW IN OTHER JURISDICTIONS WITH CONSTITUTIONAL RESTRICTIONS

4.01 Even in the common-law world, the jury system has been established in a surprisingly small number of constitutional instruments. There is no reference to the right to trial by jury in the *Magna Carta* nor the English *Bill of Rights* of 1689, though the *Bill of Rights* does state that “jurors ought to be duly empanelled and returned” to stamp out the practice at the time of returning partial, corrupt and unqualified persons to serve on juries. Apart from the Irish Constitution, the main examples of instruments establishing the jury are the Constitutions of New Zealand, Australia and the U.S.

A. New Zealand

4.02 S.24 (e) of the New Zealand *Bill of Rights Act, 1990*, gives a right of trial by jury for an offence punishable by imprisonment for a term in excess of three months.⁷⁹ However – and it is a substantial qualification – under s.4 of the Act:

“ No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),

(a) hold any provision of the enactment to be impliedly repealed or revoked,

or to be in any way invalid or ineffective; or

(b) decline to apply any provision of this enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.”

4.03 On the other hand, s.6 of the *Bill of Rights Act, 1990* states:

“Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

4.04 S.6 was successfully invoked in the context of s.24(e) in *R v. Tauhinu*.⁸⁰ The provision at issue in the case was s.49(2) of the *Domestic Violence Act, 1995*,

⁷⁹ S.24(e) of the *Bill of Rights Act, 1990* says:

S.24 Everyone who is charged with an offence.....

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months.

which provided that a person who breached the section was liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding NZ\$5,000. Despite the use of the words “was liable on summary conviction”, the District Court held that, when read in light of s.24(e) of the *Bill of Rights Act, 1990* “s.49(2) should be interpreted so that a right of trial by jury is maintained”.

4.05 There have been several other attempts⁸¹ to make the argument that a statutory provision authorising summary trial for a crime with a higher maximum penalty than three months violates the *Bill of Rights Act*. However, all have foundered on the rock of s.4. Consequently, there is no New Zealand case-law which is helpful in regard to the questions examined in this Paper, though it is worth noting that the standard set in s.24(e) is only three months imprisonment and there is no reference to any maximum fine.

B. Australia

4.06 S.80 of the Australian Commonwealth Constitution declares that “The trial on indictment of any offence against any law of the Commonwealth shall be by jury”.⁸² The predominant judicial approach to the interpretation of this provision remains the literal reading adopted by Isaacs J in *R v. Bernasconi*,⁸³ which is that if an offence is not made triable on indictment, then the constraints imposed by s.80 cannot apply and the provision has no effect.

4.07 On the other hand, there has been a minority who have protested that the effect of the literal interpretation is to “reduce [the provision] to a mere procedural provision” giving effect to its language rather than its spirit.⁸⁴ Similarly, in a famous joint dissent, in *R v. Federal Court of Bankruptcy; Ex parte Lowenstein*,⁸⁵ Dixon and Evatt JJ observed that the literal interpretation “seems...to mock at the provision”.

4.08 For present purposes, it is more pertinent to focus on the minority line, and what approach those who follow it adopt in relation to the cut-off point which determines what offences fall within the scope of the right to jury trial. In Australia, there has been little discussion of this secondary point. However, Dixon

80 *R v. Tauhinu* [1999] DCR 78.

81 *Birch v. Ministry for Transport* High Court of Auckland (Fisher J), 31 March 1992, AP 54/94, *R v. Phillips* [1991] 3 NZLR 175 (CA), *Reille v. Police* [1993] 1 NZLR 587, *Tapena v. Police* [1993] 10 CRNZ 614, *Dreliozis v. Wellington* [1994] 2 NZLR 198.

82 See generally Hanks, *Constitutional Law in Australia* (2nd ed., Butterworths, 1996), 513-6, and Blackshield and Williams, *Australian Constitutional Law and Theory* (The Federation Press, 1998), 998 – 1005.

83 *R v. Bernasconi* (1915) 19 CLR 629, 637. This was confirmed as recently as *Kingswell v. R* (1985) 159 CLR 264 and *Cheng v. R, Chan v. R* (2000) 175 ALR 338.

84 Constitutional Commission, *Final Report* (AGPS, Canberra, 1998) 593-4.

85 *R v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 581- 8.

and Evatt JJ in *Lowenstein* remarked that the criterion for exclusion from the right to jury trial should be the severity of punishment and, in particular, should be “the liability of the offender to [any] term of imprisonment or to some graver form of punishment.”⁸⁶

4.09 Another dissenter from the dominant tradition – Deane J in *Kingswell v. The Queen*⁸⁷ – expressly departed from this aspect of Dixon and Evatt JJ’s view. Deane J offered “the tentative view that the boundary will ordinarily be identified by reference to whether the offence is punishable by a maximum term of imprisonment of more than one year.”⁸⁸ It is striking that in the tentative sketching of the limits of an offence which can be tried without a jury by those Australian judges who think that there is such a limit, there is no reference to any fine.

C. United States

(a) Trial Without Jury

4.10 In the United States there is an equivalent to a minor offence, known as a “petty offence”. Article III, section 2, clause 3 of the Constitution⁸⁹ and the Sixth Amendment⁹⁰ provide for trial by jury in all crimes or criminal prosecutions. Nevertheless, the US Supreme Court has steadily ruled,⁹¹ for practical reasons, that

⁸⁶ *R v. Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556.

⁸⁷ *Kingswell v. R* (1985) 159 CLR 264.

⁸⁸ *Ibid.* at 318.

⁸⁹ Article III, Section 2, Clause 3 states: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed”.

⁹⁰ The Sixth Amendment states that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence. It is true that, so far as the jury is concerned, there is a fair measure of overlap between the two provisions. However, regarding the significance of the Amendment, following a survey of contemporary debates, two distinguished commentators write: “The Sixth Amendment enumerates the elements of “trial by jury” in Article III; it does not extend the field of its operation. We find not a trace of belief – either in the debates on the ratification of the Constitution, or in the Congress that adopted the Sixth Amendment – that jury trial covered “petty offences,” nor suggestion that the area of criminal cases in which the jury was to operate be widened. So far as purpose illumines, it is clear that the scope of trial by jury guaranteed by the Sixth Amendment is identical with the scope of jury trial in Article III. Evidence is wholly lacking of a desire for change.” – Frankfurter and Corcoran, “Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury” 34 Harv LR 918, 971 (1926).

⁹¹ See *District of Columbia v. Clawans* where Stone J states: “It is settled by decision of this court which need not now be discussed in detail that the right of trial by jury thus secured (that is, by the Constitution and the Sixth Amendment) does not extend to every criminal proceeding”, 300 US 617, 624. See also footnote 90 above for an example of other commentators who agree with this analysis.

the Constitution does not require that a jury must try a charge of “petty offence” (to use the American term). The reason given for this ruling is that when the Constitution was adopted in 1787 there were many courts within the United States exercising summary jurisdiction over these petty offences. Due to the fact that the Constitution was interpreted against its legal background, the continuation of these courts was deemed justified by the view that a petty offence was not a crime, despite the apparently unqualified nature of these two provisions. Thus, a person against whom there was a charge of a petty offence was not entitled to have the case tried before a jury.

4.11 The first case in which the Federal Supreme Court expounded the notion that a trial of a petty offence could be conducted without a jury was in 1888, in *Callan v. Wilson*⁹² where the court stated that:

“according to many adjudged cases, arising under Constitutions which declare, generally, that the right to trial by jury shall remain inviolate, there are certain minor or petty offences that may be proceeded against summarily, and without a jury”.⁹³

4.12 The Supreme Court looked to the constitutional practice of various states in relation to mode of trial, which stemmed from the traditions of the common law in England, in arriving at this conclusion. Harlan J, who gave the judgment of the court, concluded that:

“there is a class of petty or minor offences, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this district, may, under the authority of Congress, be tried by the court and without a jury”.⁹⁴

4.13 He cited an earlier case from Pennsylvania, *Byers v. Commonwealth*,⁹⁵ as an illustration of this point. In that case it was held that while the founders of the Commonwealth of Pennsylvania brought with them the right to trial by jury, and while that mode of trial was considered the right of every Englishman, too sacred to be surrendered or removed, “summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common-law right to a trial by jury”.⁹⁶ Therefore, the jurisdiction of Justices of the Peace in the US to try petty offences is rooted in the foundations of the English common law court system which was prescribed into the state constitutions. As expounded in the 1880 case of the Court of Appeals of Maryland, *State v. Glenn*,⁹⁷ in England, despite the right to be tried by one’s peers under the *Magna Carta*, for

92 *Callan v. Wilson* 32 L Ed 223.

93 *Ibid.* at 227.

94 *Ibid.* at 228.

95 *Byers v. Commonwealth* 42 Pa 89.

96 *Ibid.* at 94.

97 *State v. Glenn* 54 Md 573.

centuries it had been accepted under law that summary jurisdiction could be conferred on Justices of the Peace to try parties for minor and statutory police offences. The judgment continues:

“And when it is declared that the party is entitled to a speedy trial by an impartial jury, that must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure, as theretofore practised been the subjects of jury trial. It could never have been intended to embrace every species of accusation involving either criminal or penal consequences”.⁹⁸

4.14 Somewhat more recently, in the case of *Duncan v. Louisiana*⁹⁹ in 1968, the US Supreme Court held that the Sixth Amendment, as applied through the Fourteenth Amendment to the States, requires that defendants be afforded the right to jury trial for serious offences. They also reaffirmed, however, the principle that petty offences may be tried without a jury.

(b) Maximum Prison Sentence

4.15 The punishment for such offences was discussed in the 1855 case of *State v. Conlin*,¹⁰⁰ referred to by Harlan J in *Callan v. Wilson*, where the court sustained the right of the legislature to provide for the punishment of minor offences “with fine only, or imprisonment in the county jail for a brief and limited period.”¹⁰¹

4.16 In the 1970 US Supreme Court case of *Baldwin v. New York*¹⁰² three members of the majority of the court held that the most relevant objective criterion in deciding whether an offence is a petty offence is the severity of the maximum penalty which may be imposed, as this reflects the seriousness with which society regards the offence. Seven Supreme Court judges participated in the judgment. Three gave the judgment of the Court that under the Sixth and Fourteenth Amendments to the American Constitution only “petty offences” could be tried without a jury, and that for such offences imprisonment could not be authorised for a period of over six months.¹⁰³

4.17 One further judgment, dissenting from the judgment of the Court and given by Harlan J in a separate opinion in the related case of *Williams v. Florida*,¹⁰⁴ agreed that it was appropriate in Federal cases to draw a line between “petty” and

98 *State v. Glenn* 54 Md 573, 605.

99 *Duncan v. Louisiana* 391 US 145, 159.

100 *State v. Conlin* 27 Vt 318.

101 *Ibid.* at 323.

102 *Baldwin v. New York* 399 US 66.

103 White J, who gave the judgment of the court, and Brennan and Marshall JJ.

104 *Williams v. Florida* 399 US 78.

“serious” offences based on a six month prison sentence, but that individual states should not be encumbered by this requirement of jury trial. Two judges, Black and Douglas JJ, concurring with the judgment, took the position that the right to trial by jury applied to all crimes, serious and petty, and Burger CJ felt there was nothing in the Sixth or Fourteenth Amendments that would invalidate the New York court system in which the accused could be sentenced to one year’s imprisonment without a jury trial.

4.18 In 1968, the US Supreme Court stated in *Griswold v. Connecticut*¹⁰⁵ that crimes carrying possible penalties of up to six months imprisonment do not require a jury trial if they otherwise qualify as petty offences. In the 1975 case of *Muniz v. Hoffman*¹⁰⁶ the court held that like other minor crimes “petty” contempts could be tried without a jury, but a sentence of imprisonment for longer than six months was constitutionally impermissible unless the contemnor had been given the opportunity of jury trial.

4.19 How does one know whether an offence is “petty”? Felix Frankfurter and Thomas Corcoran set out a definition of a petty offence which has been used in the past by the US Supreme Court.¹⁰⁷ They defined a petty offence in the following terms:

“Broadly speaking, acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society’s danger, and were stigmatised by punishment relatively light.”¹⁰⁸

4.20 In their view there were “general tendencies”¹⁰⁹ which could be pointed to which set aside a petty offence from one which must be tried by a jury. Pettiness was not a rigidly fixed phenomenon – “The gravity of danger to the community from the misconduct largely guided the moral judgment; the wide repetition of the act, raising practical problems of enforcement, in part influenced the moral value which the community attached to the act”.¹¹⁰ Furthermore, “The apportioned punishment was both a consequence of the minor quality of the misconduct and an index of the community’s moral judgment upon it”.¹¹¹ In the opinion of these two commentators, therefore, the severity of the punishment was not the most vital yardstick for deciphering what constitutes a petty offence, as is the case in this

105 *Griswold v. Connecticut* 381 US 479.

106 *Muniz v. Hoffman* 422 US 454.

107 The passage was quoted by Hilton J in *State of Minnesota (ex rel. Connolly) v. Parks* 273 NW 233.

108 Frankfurter and Corcoran, “Petty Federal Offences and the Constitutional Guaranty of Trial by Jury” (1926) 39 Harvard Law Review 917, 980-981.

