



THE USE OF CRIMINAL FINES – LESSONS FROM THE INTERNATIONAL EXPERIENCE

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14 October 2016

Keywords: fines, offences, criminal offences, sanctions, alternatives to
imprisonment, sentencing, punishment



ENHANCING CRIMINAL JUSTICE – KAZAKHSTAN

MODERNISING SENTENCING

THE USE OF CRIMINAL FINES – LESSONS FROM THE INTERNATIONAL EXPERIENCE

Keir Hopley

This paper is written to discharge the first deliverable of my mission to Kazakhstan designed to increase the use of criminal fines as an alternative to imprisonment. It reviews such information as is available, draws conclusions from these, and makes preliminary recommendations as to what might be transferable to Kazakhstan and how best it might be made to work successfully. These recommendations are tentative and will be refined in the light of discussions in Astana and at the forthcoming Round Table. As ever in these matters, successful reform will depend as much on winning hearts and minds of those in positions to influence delivery as in legislative change.

The academic literature

In contrast to the many books and articles that have been written to compare different systems and rates of incarceration, very little has been written on the use of fines. And what there is now somewhat dated.

Perhaps the best known comparative work is a study of four jurisdictions by Robert W Gillespie¹, an Associate Professor in the Faculty of Economics at the University of Illinois. Gillespie examined the use of fines in England and Wales, the then Federal Republic of Germany, Sweden and the United States.

Gillespie's objective was to explore why fines seemed to be used comparatively little in the United States as against the three countries in Western Europe. His study confirms that that indeed was the case. He is otherwise tentative about drawing conclusions as there was little empirical data available to him, but his final paragraphs nonetheless resonate some thirty five years on:

“The use of incarceration reduces the total economic output of society by immobilizing

¹ Gillespie, R W: *Fines as an alternative criminal sanction to Incarceration: an international perspective* by, Associate Professor, Department of Economics, College of Commerce and Business Administration, University of Illinois at Urbana-Champaign, Faculty Working Paper #712, Urbana-Champaign, Illinois, USA1980



the labor resources of the offender and society's resources needed to enforce the sentence. By substituting, at the margin, monetary penalties for incarceration more resources become available for economic production and an economic gain is realized. ... The economic judgment is that, other things equal, monetary penalties, in either form, are superior to incarceration. We concluded that the above analysis has established a strong presumption that U.S. sentencing policy fails to utilize monetary penalties as an alternative to incarceration up to the point where the marginal social cost of punishment for each is equal. Consequently, the social cost of crime and crime control is higher than it need be. Although our evidence is not claimed to be conclusive, it does point to a serious need to both re-think the a_ priori basis of current U.S. policy, i.e., punishment versus rehabilitation, and to initiate the necessary research to fill the vacuum of empirical knowledge in which this policy has been formulated.”²

Difficulties in international comparison

Gillespie’s difficulties in finding empirical evidence are unsurprising. How to compare accurately one jurisdiction with another has exercised the minds of many academics and practitioners. Frustration at this is palpable in a briefing to the United Kingdom Parliament by the National Audit Office, the public body charged with ensuring that the governmental machine in the UK is operating efficiently and delivering value for money. For example:

“1.7 The main reason why experts often hesitate before embarking on international comparisons in the justice area is because they are so difficult. On the face of it, they appear to be considerably more difficult than comparisons of other public policy issues, for instance, health. In the health arena, definitions of illnesses and lists of acceptable treatments are relatively standard throughout the developed world: certainly more so than definitions of crime or of specific punishments and rehabilitative techniques. The concept of ‘dosage’ is a good case in point. It has come into use increasingly in the criminal justice environment in Britain in recent years, but is still a much more inexact and less measurable idea there than in the medical profession. Put simply, as the European Institute for Crime Prevention and Control wrote in 2010, in the field of criminal justice ‘the availability of internationally comparable statistics is very limited’.