109 *Ibid.* at 980.

110 *Ibid.*

111 *Ibid.*

jurisdiction with a minor offence, but rather one of a number of factors to be considered.

4.21 The United States Supreme Court has followed this line of thinking in formulating a set of principles to be used as a guide for deciding when an offence is minor.¹¹² In the Irish case of *Melling v. Ó Mathghamhna*¹¹³ Lavery J sets out the principles which were expounded by these cases. He states:

“It appears to me that these principles may be stated thus:- first: in the construction of a statute and, at least equally in construing a provision in a constitution as a fundamental law, it is necessary to consider how the law stood when the statute was passed. Second: the severity of the penalty involved. Third: the moral quality of the act. Fourth: its relation to common law crimes.”¹¹⁴

4.22 In *Schick's Case*¹¹⁵ Brewer J, delivering the opinion of the court, says: “The truth is the nature of the offence and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offences, among crimes or misdemeanours.”¹¹⁶ Therefore, according to the US Supreme Court, and academic commentators seem to agree, when deciding whether or not an offence is minor or “petty” in nature, one must consider several factors which, looked at together, point to the nature of the offence.

(c) **Maximum Fine**

4.23 *Muniz v. Hoffman*,¹¹⁷ is one of the few cases in any jurisdiction to consider the question of whether the maximum fine should vary with the means of the accused.¹¹⁸ The case centred upon the National Labour Relations Act which authorised the National Labour Relations Board to obtain injunctive relief against a local trade union pending final adjudication of certain unfair labour practice charges. A fine of US\$10,000 was imposed on a trade union for violating the injunction. It is notable that this case was decided in 1975, when the impact of such a sum of money would have been substantially greater than it is today. White J, delivering the judgment on behalf of five members of the Court¹¹⁹ stated:

112 See *Callan v. Wilson* 32 L Ed. 223, *District of Columbia v. Colts* 282 US 63, *Schick v. United States* 195 US 65, *District of Columbia v. Clawans* 300 US 617.

113 *Melling v. O Mathghamhna* [1962] IR 1.

114 *Ibid.* at 13.

115 *Schick's Case* 195 US 65.

116 *Ibid.* at 68.

117 *Muniz v. Hoffman* 422 US 454.

118 The only other case that might seem to deal with this point which we have found is at para.8.13.

119 Three of the other members of the Court, Stewart, Marshall and Powell JJ, dissented on a non-constitutional ground. Douglas J was the only judge to dissent on the constitutional ground: “The Court fails to give effect to...[the phrase ‘all criminal prosecutions’ in the Sixth

“It is one thing to hold that deprivation of an individual’s liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than \$500 is contemplated. [18 USCS 1(3) defined petty offences as crimes the penalty for which does not exceed imprisonment for a period of six months, or a fine of no more than \$500, or both]. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different. It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a \$501 fine would be considered a serious risk to a large corporation or labour union...we cannot say that the fine of \$10,000 imposed on Local 70 [the local trade union] in this case was a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake. This union...collects dues from some 13,000 persons; and although the fine is not insubstantial, it is not of such magnitude that the union was deprived of whatever right to jury trial it might have under the Sixth Amendment.”¹²⁰

4.24 In the case of the US, therefore, it seems plain from, for example, this long quote in *Muniz v. Hoffman* that the central criterion in relation to penalties is imprisonment, be it for six or twelve months. It seems to be suggested in this case that a fine is largely only significant as an add-on to a prison sentence, and not as much in its own right. This is in line with a basic precept widely observed in Irish law, though, oddly, not in the field under review — that liberty should be a well-protected value under the law. This tenet is illustrated, for instance, by the fact that the tort of false imprisonment is relatively often accompanied by exemplary damages, and by respect for the principle of *habeas corpus*.

Amendment] when it declares that a \$10,000 fine is not ‘of such magnitude that a jury should have been interposed to guard against bias or mistake.’[at page 477 of the court’s judgment]. I have previously protested this Court’s refusal to recognise a right to jury trial in cases where it deems an offence to be ‘petty’”[This was stated in Douglas J’s dissenting opinion in *Cheff v. Schnackenberg* 384 US 373]. It seems, from this last sentence, that Douglas J took the absolutist ground that, following the literal interpretation of the Constitution, any criminal offence attracts the right to a jury trial. He was not, however, opposing the view that the maximum fine which could be imposed could vary with the means of the accused.

120 *Muniz v. Hoffman* 422 US 454, 477.

CHAPTER FIVE: THE BRITISH DEBATE ON “EITHER WAY” OFFENCES

5.01 Since the Constitution of the United Kingdom is unwritten, there is no equivalent to our Article 38.2. On the other hand, the English and Welsh legal system developed the idea of jury trial more than eight centuries ago under Henry II and it has always been regarded as a central feature of their legal system and the object of considerable respect, though sometimes controversy as well. Indeed, it is not too much to say that the concept of jury trial enjoys the status of a “convention of the Constitution”.

5.02 However, what is essentially the subject of this Paper – the appropriate scope of the right to jury trial – has been the subject of heated and informed debate in Britain since 1999.¹²¹ It is appropriate to include a summary of this debate because of the indirect light which it sheds on the present discussion.

5.03 The debate in England and Wales centres around the Home Secretary’s proposed legislation, the *Criminal Justice (Mode of Trial) Bill, 2000*, which seeks to remove a defendant’s right to choose the mode of trial when charged with an either-way offence,¹²² thus directing more trials away from the Crown Court to the Magistrate’s Court. In England and Wales, trials in Magistrates’ Courts are often held before lay magistrates, who are given advice on the law from the clerk of the court (with the other possibility being that a stipendiary magistrate hears the case). Besides this, a big difference between a Magistrate’s Court and Crown Court hearing is that there is no jury in a Magistrate’s Court. Accordingly, the Commission regards the current debate in England and Wales as essentially involving the right to jury trial and, therefore, it is germane to this Paper.

5.04 Under the proposed legislation the decision as to in which court an either-way case is to be heard would rest solely with the magistrate, who would hear representations on the matter from both the prosecutor and the defence. In making this decision the magistrate should consider the nature of the case and any relevant

¹²¹ This is not the first time, however, that this issue has been the subject of political debate in the UK. In 1975 the Interdepartmental Committee on the Distribution of Criminal Business (the James Committee) published a report including a proposal that magistrates should decide the mode of trial for “triable-either-way offences” which would enable the business of the criminal courts to be regulated more economically – The Interdepartmental Committee on the Distribution of Criminal Business, *The Distribution of Criminal Business between the Crown Court and Magistrates’ Courts* (Cmnd 6323, November 1975). This proposal sparked debate on the issue.

¹²² “Offences-triable-either-way” are a classification of offence under the *Criminal Law Act, 1977* and they may be tried either summarily or on indictment. If tried summarily, the maximum term of imprisonment which magistrates may impose is six months and the maximum fine is Stg£5,000.

circumstances of the offence (though not the circumstances of the accused) and whether the punishment which he has the power to impose would be adequate.¹²³ The defendant's right to insist on jury trial would be removed,¹²⁴ although the defendant may appeal the decision to the Crown Court if at the mode of trial hearing he had made representations that he should be tried on indictment.

5.05 The Bill itself is, in fact, no longer in existence as it was withdrawn after an amendment introduced by the government at committee stage in the House of Lords was defeated.¹²⁵ Because of problems with timing, a new bill could not be introduced into the October 2000 parliamentary session, which rendered it impossible to invoke the *Parliament Acts* as originally planned.¹²⁶ However, in practice this area of the criminal law fell within the ambit of a review of the criminal justice system by Lord Justice Auld who began work in December 2000, and which was published on October 8th 2001.¹²⁷ According to the Home Office, it was expected that Lord Justice Auld's recommendations would supersede the need for the *Criminal Justice (Mode of Trial) Bill*, perhaps by recommending setting up a single unified criminal court, which would encompass both the Crown Court and the Magistrates' Court. If the review did not meet expectations in this regard, however, it was considered very likely that the *Criminal Justice (Mode of Trial) Bill* would be reintroduced into parliament as the Government had stated itself to be committed to the principle behind the Bill.¹²⁸

5.06 Lord Justice Auld's review does focus extensively on the issue of the right of election of trial by jury in either-way offences, and he does come to the same conclusion as others before him, such as Narey,¹²⁹ that as a matter of principle, the mode of trial in either-way cases should be decided objectively by the court, rather

123 In 1995, *National Mode of Trial Guidelines* were introduced as an aid to magistrates in deciding the appropriate court for an either-way case. The guidelines include that the court should never make its decision on the grounds of convenience or expedition; the court should assume that the prosecution version of the facts is correct; if the case involves complex issues of fact or law, the court should consider setting the case down for trial in the Crown Court; in general, except where otherwise stated, either-way offences should be tried summarily unless the case has certain features and the court's sentencing powers are inadequate. The Guidelines were intended merely to provide guidance to magistrates rather than direction and are not intended to interfere with a magistrate's duty to consider each case on its individual facts.

124 This reform was recommended in 1993 by the Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (Cm 2263, July 1993) and the *Review of Delay in the Criminal System* (the Narey Report) in 1997.

125 HL Deb. 20 January 2000 cl. 1246 – 1298.

126 The *Parliament Acts* would enable the Government to pass a bill that had been rejected by the House of Lords.

127 The Right Honourable Lord Justice Auld, *A Review of the Criminal Courts of England and Wales* (September 2001).

128 The principle being that due to the need for a more efficient system in the Crown Court, particularly a reduction in delays, a defendant should not be given the right to choose to have a jury trial for either-way offences.

129 Lord Chancellor's Department, *Review of Delay in the Criminal Justice System* (December 1997).

than by the accused. The review does go on to propose a single criminal court as was anticipated by some. Under the Auld proposals the court would be divided into three divisions, the Crown Division, the District Division and the Magistrates' Division. As a result of these divisions, a high proportion of either-way cases would be heard, not by a jury or, alternatively, by magistrates, but rather by the intermediate tribunal of the District Division which would be composed of a judge sitting with two lay magistrates. The more serious either-way cases would be heard by the Crown Court and the less serious ones by the Magistrates Court. It is proposed that either-way offences would be allocated to the right level of court according to statutory criteria, including the seriousness of the offence and the circumstances of the defendant.¹³⁰ It remains to be seen if these proposals prove acceptable to the Government and are implemented, or if they will choose to reintroduce the *Criminal Justice (Mode of Trial) Bill* to parliament, which seems unlikely as the Auld proposals are largely in line with the Bill.

5.07 A statutory statement of the general right of a defendant to choose jury trial was first made in English law in the *Summary Jurisdiction Act, 1879*, the modern equivalent of which could be said to be the right of the defendant to choose jury trial in either-way offences. S.17 of the *Summary Jurisdiction Act, 1879* set out a general right to claim trial by jury, which was exercisable once the maximum sentence on summary conviction exceeded three months' imprisonment. S.17 stated:

“(1) A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the court and before the charge is gone into but not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence, and, if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly, and the expenses of the prosecution shall be payable as in cases of felony.

(2) A court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect: ‘You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury?’ with a statement, if the court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried if tried by a jury.”

¹³⁰ For further discussion of the review, see Michael Zander, “The Auld Review of the Criminal Courts: a Magisterial Report” (2001) *New Law Journal* Vol 151 No 7003, 1461 – 1463.

5.08 Under s.12 of the Act, an adult charged before a court of summary jurisdiction with an indictable offence specified in the First Schedule of the Act could be dealt with summarily if the court was of the opinion that it was expedient to do so, having regard to the character of the accused, the nature of the offence and all the circumstances of the case. It is important to note, however, that the informed consent of the person charged is required. If found guilty on summary conviction the court cannot impose a term of imprisonment exceeding three months or a fine of over twenty pounds. S.12, therefore, can be seen as the equivalent of s.2 of the *Criminal Justice Act, 1951* in this jurisdiction, although the consent of the DPP or Attorney General is not required under the 1879 Act.

5.09 S.27(1) of the *Criminal Law Act, 1977*¹³¹ gave effect to a recommendation of the James Committee¹³² to reduce to six months the maximum period of imprisonment available on summary conviction for a number of offences formerly carrying longer maximum periods. S.28(1) states:

“On summary conviction of any of the offences triable-either-way listed in Schedule 3 to this Act a person shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding the prescribed sum or both”.

5.10 Under s.28(7) a standard maximum fine of Stg£1000 on summary conviction for offences triable either-way was laid down. This increase was also on foot of recommendations from the James Committee, which many considered a key element in the rationalisation of the criminal justice system.¹³³ This figure was an increase from Stg£400 to take account of inflation.

5.11 Under s.18 of the *Summary Jurisdiction Act, 1879* a court of summary jurisdiction “shall not, by cumulative sentences of imprisonment...to take effect in succession in respect of several assaults committed on the same occasion, impose on any person imprisonment for the whole exceeding six months”. Therefore, the present six month maximum sentence for a minor offence in England and Wales has its roots as far back as 1879.

5.12 At present, the election of mode of trial for either-way offences is governed by the *Magistrates’ Courts Acts, 1980*. The maximum term of imprisonment which a Magistrates’ Court may impose for an either-way offence is still six months, and if there are two or more offences, the aggregate term of

131 S.27(1) states: “without prejudice to s.108 of the *Magistrates’ Courts Act, 1952* (consecutive terms of imprisonment), a magistrates’ court shall not have power to impose imprisonment for more than six months in respect of any one offence.”

132 Interdepartmental Committee, *The Distribution of Criminal Business between the Crown Court and the Magistrates’ Court* (Cmnd 6323, November 1975).

133 For example, see HC Deb. 3 May 1977 c248 - 249.

imprisonment may not be more than 12 months.¹³⁴ The maximum fine which can be imposed at present is Stg£5,000.¹³⁵

5.13 The arguments in favour of the *Criminal Justice (Mode of Trial) Bill* are based on a preference for an expedient and more cost efficient criminal court system,¹³⁶ moving as many cases as possible into the jurisdiction of the Magistrates' Court where, it is argued, cases are dealt with more quickly than in the Crown Court due to the fact that there is no jury. According to the Home Office:

“Too many defendants have been working the system, demanding Crown Court trial purely to delay proceedings. Not only does this cause suffering and distress to the victims and witnesses, but it also costs the taxpayer a lot of money in extra court costs.”¹³⁷

5.14 The Attorney General, Lord Williams of Mostyn, stated, when opening the debate on the second reading of the *Criminal Justice (Mode of Trial) Bill* in the House of Lords:

“We want to strengthen and improve the workings of the jury system in serious cases. We do not want the system to be unable to deal promptly with serious cases so that very often those accused of serious crime are remanded for too long a period in prison conditions which very often are not satisfactory...the wider community...has a wider, sustainable interest in the efficient, just, fair and prompt conduct of the criminal process. I suggest that in many cases those who elect trial are distorting the system...It is not simply a matter of cash...judicial and Crown Court time is limited. It is not fair, right, appropriate or supportable that those who are complainants, alleged victims or witnesses in serious cases should have to wait a long time before the issue is determined.”¹³⁸

5.15 The explanatory notes to the *Criminal Justice (Mode of Trial)(No. 2) Bill*, which was introduced into the House of Lords on 26 July 2000, state that the financial effects of the Bill would be a net resource saving of Stg£128 million since

134 *Magistrates' Courts Act, 1980*, ss.31 and 133. See also Andrew Ashworth, *Sentencing and Criminal Justice* (3rd ed., Butterworths, 2000), 2.

135 As the maximum amounts of fines payable on summary conviction can often prove inadequate as a result of inflation, s.37 of the *Criminal Justice Act, 1982* specified that maximum fines for summary offences were to fall into one of five levels on a “standard scale” which could be increased or reduced, according to inflation, by an order of the Home Secretary.

136 A Home Office research paper published in 1999 set out the cost of proceedings in the criminal courts. Magistrates' Court proceedings cost on average Stg£550 while Crown Court proceedings cost, on average, Stg£8,600 – Home Office, *The Cost of Criminal Justice* (Home Office Research Findings No. 103, 1999).

137 Home Office, *Criminal Justice (Mode of Trial) Bill* (Home Office Press Notice, 19th November 1999).

138 HL Deb. 2 December 1999 c924 – 925.

it was estimated that there would be a reduction in the number of Crown Court trials by around 14,000 per annum.¹³⁹

5.16 A Home Office study conducted in 1986 stated that:

“Recent years have seen an upward trend in the number and proportion of triable-either-way cases committed to the Crown Court. The study found that overall, in two-fifths of committals to the Crown Court magistrates had declined jurisdiction, taking the view that the case was not suitable for summary trial...In the remaining three-fifths of cases committed to the Crown Court, defendants exercised their option to be tried by jury.”¹⁴⁰

5.17 The thrust of such statistics, in other words, is that allowing a defendant to choose where to be tried merely leads to delay and expense in the criminal justice system which could be avoided by directing more either-way cases to the Magistrates’ Courts.

5.18 More recently, however, a Home Office consultation paper published in July 1998 came to a very different conclusion in relation to the number of triable-either-way cases which come before the Crown Court as a result of the accused insisting on jury trial, suggesting that there has been a changing trend:

“There has been a steady decrease over the last ten years in the percentage of either-way cases committed to the Crown Court for trial which arrive there by way of election, rather than because the magistrates decline jurisdiction. In 1987, elected cases accounted for 53 per cent of committals for trial; since then the proportion has gradually fallen to the present level of 28 per cent.”¹⁴¹

5.19 In other words, in an increasing proportion of cases, magistrates have declined jurisdiction because they take the view that the case was not suitable for summary trial rather than accused persons electing to be tried in the Crown Court.

5.20 The Paper goes on to state that the reason for this fall in the number of elected cases is not clear. According to the Labour peer, who is also a QC, Baroness Kennedy of the Shaws, in a speech during the second reading debate on the Bill in the House of Lords in December 1999,¹⁴² the majority of those charged with either-way offences ask to be dealt with in the Magistrates’ Court. She goes on to say that although in 1993, when the Royal Commission on Criminal Justice published its report,¹⁴³ 34,000 cases were being tried in the Crown Court as a result

139 According to the Home Office, the net annual spending on the Criminal Justice System is over Stg£12 billion.

140 David Riley and Julie Vennard, *Triable-either-way cases: Crown Court or magistrates’ court?* (Home Office Research Study 98, 1988), iii.

141 Home Office, *Determining Mode of Trial in Either-Way Cases: A Consultation Paper* (July 1998), para. 6.

142 HL Deb 2 December 1999 c970 – 972.

143 The Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal*

of election, by 1999 that number had been reduced to 18,000, and 95 per cent of those charged with either way offences pleaded guilty and were dealt with in the Magistrates' Court. This is largely a result of the introduction of "plea before venue"¹⁴⁴ and the fact that credit is now given for an early guilty plea. Therefore, there has already been, over the past few years, a huge reduction in the amount of cases going for trial.

5.21 Further studies show that when the cases of those defendants who elect to be tried in the Crown Court eventually come to trial, the majority end up pleading guilty. In fact, a study carried out for the Home Office in 1990 found that 82 per cent of those defendants who chose to be dealt with in the Crown Court ended up pleading guilty to all charges on which they were convicted.¹⁴⁵

5.22 One may ask why a defendant would choose to go before the Crown Court if they are going to ultimately plead guilty, when the maximum sentence which may be imposed in the Crown Court is far higher than in a Magistrates' Court, and indeed, the fact that this occurs has often been cited throughout the debate on the issue of mode of trial as being a major reason for taking the choice of mode of trial away from the defendant. It can be argued that some defendants who choose the Crown Court only to later admit their guilt may do so in order to delay proceedings for as long as possible, wasting time and resources. Such a delay can maximise time spent in remand custody which is offset against any custodial sentence which may be imposed. Unconvicted defendants serve more of their sentence on remand and enjoy privileges not extended to convicted prisoners, there is always the possibility that witnesses may not attend trial, they want to know whether the judge is lenient before deciding whether to acknowledge their guilt, and they simply do not want to make a difficult decision until they absolutely have to.¹⁴⁶

5.23 According to Riley and Vennard, however, the reason that so many defendants chose jury trial is because the majority of defendants electing mode of trial intended to contest their case and saw the Crown Court as giving a better chance of acquittal, which outweighed the risk of being given a more severe sentence by that court¹⁴⁷ Furthermore, this preference for jury trial exists despite

Justice (Cm 2263, July 1993).

144 In October 1997 s.49 of the *Criminal Procedure and Investigations Act, 1996* introduced a new procedure called "plea before venue". Under this procedure when a person is charged with an offence triable either-way, the Magistrates' Court must explain to the accused that he may indicate whether he would plead guilty or not if the case went to trial. The Court must also explain to him that if he does plead guilty he will be tried summarily, but may still be committed to the Crown Court for sentence if appropriate.

145 Carol Hedderman and David Moxon, *Magistrates' Court or Crown Court? Mode of Trial Decisions and Sentencing* (Home Office Research Study No. 125, 1992), vi – vii. Riley and Vennard's study, published in 1998, also found that when the cases of those defendants who had chosen trial in the Crown Court finally came to trial, the majority pleaded guilty – David Riley and Julie Vennard, *Triable-Either-Way Cases: Crown Court or Magistrates' Court?* (Home Office Research Study 98, 1988).

146 Dr. Satnam Coongh, *Review of Delay in the Criminal Justice System* (Lord Chancellor's Department Research Series No. 2/97, 1997), 8.

147 David Riley and Julie Vennard, *Triable-either-way cases: Crown Court or magistrates' court?* (Home Office Research Study 98, 1988), iii.

the fact that, in any given case, a custodial sentence is far more likely in the Crown Court than in the Magistrates' Court. It seems that since so many defendants choose to be tried in the Crown Court despite the higher sentences, there must be some strong incentive for so doing. According to findings such as these, therefore, it seems that the argument that many of those choosing jury trial merely do so to delay proceedings and buy themselves time before being sentenced may be unlikely.

5.24 According to the James Committee's report, "although the majority of defendants consent to summary trial, both the OPCS survey and the Sheffield research show that defendants themselves attach great importance to the choice of forum at present vested in a defendant".¹⁴⁸

5.25 Hedderman and Moxon's study found that:

"A substantial number of defendants, including some who intended to plead guilty from the outset, chose to be dealt with at the Crown Court because they did not trust magistrates to give due weight to their case, often feeling that they would be biased in favour of the police; in almost one quarter of cases where solicitors advised their client to plead guilty from the outset, they nevertheless favoured Crown Court trial."¹⁴⁹

5.26 The findings of the Home Office Consultation Paper published in July 1998, which assessed views on the appropriateness of defendants in either-way cases having a choice about mode of trial, bear this assumption out. The Paper found that:

"Defendants in the Crown Court are also more likely to be acquitted: the chance of being acquitted on a contested charge is approximately 40 per cent in the Crown Court compared with 25 per cent in Magistrates' Courts."¹⁵⁰

5.27 The Paper went on to say that:

"It is unclear, however, whether this is because juries are more inclined to acquit – rightly or wrongly – than magistrates, or because defendants with a good defence are more likely to be tried in the Crown Court, either as a result of having elected or (conceivably) by direction of the magistrates."¹⁵¹

148 The Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and the Magistrates' Court, *The Distribution of Criminal Business between the Crown Court and Magistrates' Courts* (Cmnd 6323, November 1975), para 59.

149 Carol Hedderman and David Moxon, *Magistrates' Court or Crown Court? Mode of Trial Decisions and Sentencing* (Home Office Research Study No. 125, 1992), vi – vii.

150 Home Office, *Determining Mode of Trial in Either-Way Cases* (July 1998), para. 9.

151 *Ibid.*

5.28 Nevertheless, these findings raise some questions in relation to the level of investigation in the Magistrates' Courts as opposed to a jury trial. To some extent it can be asked whether, on foot of such statistics, jury trial is more thorough and, therefore, safer in all but the most straightforward or "open and shut" cases.

5.29 In February 2000, moreover, the Bar Council announced that Crown Courts were able to hear short trials almost twice as quickly as Magistrates' Courts. According to the Bar Council the government's proposal to move many either-way cases from the Crown Court to the Magistrates' Court would, in fact, cause such cases to take much longer to be tried, and in the words of the Chairman of the Bar Council, Jonathan Hirst QC:

"This fresh evidence confirms what we have always known – that the planned curbs on jury trials will add to cost and delay the court system."¹⁵²

5.30 In summary, therefore, there is a convincing school of thought that believes that delays in the criminal justice system are not due to "rogue defendants" trying to gain as many advantages as possible by delaying proceedings, and thus wasting valuable time and resources, but rather due to manifest shortcomings in the criminal justice system itself which will not be remedied simply by removing a defendant's right to choose mode of trial and directing a greater case load towards the Magistrates' Courts.

5.31 This survey of the debate in England and Wales has been included in this Paper because it is topical and is of interest in a wider context than simply the particular question with which this Paper is concerned. The tentative conclusion to which it leads is that the reasons that may motivate an accused (where they have a choice) to prefer trial by jury are mixed: some are in accordance with the historic policy of the law supporting trial by jury (it is perceived to be fairer), and some are not (the accused hopes to take advantage of the delay which the trial brings). Even assuming that these impressions would be broadly true in this jurisdiction, however, there is no need to regard this mixture as a ground for undervaluing the jury. First, as just indicated, some of the motivations of accused persons who opt for a jury are in accordance with the conventional view. Secondly, the jury system embraces values reaching beyond the perceptions of accused persons, such as participation of the public in the criminal justice system and confidence of the general public in that system. Therefore, it is the Commission's contention that the right to jury trial should be as widely available as possible, and particularly so when prison sentences are likely to be imposed.

¹⁵² General Council of the Bar, *Straw Jury Reforms Will Worsen our Delays – New Research* (General Council of the Bar Press Notice, 24th February 2000).