“1.8 What impairs comparability? There are multiple factors. These should be borne in mind by readers of this report. They include:

- differences in the ways crimes are counted (for example, whether countries register a crime as soon as it is reported to the police or whether they do so only when it is taken up by prosecutors or associated with a named suspect);
- differences in offence categorisations (e.g. what is classed as a serious violent crime), sentence types (e.g. whether suspended sentences are used or not), and reoffending measures (e.g. whether re-arrests or reconvictions are measured);
- frequent changes in measurement rules and definitions, which evolve as recording practices and laws change and as methodological improvements are made

² *Ibid*, p 34



(e.g. in Australia the 2010 iteration of key crime statistics and its successors are not comparable with those from previous years); and

- wide variation in the timeliness of data, with, we have observed, England and Wales often being the quickest to produce their definitive statistics.”³

Data that are available

Despite the difficulties, various attempts have been made to compare systems. Perhaps the most comprehensive of these is the *European Sourcebook of Crime and Criminal Statistics*, the fifth edition of which⁴ was published in 2014. The *Sourcebook* was produced by a number of distinguished state and academic statisticians from across Europe under the direction of an international Steering Group.

Whilst it is not possible to be entirely confident that like is being compared with like, the wide range of national experts and the detailed guidelines used to compile the included statistics (which is done by national correspondents) means that one can be reasonably assured that the comparisons are valuable in relative if not absolute terms.

The following table⁵, taken from the *Sourcebook* is the best comparison of sentencing in a wide range of European jurisdictions that I have discovered. It is concerned with what most people would regard as “real criminal offences” rather than with regulatory or minor road traffic offences. These low level offences, particularly minor road traffic offences, tend to dominate all else. Their exclusion means that the statistics are not distorted.

³ National Audit Office UK: *Comparing International Justice Systems*, UK, Briefing for the House of Commons Justice Committee, February, London, England 2012

⁴ European Institute for Crime Prevention and Control, associated with the United Nations: *European Sourcebook of Crime and Criminal Justice Statistics 2014*, fifth edition, publication series No 80, Helsinki, Finland 2014

⁵ *Ibid.*, p 196



**Table 3.2.3.1. Total persons receiving sanctions/asures in 2010 – Criminal offences:
Total**

	Total sanctions and measures per 100 000 pop.	Of which: % verdict / admonition only		Of which: % non-custodial sanctions and measures				Of which: % suspended custodial sanctions and measures			Of which: % unsuspended custodial sanctions and measures			
		Of which: % fines	Total	Of which: % community service	Of which: % supervision	Of which: % probation as a sanction of its own right	Total	Of which: % with community service	Of which: % with supervision	Total	Of which: % partially suspended	Of which: % psychiatric hospital	Of which: % other measures	
Albania	270	59.1	41.4	13.5	...	...	...	...	...	45.1	...	...	...
Armenia	137	...	17.7	19.4	0.1	8.5	...	...	...	...	...	...	0.0
Austria	458	...	31.8	...	...	...	43.1	...	...	50.4	16.6	...	...
Bulgaria	517	...	5.4	...	...	...	...	...	...	57.4	...	...	2.0
Croatia	670	1.1	4.4	7.8	36.8	63.2	...	57.3	...	15.6	...	...	21.6
Cyprus	...	...	...	...	...	...	...	...	...	...	...	...	...
Czech Republic	672	2.9	4.9	...	...	...	...	62.8	...	6.3	16.7	...	1.8
Denmark	2611	...	83.9	...	...	...	...	7.8	...	6.8	...	...	1.5
Estonia	681	...	...	...	...	...	...	...	...	...	...	...	...
Finland	3851	0.0	87.9	1.3	99.2	0.8	...	7.3	1.2	...	3.1	...	0.4	
France	1082	1.0	39.5	15.7	...	...	...	26.0	5.1	30.6	17.8	27.5	...
Georgia	382	...	...	...	...	...	...	...	...	...	...	...	...
Germany	1005	1.0	70.0	11.1	...	...	...	12.5	...	5.4	...	...	...
Greece	384	...	47.9	...	...	...	...	...	...	...	...	...	...
Hungary	892	0.5	32.4	66.1	16.9	...	13.4	22.3	50.2	...	11.6	...	...
Ireland	...	...	...	...	...	...	...	...	...	...	...	...	...
Italy	...	...	...	...	...	...	...	...	...	...	...	...	...
Kosovo (UNR)	449	2.0	46.8	...	...	...	...	...	...	...	...	...	...
Latvia	...	...	...	...	...	...	...	...	...	...	...	...	...
Lithuania	471	0.7	31.0	12.4	60.1	...	...	12.8	...	52.9	...	...	...
Malta	...	...	...	...	...	...	...	...	...	...	...	...	...
Netherlands	578	1.1	38.9	25.6	98.9	10.4	75.9	...	23.0	33.5	0.6	0.9
Poland	1134	...	21.3	11.5	100.0	...	...	58.0	...	27.5	9.2	...	0.0
Portugal	732	1.5	67.5	0.5	19.2	18.5	...	54.7	8.1	...	0.2	0.2
Serbia	297	0.8	11.1	60.9	0.5	...	...	59.2	...	27.2	...	...	...
Slovakia	...	...	...	...	...	...	...	...	...	...	...	...	...
Slovenia	395	1.5	3.0	0.0	...	...	...	...	...	15.0	...	...	0.7
Spain	...	...	...	...	...	...	...	...	...	...	...	...	...
Sweden	1479	46.1	26.1	5.3	19.2	8.3	41.0	...	9.6	1.4	1.8	4.6
Switzerland	1339	...	...	90.6	4.6	...	...	2.4	...	7.0	...	...	...
Turkey	1673	...	29.4	12.3	...	...	...	6.3	...	17.6	...	...	34.5
Ukraine	369	...	14.9	...	...	...	...	...	...	24.2	...	...	3.5
UK: E & W	2458	...	65.3	92.5	...	...	...	3.5	...	7.5	...	...	9.7
UK: N. Ireland	1602	...	63.0	9.7	30.0	42.4	...	9.6	...	8.9	...	...	3.7
UK: Scotland	1252	17.0	41.4	20.9	47.4	1.5	47.7	...	...	20.7	...	0.1	...
Mean	994	9.1	37.1	25.1	41.0	23.3	30.5	23.8	34.7	29.8	20.0	19.7	0.7	5.7
Median	677	1.1	32.4	12.4	30.0	8.5	30.5	12.7	41.0	29.1	15.6	22.0	0.4	1.8
Minimum	137	0.0	3.0	0.0	0.1	0.8	13.4	2.4	1.2	6.3	3.1	1.4	0.1	0.0
Maximum	3851	59.1	87.9	92.5	100.0	63.2	47.7	62.8	75.9	54.7	57.4	33.5	1.8	34.5



Analysis

The divergence in proportions of offenders imprisoned and those subject to fines is large. For those countries for which the information is available, immediate imprisonment rates range from 3.1% in Finland to 57.4% in Bulgaria; and fine rates range from 3.0% in Slovenia to 92.5% in England and Wales.

But there is no straightforward inverse relationship between percentages fined and prison populations. Whilst, generally speaking, it would appear that those with a higher proportion of offenders fined have a lower proportion *sent* to prison, that relationship does not translate into numbers of people *in* prison.

That is for a whole variety of reasons. The prison population for any country is determined by the combination of four factors:

- i. **numbers convicted** before the courts;
- ii. the **custody rate**, that is to say the proportion of those sentenced who are sent to prison;
- iii. **sentence length**; and
- iv. the **percentage of time served** before release, whether on parole, licence, supervision or not.