CHAPTER SIX: THE MAXIMUM FINE AND SENTENCE APPRAISED

6.01 In this chapter, working mainly from a policy perspective, we consider the maxima in relation to fines and imprisonment which have been laid down by the courts as being required by the term “minor offences”. The approach is primarily to compare the maxima for fines and imprisonment with each other. We believe that this approach is justified because, in most cases, only one or other type of punishment (not both) is imposed so that, unless there is equivalence between the two, one category of offender is at an advantage compared to another. In addition to this type of comparison, we also refer to the law in other jurisdictions, as outlined in Chapter Four.

A. Survey of U.S. Attitudes

6.02 According to the results of a socio-legal survey carried out in the US in 1984¹⁵³ in relation to the development of severity scales for penalties, a 12 month prison sentence was considered by those who participated in the survey to be equivalent to a US\$10,000 fine, (or in the equivalent in Irish pounds in 2001, IR£15,420 or €19,579.36). The survey was carried out in order to assess societal conceptions of the seriousness of offences in relation to the severity of penalties. Those questioned came from four different sections of the population in the US, namely prisoners, probation officers, police officers and sociology students with an interest in criminology.¹⁵⁴ Since so far as the criminal law is concerned, the groups surveyed were from opposite sides of the social spectrum¹⁵⁵ it was taken that the views were balanced and typical of the population as a whole.

6.03 The method used was that the respondents were presented with a list of 36 penalties, including death, imprisonment of varying duration, suspended prison sentences, probation and fines. Each respondent was asked to rank the different

153 Leslie Sebba and Gad Nathan, “Further Exploration in the Scaling of Penalties” (1984) Vol. 23 British Journal of Criminology No. 3, 221.

154 The police officers were enrolled for study at the John Jay College of Criminal Justice, the prisoners were inmates in the Philadelphia House of Correction and the students were an undergraduate criminology class at the University of Pennsylvania. These groups were chosen in order to test the hypothesis that different perceptions of legal sanctions and the legal system in general can be anticipated according to the degree and nature of one’s involvement with the criminal justice system.

155 The surveys given to each of the respondents also solicited socio-demographic data from the respondents and sought information as to their attitudes to various law enforcement issues in order to reflect any diverse attitudes of the different population samples on such issues. The results showed a high degree of similarity in the ranking order of the 36 penalty items assessed by the four different groups.

punishments in descending order of severity.¹⁵⁶ A term of imprisonment of 12 months was given a score of 16.75 whereas a US\$1,000 fine was given 26. It is important to note that between these two figures, there were seven other penalties ranked, including a fine of €19,579.36 (in the 2002 euro equivalent or IR£15,420) which, at 17.75, is ranked one below (in other words considered less serious than) a 12 month prison sentence.¹⁵⁷

6.04 These figures give us a picture of public perception, admittedly in the United States, of particular prison sentences in relation to fines. Clearly the respondents did not view a 12 month prison sentence as a minor penalty. Indeed, a 12 month prison sentence was ranked three places higher, in terms of seriousness than a fine of €22,474.36 (IR£17,700).¹⁵⁸

B. Financial and Other Costs of a 12 Month Prison Sentence

6.05 In this section, we concentrate on the monetary loss which follows from being in prison. We do not concern ourselves with other adverse consequences, for example, effects on reputation, employability, personal relationships, psychological or physical well being.¹⁵⁹ Assume, as the first possibility, that the prisoner would, if not in prison, be in receipt of unemployment benefit.¹⁶⁰ The basic rate of unemployment benefit for a single person is, at the time of writing, €108.56/week (IR£85.50)¹⁶¹ Prisoners are disqualified from receiving social welfare payments

156 An indicator, or “modulus” score, to which other severity scores were to relate, of 10 equating to the penalty of one year’s probation was used. The death penalty was given a score of 1.00 and a US\$10 fine a score of 36.00.

157 If we look at the alternative method of scoring used by the authors, that is taking the median scores for different penalties given by the different groups of respondents, the results are even more striking. The police group gave a 12 month prison sentence a median of 21.3 and a US\$1,000 fine a median of 10.1. They gave a US\$10,000 fine a median of 19.8. The prisoners gave a US\$10,000 fine a median of 100, a 12 month prison sentence a median of 97.9 and a US\$1,000 fine a median of 20. The results for the other two population groups are similar. Thus, the message of the survey – that a 12 month prison sentence is regarded as more severe even than a US\$10,000 fine in 1984 terms – is illustrated even more strongly when one considers these median scores.

158 It is worth mentioning that in this jurisdiction, during a recent discussion of a class of approximately 100 student barristers, there was a strong feeling that a 12 month prison sentence is far beyond the boundaries of a €2,539.48 (IR£2,000) fine, and that the two are in no way equivalent penalties.

159 A further consideration is the unanimous decision of the Supreme Court on 11th July 2000 in the Stephen Walsh case that there is no Constitutional right for a lawfully held prisoner to vote. One’s right to vote, a fundamental civil right, is not infringed when a fine is imposed, but it is when a prison sentence is imposed - Irish Times, 12th July 2001.

160 In 1996, according to a study carried out by leading criminologist Paul O’Mahony on the social and criminal histories of 124 Mountjoy prisoners (which, according to O’Mahony, was a representative, random sample survey, involving one fifth of the total population of the prison, a large enough sample from which to make reliable generalisations), 88% of the prisoners interviewed were unemployed prior to imprisonment. In fact, 44% had never held a job for more than 6 months – Paul O’Mahony, “Punishing Poverty and Personal Adversity” (1997) 7 Irish Criminal Law Journal, 51, 60 – 63.

161 *Social Welfare Act, 2001*, s.4. If that person’s spouse or partner is also unemployed, or earns

while in prison. If they work or participate in a training course they receive a daily gratuity of around €1.27 (IR£1), of which they are allowed to spend half, but must save the remainder until their release. Therefore, the basic personal loss to a claimant receiving social welfare who is sent to prison is €5,181.80 (IR£4,081) per annum.¹⁶²

6.06 Assume, by contrast, that the person is in employment before being sent to prison. The minimum wage in Ireland is €5.97/hour (IR£4.70), which amounts to €12,412.96 (IR£9,776) a year for an average 40 hour working week. To take some other possibilities, the average gross earnings for a skilled operative in the construction industry in 2000 was €35,261.90 (IR£27,771) per annum, or €16,400.57 (IR£12,916.50) for apprentices. The average gross pay for the motor trade in 2000 was €21,516.35 (IR£16,945.50), in the civil service €27,599.66 (IR£21,736.50), in retail €24,384.68 (IR£19,204.50) and €21,355.72 (IR£16,819) for manufacturing industry workers.

6.07 From these figures it is clear that imprisonment has huge economic consequences for a prisoner, and his family, quite apart from the emotional, psychological and social implications to be considered. If the prisoner was previously in employment, he may very likely lose his job, and his job prospects may be greatly reduced for the future due to his having spent time in prison.

6.08 On foot of the above findings, the financial implications of imprisonment for 12 months are far greater than that of a €3,000 fine. Even if the convicted person was in receipt of the most basic rate of unemployment benefit prior to being sent to prison for 12 months, the financial loss would be roughly €5,181.80, taking into account the daily gratuity that prisoners receive. This figure is quite apart from any interest that may accrue on delayed mortgage payments or loan repayments which had to be suspended while in prison.¹⁶³

less than €88.90 (IR£70) per week, €68.58 (IR£54) can be claimed for that spouse or partner. If the spouse or partner earns between €88.90 and €184.15 (IR£145) per week a reduced rate can be claimed. If there are any dependant children, €16.76 (IR£13.20) can be claimed for each child, unless one partner or spouse earns over €184.15 (IR£145) per week when only half rate can be claimed for each child.

¹⁶² These figures were provided by the Department of Social, Community and Family Affairs. This loss is in terms of the basic amount of unemployment benefit that would be lost, and is quite apart from any other benefits, such as rent/mortgage interest supplements or fuel allowance. If a prisoner has a spouse and children, the spouse is entitled to One-Parent Family Payment. This payment is means tested and the maximum rate is €108.56 (IR£85.50) per week plus €19.30 (IR£15.20) per child. In addition to the One-Parent Family Payment, the spouse can claim half rate unemployment benefit or disability benefit. In order to be eligible for the One-Parent Family Payment the person being sent to prison must be sentenced to at least six months imprisonment or must have been in custody on remand for at least six months.

¹⁶³ In general, there is no particular scheme for dealing with mortgage or loan repayments which cannot be made while an individual is serving a prison sentence, but even if a loan is renegotiated or payments are suspended until the person is released from prison, interest on the loan will accrue over a longer period of time.

C. Effect of Inflation on Fines

6.09 There is one major reason why there seems to be a disproportion between the maximum fine in comparison to the maximum prison sentence which may be imposed without a jury trial. This is the fact that there has been no authoritative, modern review of the effect of inflation or other economic factors since 1922 (or 1937) in this jurisdiction on the limit for a fine for a minor offence. We may accept as the baseline the figure set out in 1960 in the first major case to deal with this issue, *Melling v. Ó'Mathghamhna*.¹⁶⁴ In *Melling* a majority of the Supreme Court held that a fixed penalty of €127 (IR£100) left an offence imposed under the *Customs Consolidation Act, 1876* within the minor category, although they did observe at the upper limit that even a penalty much lower than €1,270 (IR£1,000) would have taken the offence beyond it.

6.10 It is important to note here, however, that all members of the court, majority and minority, decided the case on the basis that, in assessing the constitutional limits which fix what is a minor offence, “we must take the value of money as being what it was in 1922”.¹⁶⁵ The significant point is that if one looks at the basic rate of inflation since 1922, €127 (IR£100) in 1922 is worth €5,078.95 (IR£4,000) in today’s terms (and, indeed more if one takes 1937 as the base year since there was deflation of about 10% from 1922 to 1937). The figure of €5,078.95 (IR£4,000) is, of course, substantially higher than the actual maximum figure being fixed in contemporary legislation of €3,000 (just over IR£2,300).

6.11 In no case since *Melling*, however, has the Supreme Court considered in any meaningful way what the limit on fines for minor offences would be in light of inflation since 1922. The only case in which this was done to any degree was *State (Rollinson) v. Kelly*,¹⁶⁶ in which Henchy J, in order to determine whether the €634.87 (IR£500) fine under the *Betting Act, 1931* rendered the offence minor, reviewed the *Melling* case.¹⁶⁷ Henchy J compared the fine in *Melling* to that in *Rollinson*, stating that €127 (IR£100) in 1960 (when *Melling* was decided) would be equal to €1,142.76 (IR£900) in 1984. It was on foot of this comparison that Henchy J found that the €634.87 (IR£500) fine imposed under the *Betting Act, 1931* kept the offence within the minor category. Although Henchy J did consider the allowable fine from *Melling*, he did so by reference to inflation as it had occurred between 1960, the date of *Melling*, and 1984, the date of *Rollinson*. He thereby chose a different criterion and diverged from the approach taken in *Melling*, which was to take the relevant date as being 1922, as stated in the extract from Kingsmill Moore J’s judgment, quoted at para.6.10.

6.12 There is a further point. In most of the cases on this topic, the judges appear to be assuming that the only factor by which the case ought to be adjusted is

¹⁶⁴ *Melling v. O Mathghamhna* [1962] IR 1.

¹⁶⁵ *Ibid.* at 35 (as it was put in Kingsmill Moore J’s dissenting judgment).

¹⁶⁶ *State (Rollinson) v. Kelly* [1984] IR 248.

¹⁶⁷ *Ibid.* at 261.

the inflation rate.¹⁶⁸ However, in the Commission's view it is a matter for argument as to whether inflation is the appropriate connecting factor. The basic question in regard to any punishment is the impact which it has on the individual being sentenced rather than value in any abstract sense. If one is concerned with the impact on the individual, then one should focus on the effect on his well being which is caused by the deprivation of a particular sum of money. This depends not just on inflation but on other factors, such as how well off he is after the fine. If one adopts this view, then the consequence is that one should take, as the "connecting factor", not the inflation rate, but the increase in the wage rate.

6.13 There is, in fact, a significant difference between the two figures. Take, first, as an example of wage increase, the change in the average weekly wage for a worker in the manufacturing industry. In 1953 (the earliest year for which information is available) the figure was €6.95 (IR£5.47). By 2001, the equivalent was €463.45 (IR£365). In other words, there was a 66-fold increase. The comparable figure for inflation, for the same period, was only a factor of 19.¹⁶⁹ Thus to adopt the increase of wage rates figure, rather than the inflation rate, would increase the maximum figure for the fine by a factor of as much as three.

D. Maximum Jurisdiction in Civil Cases

6.14 As another comparison, it is worth noting the changes in the maximum jurisdictions in civil terms of the District and Circuit Courts, which are as follows: under the *Courts of Justice Act, 1924*, the original jurisdiction of the District Court was €31.74 (IR£25) and that of the Circuit Court was €380.92 (IR£300). Under the *Courts of Justice Act, 1953* this was raised to €63.49 (IR£50) for the District Court and €761.84 (IR£600) for the Circuit Court. Under the *Courts Act, 1971*, the jurisdiction of the District Court was raised to €317.43 (IR£250) and that of the Circuit Court to €2,539.48 (IR£2,000). Under the *Courts Act, 1981* the jurisdiction of the District Court was again raised to €3,174.35 (IR£2,500) and that of the Circuit Court to €19,046.07 (IR£15,000). Finally, under the *Courts Act, 1991* the jurisdiction of the District Court was raised to €6,348.69 (IR£5,000) and that of the Circuit Court was raised to €38,092.14 (IR£30,000). Again the maxima are to be raised - the *Court and Court Officers Bill* is currently before the Oireachtas awaiting debate. The maxima set out in the Bill at present are €20,000 (IR£15,751.28) for the District Court and €100,000 (IR£78,756) for the Circuit Court. €1.27 (IR£1) in 1924 would now be worth €54.61 (IR£43). Therefore, €31.74 (IR£25), the District Court jurisdictional limit in 1924, would now be worth €1,364.97 (IR£1,075). However, the present District Court jurisdictional limit is €6,348.69 (IR£5,000) and is to be raised to €20,000 (IR£15,750). These increases in the civil jurisdiction of the District Court clearly go far beyond mere inflation levels. This is a striking comparison with the minimal increases in the criminal jurisdiction of the District Court.

¹⁶⁸ The only case in which a judge looked at other factors to any degree was in *State (Rollinson) v. Kelly* [1984] IR 248, in which Griffin J briefly considered wage increases – at 263. However, he only considered such increases since 1960, and not since 1922 or 1937.

¹⁶⁹ All economic data is from the Central Statistics Office.

E. Imposition of Fines before Prison Sentences

6.15 A third, and the Commission considers even more telling point of comparison, is that the standard approach for any judge passing sentence is to consider, first, whether a fine will meet the case. Only if he concludes that even a stiff fine will not suffice in the particular circumstances does he go on to impose, instead, a custodial sentence.¹⁷⁰ Such an approach surely assumes, and this is the important point, that, except in extreme circumstances, a custodial sentence, of whatever short length, would be regarded by a judge as a more severe punishment than a fine, bearing in mind that a fine will always be roughly proportionate to the defendant's capacity to pay. This is the view the Commission believes would be shared by most people, lawyers and non-lawyers alike.

6.16 Significantly, it is also the prevailing view in the other jurisdictions examined whose constitutions require them to rate the severity of offences in order to categorise whether a jury trial is required or not.¹⁷¹ As a general rule in these jurisdictions, the critical test is the prison sentence with the fine being taken into account, if at all, as a make weight. For example,¹⁷² in Australia Dixon and Evatt JJ stated in *R v. Federal Court of Bankruptcy ex p. Lowenstein*¹⁷³ that the criterion for excluding an offence from the minor category should be the severity of the punishment, particularly "the liability of the offender to [any] term of imprisonment or to some graver form of punishment".¹⁷⁴ As already noted, the Australian judges who are of the view that there is a limit on which offences may be tried without a jury, in considering what that limit is, refer only to prison sentences and not to fines.¹⁷⁵ Moreover, in the US case of *Muniz v. Hoffman*¹⁷⁶ the US Supreme Court was of the opinion that "From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different."¹⁷⁷ In that case they held that six months imprisonment was enough to bring an offence out of the minor category, but that the imposition of a US\$10,000 fine on a trade union was not.¹⁷⁸

6.17 The Commission's preliminary conclusion, therefore, is that, in the light of these considerations and comparisons, especially the point which has been made

170 This generalisation is somewhat over-simplified. It does not, for instance, address the situation in which the defendant has repeatedly failed to pay a fine previously, but a prison sentence would not usually be the appropriate sentence. However, this simplification does not matter since here we are only concerned with contrasting imprisonment with fines.

171 See Chapter Four.

172 See para.4.08 above.

173 *R v. Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556.

174 *Ibid.*

175 See para.4.09.

176 *Muniz v. Hoffman* 422 US 454.

177 *Ibid.* at 477.

178 See para.4.23.

regarding the change in the value of money and in incomes, if the point was thoroughly argued before the present Supreme Court, the Court might be prepared to set a significantly higher limit for the fine for a minor offence than is assumed to be the case at the moment.

F. Maximum Prison Sentence of Six Months

6.18 Despite the view just expressed, at the moment, it must be admitted that the conventional wisdom is that there could be constitutional dangers if a fine of much above €3,000 (IR£2,300) were imposed for a minor offence. This takes us on to the second possible area of reform, namely the maximum permissible prison sentence. The Commission believes that for two reasons the maximum prison sentence ought to be reduced. In determining whether an offence is minor, it is wrong and out of line with common perceptions of justice to treat a fine of €3,000 (IR£2,362.69) as calling for jury trial but a prison sentence of 12 months as not warranting this. Therefore, the Commission would submit that the penalty system for minor offences in this jurisdiction is, at present, unbalanced.

6.19 This general view translates in practice into a strong sense that to try to avoid the kind of unfairness identified in the previous paragraph, either the maximum prison sentence available for minor offences ought to be reduced or the maximum fine increased.

6.20 Secondly, in addition to this negative reason, and quite apart from any change to the fine level, there is a positive reason for reducing the maximum prison sentence. In the first place, there is a lot to be said for the view that imprisonment for any length of time at all represents such a comprehensive restriction on an individual's liberty that it ought only to be visited on a person following a trial with the highest form of protection. However, the Commission is not proposing this view (for the present) for the entirely pragmatic reason that it would cause such an upheaval in our system for the administration of justice.

6.21 Instead, the Commission would propose a maximum sentence of six months. This would bring the maximum somewhat closer to the equivalent level for a fine. It is also in line with the limit utilised in the other jurisdictions which have provisions akin to our constitutional scheme confining non-jury trial to "minor offences". The Commission appreciates that this change will increase the work of the Circuit Court, which is already overloaded. However, the Commission believes that it is essential to implement the Constitutional principle that there should be a right to jury trial, save in minor offences. This is an important principle and a lack of resources is not a justification for eroding it. If resources, such as additional Circuit Court judges, are required, as we accept that they are, in order to honour it, then these ought to be provided. The Commission understands that, in any case, the allocation of jurisdiction as between the District court and Circuit Court is presently being reviewed by the Working Group on the Jurisdiction of the Courts. We hope that our proposal could be considered in the broader context of this review.

6.22 It is taken that the Commission's brief does not extend to recommending constitutional amendments. However, on this occasion the Commission would like to suggest to the body that is charged with this responsibility, the All-Party

Oireachtas Committee on the Constitution, that here is an area worthy of consideration. This Committee is presently considering the institutions of government. When it reaches the question of individual constitutional rights, it may be appropriate to consider whether Article 38.2 should be amended to stipulate that an offence carrying a maximum prison sentence of longer than six months cannot be a minor offence. The Constitutional Review Group considered merely whether the definition of “minor offence”, as developed by case law, ought to be codified but appear not to have considered whether it ought to be modified, as we propose here.¹⁷⁹

6.23 *Pending such a constitutional amendment, as a practical measure, the Commission would first propose that there should be a clear headline in statutory law to the effect that the District Court may impose a prison sentence of a maximum of six months for minor offences. An example would be s.27 of the Criminal Law Act, 1977 in England.¹⁸⁰ This provision would have to be subject to s.2(2) of the Criminal Justice Act, 1951, as amended, concerning indictable offences triable summarily, for which a 12 month maximum sentence may be imposed.¹⁸¹ It should also be confined to offences which the District Court has tried itself so as to exclude from the scope of this provision the District Court’s power to sentence in indictable cases in which there has been a guilty plea, referred to it for sentence only.¹⁸²*

6.24 Strictly speaking, such a provision would not govern any future legislation which went beyond six months because it would not amount to a definition of “minor offence”. The term “minor offence” is used in the Constitution and, therefore, is for the judges to interpret. However, it would at least offer a guideline which would give the legislature considerable pause for thought in the future. Such provision might also be of some indirect effect on the judge’s interpretation of “minor offence”, for this is an area in which, in the absence of any better foundation from which to reason, the judiciary has been strongly influenced by legislative practice. It is possible, therefore, that a clear statement from the legislature would be of indirect influence, if any future legislature went beyond six months and the legislation were challenged as creating a non-minor offence.

G. Duty to Give Written Reasons when Imposing a Custodial Sentence

6.25 Over the past 15 years or so, the courts have developed the doctrine of the constitutional right to reasons. This right is based on the concept of constitutional justice, or “natural justice”. Although most of the case law in this jurisdiction

¹⁷⁹ Report of the Constitutional Review Group (1996) Pn. 2632.

¹⁸⁰ S.27(1) states: “Without prejudice to section 108 of the *Magistrates’ Courts Act, 1952* (consecutive terms of imprisonment), a magistrates’ court shall not have power to impose imprisonment for more than six months in respect of any one offence.

S. 27(2) states: “Unless expressly excluded, subsection (1) above shall apply even if the offence in question is one for which a person would otherwise be liable on summary conviction to imprisonment for more than six months”.

¹⁸¹ See paras.1.06 – 1.12 above.

¹⁸² See para.1.13 above.

concerns administrative bodies, in light of the internationally accepted principle that individuals are entitled to the strictest protections when being tried on criminal charges before a court of law,¹⁸³ it seems incontrovertible that any constitutional right to fair procedures available before a quasi-judicial or administrative body would be available before a criminal court.¹⁸⁴ This contention is borne out by the jurisprudence of the European Court of Human Rights in the case of *Hiro Balani v. Spain*¹⁸⁵ where the Court held that on its true construction, Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* obliges a court to give reasons for its judgments. This line of reasoning has recently been set forth in this jurisdiction in *Aidan O'Mahony v. Judge Thomas Ballagh and the DPP*¹⁸⁶ in which the Supreme Court stated that submissions made to a trial judge must be ruled upon in a way that indicates what arguments are accepted and what are rejected, and that the trial judge must, as far as practicable, give reasons for same.

6.26 It is submitted, therefore, that there is a duty on a District Judge to give reasons for his decision. The Commission is of the view that this duty must encompass, in particular, the decision of a District Judge to impose a custodial sentence rather than a non-custodial one. As already stated,¹⁸⁷ the standard approach in relation to sentencing is for a judge to impose a fine, if it meets the case, before having recourse to a prison sentence. This progression is based on the view that a prison sentence is a more severe punishment than a fine for a particular offence, assuming that the fine is in proportion to the offence and the offender's ability to pay. In the light of the severity of the consequences of a custodial sentence on a defendant, the Commission proposes that there should be a duty on a District Judge to give written reasons when imposing a custodial sentence rather than a fine for a minor offence. They should be put on record in the District Court Office and be available for future reference. This, it is envisaged, would ensure that a District Court Judge briefly records the carefully thought out reasons before imposing a custodial sentence.

6.27 The format of such written reasons can be concise and simple. The Commission is aware that the District Court has a large volume of cases to deal with every day, and that to impose a duty to give a detailed written judgment would cause delays. The method of recording the reasons for imposing a custodial sentence should be convenient and expeditious. At present the actual sentence to be imposed is written by the District Judge on the foot of the charge sheet, or if there is only a summons, either on the foot of the summons itself or in the accompanying

183 See, for example, Article 6 of the European Convention on Human Rights and Fundamental Freedoms and Article 14 of the International Covenant on Civil and Political Rights..

184 See further Hogan and Morgan, *Administrative Law in Ireland* (3rd ed., Sweet & Maxwell), 1998, 570 – 573.

185 *Hiro Balani v. Spain* [1994] ECHR 18064/91.

186 *Aidan O'Mahony v. Judge Thomas Ballagh and the DPP* Irish Examiner Law Report, January 28, 2002.

187 See para.6.15.

minute book.¹⁸⁸ It is suggested that the reasons for imposing a custodial sentence could be written, very briefly, where the sentence being imposed is being written. A second alternative, if the District Court Service felt that it would be more efficient, would be that the District Judge could record the reasons in a “custodial sentence book”, which would be kept by the Clerk in the District Court Office for future reference.

6.28 It is suggested that wording along the following lines could be used: “I impose a custodial sentence of...for the following reasons:...”. The reasons do not have to be lengthy or time consuming, and their elaboration does not have to cause undue delay to the District Court proceedings.

6.29 *Therefore, as the right to personal liberty is so fundamental to the Irish legal and constitutional system, the Commission is of the view that a District Judge should be required to give short, written reasons for any decision to impose a prison sentence rather than a non-custodial sentence.*

6.30 Finally, we consider two possible objections to our proposal that there should be a legislative statement that the District Court may impose a prison sentence of only up to six months. In para.6.23, we referred to the regime created by s.2(2) of the *Criminal Justice Act, 1951*, as amended, as being an exception to our recommendation. The reason is that in the case of charges brought under this legislation, the Court, the accused and the DPP each, in effect, have a veto on the offence being brought in the District Court. So long as the accused continues to have a veto, this seems to us to be a sufficient justification for making an exception of this provision, despite the fact that it allows for a maximum sentence of 12 months.

6.31 Secondly, we note the expert view¹⁸⁹ that reducing the maximum prison sentence for minor offences from twelve months to six months has disadvantages. Such short sentences, it is argued, fail to allow prisoners any time to rehabilitate in any meaningful way or at all. Most of the training or drug-addiction programmes, are only available to longer-term prisoners serving at least 12 months. Furthermore, if there is a large number of prisoners serving short sentences in the prison system, the constant changing of prisoners disrupts the running of the prison and the operation of training and rehabilitation programmes. This argument continues that it would be far more beneficial to abolish short-term prison sentences altogether, as they have done in some Continental European countries such as Germany,¹⁹⁰ where they have introduced alternative methods of punishment such as weekend or evening detention, community service or house arrest.

6.32 We record this view in order to make the response that we are not, in this Paper, considering the radical change of reducing or removing short prison sentences. We are accepting and not reviewing the status quo on this point. We

188 A minute book is a computer print out of the list of cases being heard before the District Court that day.

189 This view has been put forward to us by leading criminologists in this country.

190 In Germany prison sentences below six months have been abolished.

make the point, that, assuming that sentences of between six to twelve months are to be retained, they should be imposed only following a jury trial. This should not have the effect of making such sentences more common, but may, in fact, have the effect of making them less prevalent.

CHAPTER SEVEN : REFORMING THE LAW I: A HIGHER MAXIMUM FOR WELL-OFF OFFENDERS – GENERAL POLICY CONSIDERATIONS

7.01 In the previous chapter, we argued that as a matter of policy the financial figure of €3,000 (just over IR£2,000) appears to be too low as the maximum fine that may be imposed without a jury. Although these arguments are certainly not peculiar to companies, they do apply with particular force to them. It has already been outlined, in Chapter Two,¹⁹¹ that it could be constitutionally unsound to impose higher fines on individuals.

7.02 More and more offences are, for good reasons, being created in the “regulatory” field – offences in areas such as the environment, consumer protection and health and safety at work. Many such offences apply more often in the case of companies than in the case of human beings. There is an increasingly strong view that corporations ought to be accountable for their actions, and that one of the weapons (though not the only one) in the law’s armoury to achieve this is criminal prosecution.¹⁹² For example, where a large company does substantial damage to the environment and a jury trial on indictment follows, resulting in a conviction, a penalty of a stiff fine will often be the appropriate outcome. However, circumstances are infinite and the law must be flexible: even mighty corporations commit less serious offences, as do smaller companies. In such a situation, summary trial is apt. A maximum fine, however, of €3,000 may not be an appropriate penalty in the case of many corporations. Indeed, to our colleagues in the EU, the inspiration of much of our regulatory law, such a small fine will seem strange. Even more important, perhaps, is that to the Irish public it may seem perplexing or derisive that the law thinks it possible to “secure the attention” of even a small or medium sized company by a fine of only €3,000. It seems, therefore, that a move in the direction of providing for an increased penalty where the offender is a company is in line both with developments elsewhere, and with common sense and justice.

7.03 Various mechanisms are available to meet these objectives. The first is to hold individual managers, directors or members of a company personally responsible for criminal offences committed by the company when they acquiesce or participate in the committal of the offence. An example of such a legislative provision is s.158 of the *Planning and Development Act, 2000*. This provision states:

191 Paras.2.13 – 2.19.

192 See forthcoming Law Reform Commission Consultation Paper on *Corporate Manslaughter*.

“(1) Where an offence under this Act is committed by a body corporate or by a person acting on behalf of a body corporate and is proved to have been so committed with the consent, connivance or approval of, or to have been facilitated by any neglect on the part of a person being a director, manager, secretary or other officer of the body or a person who was purporting to act in such a capacity, that person shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

(2) Where the affairs of a body corporate are managed by its members, *subsection (1)* shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.”¹⁹³

7.04 A second way allows a victim of the company’s wrongdoing, assuming that there is a victim, to sue the company for exemplary damages.¹⁹⁴ Exemplary damages are damages which exceed the amount necessary for simple compensation. The aim of exemplary damages is two-fold: to punish the defendant and to deter both the defendant and others from engaging in conduct that is extremely malicious or socially harmful. They have the additional, incidental effect of providing compensation and satisfaction to the plaintiff. Exemplary damages are a means not only of deterring abhorrent behaviour by the State, but also on the part of increasingly powerful non-state actors. In relation to powerful non-state bodies, exemplary damages as a form of control developed because there has been, for some centuries, a lack of specific machinery to deal with the situation where extremely harmful conduct has not been made criminal, or where a wrong is criminal but a decision is taken not to prosecute, or where the prescribed punishment would not be adequate. In such circumstances, exemplary damages may prevent a wrongdoer from escaping with relative impunity.

7.05 The Commission also advances two other inter-related proposals to achieve the same result of penetrating the carapace of the corporation. The first, set out in this chapter, is that the level of a fine, within the prescribed maxima, may be increased depending on how well-off an offender is, and the second (discussed in the Chapter Eight) is that higher fine maxima should be available for corporations. Both these proposals are necessary since, without the first, there would be a danger that, because of the long-established rule that a well-off offender cannot be fined a larger amount, the means of a corporation would not be taken into account in order to impose a meaningful and appropriate fine. The second, that of a higher maxima for corporations, is necessary because without it, even the maximum fine that may be imposed is so small that, given the resources of many corporations, no significant fine could be imposed on them. Here we elaborate on the reasons for and implications of each of these recommendations.

¹⁹³ A similar provision is in s.9 of the *Prevention of Corruption Act, 2001*.

¹⁹⁴ See Law Reform Commission, *Report on Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000).

7.06 It must be acknowledged, however, that companies come in a variety of sizes, and, especially in Ireland, there are many small, less profitable companies. It could plainly be unjust if such a company were fined any more than even, perhaps, an individual for an offence of the same seriousness. However, the Commission does not think that this fact is a reason against this recommendation. As is discussed below,¹⁹⁵ the Commission believes that the means of an offender should always be taken into account in fixing the amount of a fine. Thus, in the case of small companies, the District Court should take into account that the company is no better off than the average human offender and so should not be fined any more.

A. Higher Fines for Well-Off Offenders

7.07 The Constitution sets it down in Article 40.1 that: “All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

7.08 While this precept has not yet been drawn upon in the field of sentencing (which has, in any case, received little by way of judicial statement of principle) it is axiomatic that equality is necessary in order to do justice.¹⁹⁶ This notion of equality in the area of sentencing has been given a sharper context in England and Wales where it has been described and referred to as “the principle of equal impact”. Professor Ashworth has written about it as follows:

“The principle of equal impact points to another aspect of social justice in relation to fines. It has long been established that a court should have regard to the means of the offender when calculating the amount of a fine, but this principle has been somewhat blunted in practice in three ways – the old rule that fines should not be increased for the rich, the difficulties in obtaining accurate information about an offender’s financial situation, and courts’ reluctance to impose fines that appear derisory to them.”¹⁹⁷

7.09 The relevant point here, which is referred to in this passage as “the old rule that fines should not be increased for the rich”, refers to a precept that is long-established in the common-law. This is the notion that when fixing a fine the practice¹⁹⁸ is to reduce the amount of the fine where the offender’s means are

¹⁹⁵ See paras.7.10 – 7.11.

¹⁹⁶ Equality before the law is relevant in a number of other ways. One is that courts should not fine a wealthy offender when the offence justifies a more severe measure (usually imprisonment), which would have been imposed on a less wealthy offender – see *Markwick* (1953) 37 Cr. App. R 125. The obverse of this is that courts should not impose a more severe penalty on an offender who lacks the means to pay what is regarded as an adequate fine. The English Court of Appeal has struck down several suspended sentences on this ground. (See *McGowan* [1975] Cr. L.R. III; *Ball* (1981) 3 Cr. App R. (S) 283). The proper course, if a court declines to impose a fine, is to move down to a conditional discharge and not up to a more severe measure.

¹⁹⁷ Ashworth, *Sentencing and Criminal Justice* (3rd ed., Butterworths, 2000), 272.

¹⁹⁸ It is appropriate to use the term “practice” where judicial discretion is the underlying premise.

inadequate, but not to increase the amount where the offender is well-off. Authority for this includes *R v. Messana*¹⁹⁹ and *R v. Fairbairn*.²⁰⁰ While the rule has not been the subject of an Irish authority, given its long establishment in England, it is prudent to assume that it would be followed here.²⁰¹

7.10 The Commission agrees with the line of criticism of this “old rule” contained in the passage from Professor Ashworth’s work just quoted.²⁰² The policy underlying the criticism is broadly similar to the principle behind Article 40.1, in particular the second sentence: “This shall not be held to mean that [laws] shall not have due regard to differences of capacity.” However, since this is cast as an exception to a positive statement of rights, as opposed to being a positive statement in its own right, it is probable that it cannot be used as a basis on which to attack the rule that fines cannot be increased for those who are better-off.²⁰³ Nevertheless, it is indicative of a line of policy and, the Commission believes, buttresses our view that the law should be adjusted so that higher fines can be imposed if the offender is well-off. From a policy point of view, this should be so whether the offender is a natural human person or a company, since in this context there is no reason or need, constitutional or otherwise, to make a distinction between the two.

7.11 The policy change recommended is not a very radical one: in many cases, simple statutory guidance would only codify what courts are doing anyway. However, so far as the courts are not taking means into account, the Commission is of the opinion that they should do so, for it seems self-evident that in deciding on the amount of a fine the means of the offender, whether large or small, ought to be taken into account.²⁰⁴ To question this would seem to misunderstand totally the

199 *R v. Messana* [1981] 3 Cr App R (S) 88.

200 *R v. Fairbairn* [1980] 2 Cr App R (S) 315.

201 Walsh J, speaking in the Supreme Court in *Conroy v. Attorney General* [1965] IR 411, 437 remarked: “It must also be borne in mind that by virtue of s.43 subs.2 of the *Criminal Justice Administration Act, 1914* a District Justice in fixing the amount of the fine to be imposed must take into consideration, amongst other things, the means of the offender so far as they appear or are known to the court.” However, it seems likely from the context that what the section and Walsh J had in mind was reducing a fine in the case of a poor person, rather than increasing it in the case of a rich offender. The context of this observation is as follows. It comes at the end of a paragraph considering whether a IR£100 (€127) fine means that an offence is not minor. Walsh J states immediately before the sentence just quoted that: “The pecuniary penalty of 100 Pounds is, having regard to the notorious decline in the value of money and the increase in incomes over the same period, scarcely any greater penalty than 50 Pounds was in 1933 and most probably a lesser one”. Walsh J appears to be responding to the argument that in deciding what is a minor offence, the low income of the defendant must be taken into account by saying that this would be done anyway by virtue of the 1914 Act. (It does not seem to mean that higher income should be taken into account. The Act itself does not state explicitly either way. However, it may be assumed that it is probably not intended to authorise an increase in fine in the case of offenders with higher means).

202 See para.7.08.

203 The Constitutionality of this policy is discussed in further detail in Chapter Eight, paras.8.04 – 8.06.

204 Furthermore, Regulation 65 of the *District Court Rules, 1948* states that when enforcing orders in cases of summary jurisdiction made upon a complaint by any member of the *Gárda Síochána* for the recovery of an excise penalty under the provisions of the *Roads Act, 1920* or of any

difference between the criminal and the civil law. The civil law is, generally speaking, about compensating the victim: in simple terms, the amount paid depends on the harm done to the victim and to the means of the culprit. By contrast, the object of the criminal law is to make an impact on the culprit (whether to discourage him or to discourage others does not matter in the present context).

B. Mechanism for Implementing this Recommendation

7.12 We turn, next, to consider the two main alternative ways in which this objective may be accomplished.

(a) Unit Fines

7.13 The first way of systematising the notion that the amount of a fine should be proportionate to an accused's means, which has been adopted in a number of European countries – for example, Germany and Sweden – is the device of the *unit fine* (or in US parlance, the “day fine”). Under such a system, two persons convicted of a lower-intermediate offence might be fined, for example, 15 fine units. This corresponds to 15 days' earnings less deductions for necessary living expenses. If their earnings are unequal, they will pay different amounts, since the intended effect is to equalise the punitive impact.²⁰⁵ The *Criminal Justice Act, 1991* established a unit fine system for England and Wales, but it was dropped in 1993, less than a year after it went into actual operation.²⁰⁶

7.14 To introduce such a radical change as day fines, especially on a comprehensive basis, could only be recommended in the context of a comprehensive study of fines, and not merely as part of a study, like the present Consultation Paper, of a narrow and discrete aspect of the criminal justice system. In fact, ten years ago, the Commission did give the issue a thorough airing and reached the following conclusion:

statute amending the same, a District Justice shall, in fixing the amount of a penalty, take into consideration amongst other things the means of the offender so far as they are known to him at the time.

205 See Austin and Krisberg, “Alternatives to Incarceration: Substitutes or Supplements?” in Von Hirsch and Ashworth, (ed.), *Principled Sentencing* (Edinburgh University Press, 1992).

206 “The Home Secretary, Kenneth Clarke, made the politically extravagant gesture of announcing the abolition of unit fines entirely. That decision was founded on two manifest confusions. One confusion was that between the principle of equal impact and the details of the actual scheme adopted. Statements both in the media and among politicians repeatedly ignored the elementary justice of the principle of equal impact. They would speak and write as if all offenders should receive similar fines, irrespective of differences in wealth. The principle ‘that different financial penalties can provide the same punishment for offenders of different means’ seems to have been lost among the complaints about the practical details of the legislative scheme adopted...The other confusion was that between the right amount of structure and the right amount of discretion. The unit fine system attempted to formalise and to structure the reasoning of magistrates when calculating fines. It probably formalised it to too great an extent. But if the balance between structure and discretion was wrong, it does not follow that the whole structure should be abolished.” Ashworth, *Sentencing and Criminal Justice* (3rded., Butterworths, 2000), 274.

“While it is thought that the social and economic advantages of a day fine system would be considerable, the obstacles to its introduction could be unlimited in duration and effect (including the possibility of being found repugnant to the Constitution). The idea was met by considerable reservations on the part of those to whom the earlier Discussion Paper was circulated. Many were of opinion that the practical difficulties posed by the adoption of a variable fine system could be even greater than we surmised. In the light of such responses from the professionals working in all parts of the criminal justice system, and of the system’s potential practical and constitutional infirmity, we feel unable positively to recommend a variable fine system for this jurisdiction at this stage. We remain confident of its potential merits, however, and suggest that the question be considered again, after a standard fine scheme has been introduced, and in the light, in particular, of British experience.”²⁰⁷

7.15 Here the Commission has not comprehensively reconsidered the matter and simply adopts its earlier (rather regretful) rejection of this proposal, noting that in the interim, it has been dropped in Britain, after a rather inadequate trial.

(b) Legislation

7.16 The alternative way in which to meet the situation of the well-off offender is the present English law, which addresses the point more simply, though possibly less satisfactorily. S.65 of the *Criminal Justice Act, 1993* creates a new provision which reads as follows:

“(3) In fixing the amount of any fine, a court shall take into account the circumstances of the case including among other things, the financial circumstances of the offender so far as they are known or appear to the court...

(5) Sub-section (3) above applies whether taking into account the financial circumstances of the offender has the effect of increasing or reducing the amount of the fine.”

7.17 *Accordingly we recommend that a provision along the lines of the English legislation, just quoted, should be introduced into Irish law for the purpose of moving towards the principle of equal impact.*

C. Ascertaining the Means of the Offender

7.18 An acute problem which would arise from the above recommendation concerns the accurate and comprehensive ascertainment of the offender’s means. The problem is that, for historical reasons, the sentencing procedure is the least well developed of the criminal process. It has not kept pace with the introduction of a panoply of different sanctions. This is a subject which would be worthy of a

²⁰⁷ The Law Reform Commission, *Report on the Indexation of Fines* (LRC 37-1991), para. 134.

consultation paper in its own right. Given the scope of the present Paper, however, we can only highlight the difficulty and point to some sources from which a solution may be sought.

7.19 The first thing to mention is that at present the ways in which a court obtains information on offender's means are rather unsystematic. By contrast, in England and Wales provision is made to compel offenders to furnish the court with a statement of means. It is a summary offence to fail to furnish such a statement, to knowingly or recklessly furnish materially false information or to knowingly withhold any material information.²⁰⁸ Where no statement is furnished, the court may make such determination of the offender's means as it thinks fit.²⁰⁹ These matters are discussed in an earlier report.²¹⁰

7.20 Secondly, the position is easier in the case of companies²¹¹ than individuals because of the fact that companies are required, as a matter of law, to file annual returns. If that has not been done, this is itself a crime. However, it must be noted that a company's annual returns do not always give a true picture of a company's wealth or assets.

7.21 Undoubtedly, the difficulty of obtaining an accurate assessment of the accused's means is substantial. The proposal that the Commission is making – to match the fine to the offender's means – will operate more or less imperfectly, to the extent that courts do not have a complete picture of the accused's means. The Commission therefore believes that attempts should be made to reform the sentencing procedure, including improving the court's knowledge of the offender's means. However, the Commission does not think that the main proposal being made, to match the fine to the means of the accused, should be delayed until this comprehensive reform of the sentencing procedure is effected. As was remarked by the President of the District Court in a comment set out in an earlier Commission

208 S.20 of the *Criminal Justice Act, 1991*.

209 S.18(8) of the *Criminal Justice Act, 1991*.

210 See Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991), 58 – 62 and Appendix VI.

211 Bergman, "Corporate Sanctions and Corporate Probation" (1992) *New Law Journal* Vol 1312: "...The court remains unaware of the most basic information on the company – its turnover, annual profits, history of relationship with the regulatory agency or its general health and safety record".

Report, “A shrewd judge is more useful than a Nordic calculation in getting the penalty right.”²¹² This remark was made in relation to the unit fine option which the Commission was considering, but eventually rejected, in that Paper. Here the Commission is recommending the more modest reform of a judge being enjoined generally to take into account the offender’s means. An exact appraisal of means is not quite as important and the Commission believes that an experienced judge can be relied upon to use this widened discretion wisely to improve the quality of justice...

212 The Law Reform Commission, *Report on the Indexation of Fines* (LRC 37 – 1991), 62.

CHAPTER EIGHT: REFORMING THE LAW II: CONSTITUTIONALITY OF HIGHER MAXIMA FOR CORPORATIONS

8.01 In Chapters Two²¹³ and Seven²¹⁴ it was stated that it might well be unconstitutional to increase the maximum fine for minor offences beyond €3,000 (£2,300) in the case of “natural persons”. However, this would not necessarily be true of companies. We turn now to consider the exceptional position of companies.

8.02 Regardless of what view one takes of the purpose of punishment by way of a fine, it seems plain that the level of fine which is considered appropriate for an individual will not have any effect on many substantial, profitable companies. One way to meet this difficulty is simply to establish a split-level maximum, with one figure for companies and another for individuals. For example, s.181(B) of the Queensland *Penalties and Sentences Act, 1992*, states:

“(1) This section applies to a provision prescribing a maximum fine for an offence only if the provision does not expressly prescribe a maximum fine for a body corporate different from the maximum fine for an individual.

(2) The maximum fine is taken only to be the maximum fine for an individual.

(3) If a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to 5 times the maximum fine for an individual”.²¹⁵

A. The Question of Constitutionality

8.03 The question arises whether the proposed change would be constitutional.

(a) Article 40.1

8.04 The first provision which might seem relevant would be Article 40.1 which states that: “All citizens shall, as human persons, be held equal before the law. This

²¹³ Paras.2.13 – 2.19.

²¹⁴ Para.7.01.

²¹⁵ See also s.40(5) of the Western Australia *Sentencing Act, 1995*; s.16 of the Northern Territory of Australia *Sentencing Act*; s.431 of the Australian Capital Territory *Crimes Act, 1900*. In New Zealand, under the *Land Transport Act, 1998*, a different maximum is also introduced for companies and for individuals. This is in line with the idea of “equal impact” mentioned earlier.

shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

8.05 The question is whether a company caught by the law proposed by the Commission could argue that it was not being treated “equal[ly] before the law”. It seems unlikely, however, that the company could show the proposed reform perpetrates the evil that Article 40.1 is designed to prevent. The policy behind the proposal is to bring a greater measure of equality, and, as already mentioned, a higher fine would apply only to companies above a certain level of monetary value.²¹⁶ In terms of the Constitution’s language, one could articulate this point in either of two ways. One could base it on the first sentence of the sub-section and say that the treatment is equal in the light of the different circumstances of a large or wealthy company. Alternatively, one could draw on the later part of the sub-section and say that the law may “have due regard to differences of capacity...”. Either way, it is the Commission’s submission that the proposal does not fall foul of Article 40.1.

8.06 Nonetheless, it is conceivable that a company could try to draw a correlation between itself and a wealthy private individual of comparable resources. However, so far as there is any case-law in this field, it seems to establish that the words “as human beings” have been given full weight and are read to exclude companies from the benefit of this provision. Therefore, it would seem that corporations are not entitled to the same level of Constitutional equality as human persons.²¹⁷

(b) Article 38.5

8.07 Arguments on the basis of Article 38.5 may be more weighty. This article concerns the right to jury trial. There are two questions to be asked: first, does a company enjoy a right to trial by jury at all? Secondly, if so, would the higher level of fines proposed for companies take such an offence committed by a company beyond the category of a “minor offence” under Article 38.2.²¹⁸

8.08 Answering the first question is rendered difficult by the fact that the jury and the company come from such different historical eras - the company is the legal community’s contribution to the Industrial Revolution, which began in the 17th century, whereas the jury, so far as can be established, comes down to us from before Henry II’s reign in the 12th century. Moreover, the company’s relationship with traditional criminal law is only just beginning to be explored in a number of areas. Thus, there is scarce authority with which to answer this question in Ireland or, so far as we have been able to establish, elsewhere.

216 See para.7.06.

217 *Macaulay v Minister for Posts and Telegraphs* [1966] IR 345 and *Quinn’s Supermarket v Attorney General* [1972] IR 1. See generally Kelly, *The Irish Constitution* (3rd ed., Butterworths, 1994), 719 – 723.

218 See paras.8.11 – 8.17. Article 38.2 is also analysed in Chapter Three.

8.09 However, working from first principles the following tentative analysis may be offered. On a literal interpretation, Article 38.5 states: “no person shall be tried on any criminal charge without a jury.” The wording does not, as in Article 40.1, refer to “all citizens shall as human persons”, nor, as in Article 40.3.1, does it refer to “the personal rights of the citizen”. Thus, unless one attributes a narrow meaning to “person”, the expression is apparently not confined by reference to the nature of the accused.

8.10 From a policy point of view, the issue of whether Article 38.5 applies seems to be finely balanced. Companies have reputations which are at least as valuable to them as to individuals, and this would be affected by a criminal conviction. It is indeed one of the cardinal assumptions behind the notion of corporate criminal responsibility that a company will suffer harm to its reputation if it is convicted of a criminal offence. It may well be that since its reputation is at stake, it is entitled to jury trial. There is a third point. The provision of a jury trial should be seen not merely as an individual right of the accused – it is also an aspect of our machine of justice which has the effect of keeping criminal justice in contact with the standards of the community. The Commission’s tentative conclusion, from a consideration of the literal and policy arguments, therefore, is that it would be unsafe to rely on the argument that Article 38.5 does not apply to a corporation.

(c) *Article 38.2*

8.11 Assuming, then, that the right to jury trial does apply to a company, it must be asked whether the proposed change would remove offences from the category of “minor offence”. The real issue in this regard is that discussed in Chapter Seven, whether the wealth of the accused may be taken into account. For instance, would a provision, such as that from Queensland set out above,²¹⁹ which imposes a maximum fine for a wealthy corporation above the conventional €3,000 (IR£2,362.69) limit, be constitutionally suspect?

8.12 This question, too, is largely devoid of authority. The issue has not arisen because, traditionally, the law has said very little about sentencing. In particular, it is only in recent years, in any jurisdiction, that the law has drawn any comparison between the means of the accused and the amount of the fine, particularly in relation to the principle that a greater amount can be imposed because the accused is a person of means. Nevertheless, it is striking that the argument was not made in cases like *Kostan v. Ireland*²²⁰ in which the offender was a wealthy entrepreneur and it would have suited the prosecutor to make the case. The strongest argument in favour of constitutionality is the idea that justice and equality militate against the idea that a well-off company and a person of average means should be fined the same amount for similar offences.

8.13 The closest there is to any authority is a case on a parallel provision to Article 38.2, namely Article 37.1 of the Constitution. This provision creates an

219 Para.8.02.

220 *Kostan v. Ireland* [1978] ILRM 12.

exemption to Article 34.1, which provides that justice may be administered only in a court of law. According to Article 37.1, this is not required in the case of “the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters...”. There is a close parallel between Articles 37.1 and 38.2. Each is creating an exception to a principal provision which establishes what is regarded as vital machinery for the protection of individual rights – the court and the jury. The language and policy of the exceptional provisions – “limited” or “minor” – is also similar, in each case reflecting the idea that there can be an exception where the impact on the person affected is not serious.²²¹ The relevant case on Article 37.1, is *State (Calcul International Ltd and Solatrex International Ltd.) v. Appeal Commissioners and the Revenue Commissioners*.²²² This case concerned the powers of the Appeal Commissioners under Part XXVI of the *Income Tax Act, 1967*. In the High Court (and the case was not appealed), Barron J first held that the Commissioners were not administering justice. However, he then went on to hold, on the assumption that he was wrong on the first point, that the powers before the court were “limited” and hence came within Article 37.1. This was held to be so even though the powers were unlimited in amount. Barron J stated that:

“[The test is] the effect of the assigned power when exercised. So the nature of a power as opposed to its effect when exercised is immaterial...[The Appeal Commissioners’] decision may well affect the particular taxpayer adversely since he may be found liable to pay a sum for which he believes he was not liable. But this does not have far-reaching effects. The payment of Customs duty or Value-Added Tax is *related proportionately to the value of the goods concerned, whereas the payment of Income Tax and Corporation Tax is related proportionately to the relevant taxable income. Such payments cannot have far-reaching effects on the fortune of the taxpayer...since in each case the liability is relative, being proportionate either to his income or to his turnover as the case may be.*”²²³ (Emphasis added).

8.14 The words italicised illustrate that the High Court believed that it was the relativity between the tax paid and the means of the taxpayer rather than the absolute amount of tax paid which was to be taken into account in determining whether the function was “limited” for the purpose of Article 37.1.

8.15 Unfortunately, there is only this single authority on the point and it is in the context of Article 37.1. However, this ruling does show a common-sense argument, from the point of view of fairness and equality, being accepted in a cognate field to Article 38.2.²²⁴

221 See Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall, 1997, Sweet and Maxwell), Chap. 6.

222 *State (Calcul International Ltd and Solatrex International Ltd.) v. Appeal Commissioners and the Revenue Commissioners* High Court (Barron J), 18 December 1986.

223 *Ibid.* at 20.

224 A rare *dictum* which might seem to argue against the constitutionality of the proposal under review here is from Ó'Dálaigh J's dissenting judgment in the Supreme Court in *Melling v. Ó Mathghamhna* – [1962] IR 1. The case concerned the offence of smuggling under s.186 of the *Customs Consolidation Act, 1876*. Significantly, the punishment was a fine of either treble the

8.16 In summary, as regards the proposal the Commission is considering, there seems to be some “tradition” against it, arguments from first principles in favour and no real judicial authority in either direction. Accordingly, at present, the Commission thinks that it would be imprudent to recommend it.

8.17 It is also unnecessary since there is an alternative way of achieving substantially the same effect which runs no risks of constitutional repugnancy.

B. Fining a Corporation in Lieu of Imprisonment

8.18 This alternative method depends upon the fact that, frequently, the punishment for an offence will be couched in the form of a fine up to a certain maximum or a maximum period of imprisonment or to both fine and imprisonment.²²⁵ Plainly a corporation cannot be imprisoned. Accordingly, the simple proposal considered here is that in the case of a corporation, the maximum figure which is generally available should be augmented by an additional amount to reflect the fact that the corporation cannot be liable to any term of imprisonment.

8.19 The basic point here is that the leading authorities in the field have always stated the issue on the assumption that, as is the case of punishments for most offences, there could be both fine and imprisonment and provided that neither went

value of the goods or IR£100 (€127) (at the election of the Revenue Commissioners). Ó Dálaigh J stated:

“In attempting to fix [the point at which an offence ceases to be minor]...regard has to be had to the burden which a fine of a particular amount would impose upon the ordinary or average citizen, with, if anything, as I incline to think, a leaning in the direction of people of humbler circumstances; and this should certainly be so when, as in this case, the penalty or fine is a fixed one and unrelated to the offender’s ability to pay”. – [1962] IR 1, 43. This test set out by O’Dálaigh J was approved by Gannon J in *Clune v. DPP* – [1981] ILRM 17.

Read literally, this would seem to suggest that in the Court’s view the actual means of the accused are irrelevant and that the test as to whether a fine is too severe to be a minor offence or not is an objective one based on the average, ordinary citizen.

However, if one reads the final part of the passage (“and this should certainly be so...”) in light of the context of the case, it seems that the better interpretation of the passage is a different one. The context is that the punishment was unusual. It involved a selection, by the Revenue Commissioners, between two fixed penalties, irrespective of the accused’s means. Furthermore, this must be coupled with the fact that the approach to minor offences adopted at that period was to focus on the penalty specified in the statute, rather than (as the test now seems to be) the actual penalty imposed, in the case of any particular offence and offender. Seen in this light, the main concern of the passage seems to be that when the level at which a minor offence commences is determined, the means of a person of below-average means should be taken into account. In summary, the passage does not seem to tell against the suggestion under consideration here, but nor is it a ringing affirmation.

225 An example would be s4(1) of the *Criminal Justice Act, 1951* which states:

“On conviction by the District Court for a scheduled offence or for an indictable offence dealt with under section 3 of this Act, the accused shall be liable to a fine not exceeding one hundred pounds or, at the discretion of the Court, to imprisonment for a term not exceeding twelve months, or to both such fine and imprisonment.”

above the permitted maximum, the offence remained minor. For example, Walsh J in *Conroy v. Attorney General*²²⁶ remarks that:

“...a punishment of six months’ imprisonment and £100 [€127] fine is not in itself so severe as to exclude an offence which attracts that penalty from the category of minor offences”.²²⁷

8.20 *Conroy* was one of the first cases in which the courts attempted to give meaning to the expression “minor offence”. In subsequent cases often the facts have been such that a punishment was imposed of either a fine or a sentence of imprisonment, but not both. From one, and probably the predominant, point of view the aspect which the court must consider in deciding whether an offence is minor or not, is not the maximum fine or sentence, but the punishment actually imposed.²²⁸

8.21 However, in the recent case of *Mallon v. Minister for Agriculture*,²²⁹ there was no actual punishment before the court because the applicant had, no doubt, been well advised and had made a successful pre-emptive strike, seeking an order of prohibition to prevent the District Court proceedings from going ahead. The tenor of the judgments in *Mallon*, on the present point, is in line with that in *Conroy*.

8.22 In the Supreme Court, no argument was made on the precise point at issue here because it was accepted on both sides that:

(i) a maximum punishment of a fine not exceeding €1,270 (IR£1,000) or to imprisonment for no more than one year *or both* was constitutional; but

(ii) a maximum punishment of a fine not exceeding €1,270 (IR£1,000) or to imprisonment for no more than two years *or both* was unconstitutional.

8.23 The issue which was in dispute between the parties in *Mallon* was severability, that is, whether the unconstitutional section of the penalty could be removed leaving the constitutional part standing. The important point for present purposes is that neither the majority nor the minority judges, who were in agreement as to which elements were constitutional and which unconstitutional, suggested that the fact that *both* a fine and imprisonment could be imposed was one of the unconstitutional features.²³⁰

8.24 In summary, while the point has never been squarely disputed in a court, it seems very clear, based on the case law, that if a punishment were imposed on a convicted person which consisted of both the maximum fine and the maximum period of imprisonment, such a penalty would be constitutional.

226 *Conroy v. Attorney General* [1965] 411.

227 *Ibid* at 438.

228 See paras.2.07 – 2.11.

229 *Mallon v. Minister for Agriculture* [1996] IIR 517.

230 *Ibid* - See Hamilton CJ at 531; Blayney J at 537; Denham J at 541.

8.25 Such a punishment could only occur in the case of an individual. The suggestion that is being put forward here is to increase the maximum fine in the case of a corporation to reflect the fact that a corporation cannot be imprisoned. The Commission believes that there is no basis on which to rule that such a change would be unconstitutional. Indeed, to do so would be to insist on a level of positive discrimination in favour of corporations, which could violate Article 40.1 (the equality provision discussed at paras.8.04 – 8.06). This argument is quite separate from the additional point, based on the likely means of the corporation²³¹ which would give further support for the constitutionality of the change being proposed here, as would the view universally adopted in other jurisdictions that a fine is a less significant punishment than imprisonment.

8.26 *In short, the Commission believes that there are solid grounds for saying that it would be constitutional to increase the maximum fine in the case of a corporation to a level higher than that for human beings.*

8.27 The next question is the important practical one of how much extra the fine should be - in essence, what the ratio between the maximum figures for an individual and a corporation should be. Here it is not possible to offer a response to this question which is entirely scientifically satisfactory since it has never been necessary for the courts to consider which is the more significant element of a punishment that includes both imprisonment and a fine, never mind having to put figures on the assessment. In addition, even a simple arithmetical comparison is complicated by the fact that for some offences, the imprisonment figure is 12 rather than six months, and the figure for fines changes considerably from one offence to another.

8.28 However, in jurisdictions where comparisons have been made,²³² it is clear that imprisonment is regarded as by far the more serious element in determining whether or not an offence is minor. Furthermore, this view chimes with the great value set on human liberty in other contexts in Irish law.²³³

8.29 At the same time, the Commission is of the opinion that, at the moment, the constitutional case law does not allow us to recommend a ratio of five between the maximum fines for a corporation and an individual, as is done in Australia and New Zealand.²³⁴ We recommend a factor of three, subject to the proviso that this is in line with the present case law. The Commission is of the view that if the Keane Supreme Court (post-2000) were to make a comprehensive review of the law on the definition of a minor offence, including the arguments adduced here, it might well become constitutionally permissible to have a ratio of five.

8.30 If the changes proposed here are not made, our law will remain in the curious position of granting the significant protection of jury trial in criminal cases

231 Discussed at paras.8.11 – 8.15.

232 See paras.4.05 – 4.09 and para.8.02.

233 See para.4.24.

234 See para.8.02.

more generously in the case of corporations, and less generously in the case of human beings than any of the other jurisdictions with which comparison is possible.

8.31 *The Commission, therefore, recommends that where an offence provides for a maximum fine, whether imprisonment is or is not mentioned, then in the case of a corporation, the maximum fine possible should be increased. We suggest legislation (modelled on the Queensland Penalties and Sentences Act, 1992, quoted at para.8.02) along the following lines:*

“(1) This section applies to a provision prescribing a maximum fine (whether with or without imprisonment) for an offence only if the provision does not expressly prescribe a maximum fine for a body corporate different from the maximum fine for an individual.

(2) The maximum fine is taken to be the maximum fine, only for an individual.

(3) If a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to 3 times the maximum fine for an individual.”

8.32 It should be made clear that this provision would apply to offences established by statute, both before and after the amendment. Care should be taken to dovetail the provision with any changes towards indexation (which we understand are presently on the stocks in the Department of Justice, Equality and Law Reform), preferably by inclusion in the same legislation.

CHAPTER NINE: SUMMARY OF PROVISIONAL RECOMMENDATIONS

9.1 As far as the District Court jurisdiction to sentence to imprisonment is concerned, the Commission provisionally proposes that there should be a clear statutory headline to the effect that the Court may impose a prison sentence up to a maximum of only six months, for minor offences.²³⁵ (This provision would, however, have to be subject to s.2(2) of the *Criminal Justice Act, 1951*, as amended, concerning indictable offences triable summarily, for which a 12 month maximum sentence may be imposed.²³⁶ It should also be confined to offences which the District Court has tried itself so as to exclude from the scope of this provision the Court's power to sentence in indictable cases in which there has been a guilty plea, referred to it for sentence only.)²³⁷ [para.6.23]

9.2 The alternative, and perhaps more satisfactory, method of reform would be a constitutional amendment to state that the District Court may not impose a sentence of more than six months for a minor offence. Therefore, the Commission provisionally recommends that the All-Party Oireachtas Committee on the Constitution consider whether the Constitution should be amended to stipulate that an offence carrying a maximum prison sentence of longer than six months cannot be a minor offence. Pending such an amendment, the Commission recommends the changes in statutory law suggested in the previous paragraph. [para.6.22]

9.3 The right to personal liberty is fundamental to the Irish legal and constitutional system. Accordingly, the Commission believes that it is the generally accepted view that a judge should impose a prison sentence only if no other sanction would meet the case. In accordance with this view, the Commission provisionally recommends that the requirement of constitutional justice to give reasons be extended to a Judge of the District Court's decision to impose a prison sentence so that it is plain for all to see that the decision to impose a custodial sentence, rather than, say, a fine is fair and reasonable. [para.6.29]

9.4 As regards fines, the Commission has concluded that it is possible that the present belief that a maximum fine of over €3,000 (IR£2,362.69) would be

²³⁵ An example would be s.27 of the *Criminal Law Act, 1977*. S.27(1) states: "Without prejudice to s.108 of the *Magistrates' Courts Act, 1952* (consecutive terms of imprisonment), a magistrates' court shall not have power to impose imprisonment for more than six months in respect of any one offence.

S. 27(2) states: "Unless expressly excluded, subs.(1) above shall apply even if the offence in question is one for which a person would otherwise be liable on summary conviction to imprisonment for more than six months".

²³⁶ See paras.1.06 – 1.12 above.

²³⁷ See para.1.13 above.

unconstitutional is open to question, taking into account the maximum figure accepted for the 1920s and 30s and the changes in the value of money and wages during the intervening decades. [paras.6.09 – 6.17]

9.5 The Commission provisionally recommends that the law should be adjusted to state explicitly that higher fines may be imposed if an offender is well-off. This should be so whether the offender is a natural human person or a company, since in this context there is no reason or need, constitutional or otherwise, to make a distinction between the two. [paras.7.07 – 7.17]

9.6 The above recommendation still assumes that a fine is within what is taken to be the constitutionally permitted maximum in the case of both natural persons and corporations. However, the Commission believes that irrespective of the possibility raised at para.9.4, there are solid grounds for saying that it would be constitutional to increase the maximum fine in the case of a corporation to a figure above that fixed for human beings. Accordingly, the Commission provisionally recommends that in the case of a corporation, the maximum fine possible should be increased to reflect the fact that the corporation, unlike the human being, cannot be imprisoned. Legislation along the following lines is recommended:

“(1) This section applies to a provision prescribing a maximum fine, whether with or without imprisonment, for an offence only if the provision does not expressly prescribe a maximum fine for a body corporate different from the maximum fine for an individual.

(2) The maximum fine is taken to be the maximum fine only for an individual.

(3) If a body corporate is found guilty of the offence, the court may impose a maximum fine of an amount equal to 3 times the maximum fine for an individual.” [paras.8.26 and 8.31]

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