What drives the *flow* of numbers into prison is some combination of the first three factors; the *stock* of prisoners is also affected by the fourth factor. Different factors have greater significance at different times. For example, in England and Wales, around the turn of the 21st century, an increase in custody rates was largely responsible for an increase in the prison population, whereas over the last ten years or so the principal factor has been increasing sentence lengths. The numbers at the moment are broadly stable despite continued increases in sentence length and that is because the numbers convicted are reducing.⁶

So it would be a false assumption to surmise that an increase in the numbers of offenders fined would automatically lead to a reduction in the proportion of the population imprisoned. So whilst France fines 39.5% of its offenders and England and Wales fines 92.5%⁷, the prison population rate in France is 103 per 100,000 population and that in England and Wales 146 per 100,000 population.⁸

Nonetheless, increasing the use of fines (and other alternatives to imprisonment) can make a substantial difference to the prison population, in terms both of numbers and of rates. Gillespie describes how post-Second World War (West) Germany deliberately brought about a new philosophical and ethical approach to penal policy:

⁶ All matters within the current author's professional experience as a senior policy official in the UK Ministry of Justice

⁷ Figures taken from table above

⁸ Institute for Criminal Policy Research: *World Prison Brief*, online at http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14&=Apply



“In 1954 a Grand Commission for Penal Reform (Grosse (Straf rechtskommission) was formed and given a mandate to produce a new penal code to replace the existing code which dated back to 1871. The work of the Commission provided the basis for the official government draft of 1962 [German Draft Penal Code E 1962].

“Two major results of the reform were decriminalization of many minor and moral offenses, and in sentencing, a shift in philosophy from "retributive justice" towards "resocialization" [Lee and Robertson, 1973: 191; Herrmann, 1976: 720]. This change in philosophy was manifested by a general substitution of milder penalties, in particular, a decrease in the use of incarceration.

“For the less serious offenses, those which previously would have received prison sentences of six months or less, fines or suspended sentences were to replace incarceration altogether. The First Law Refonning [sic] the Penal Code, effective September 1, 1969, provided that prison terms of less than six months were to be replaced by fines or probation in all but exceptional cases. This policy was to be followed, general deterrence considerations, aside. Although short term sentences were not abolished completely, a very significant reduction was achieved ... In 1968 over one hundred and ten thousand sentences to prison terms of less than six months were awarded; in 1976 this figure dropped to only about ten thousand, even though total convictions rose. A rather remarkable achievement.”⁹

Another jurisdiction where a similarly impressive reduction in the prison population was achieved was Finland. Professor Tapio Lappi-Seppälä of the Institute of Criminology and Legal Policy at the University of Helsinki has written extensively on the subject.¹⁰ Briefly summarised, he ascribes Finnish success in reducing its prison population rate – from 250 per 100,000 to about 80 per 100,000 between 1945 and 2005 – to the following factors:

- i. **political will** to bring down the prison population, with a generally shared belief across all political parties that the incarceration rate was a moral disgrace;
- ii. **media**, which is generally much more sober than in many western European countries, the market being dominated by quality as opposed to tabloid newspapers and most of those being bought on subscription, all of which aspects contributed to a much higher quality of debate than would be found in, say, the UK;
- iii. **Nordic co-operation**: Finland collaborated increasingly with the other Nordic countries, all of whom tended to have a liberal approach to crime and punishment and correspondingly low incarceration rates;
- iv. **Judicial attitudes and sentencing structures**: judges and prosecutors in Finland are career professionals trained in criminology as well as law. They were very open to a more liberal approach, indeed sometimes in advance of legislators in this respect. Also, the Finnish sentencing structure is quite rigid, placing great emphasis on consistency of

⁹ *Op cit*, pp 8-9

¹⁰ See, for example, Lappi-Seppälä, T: *Controlling Prisoner Rates: Experiences from Finland*, United Nations Asia and Far East Institute, Tokyo, Japan 2007, available at http://www.unafei.or.jp/english/pdf/RS_No74/No74_05VE_Seppala1.pdf



sentencing. Once the more liberal approach had become established, the desire for a large measure of uniformity in sentencing perpetuated the new levels.¹¹¹²

Some jurisdictions within the United States are also now making attempts to lower their use of incarceration and instead make more use of fines and other non-custodial sanctions. This has often been prompted by economic reasons: California, which pioneered the “three strikes” law requiring very long sentences for third time offenders, even where the offence was relatively petty, was put in serious financial difficulties by the cost:

“the cost of housing striker inmates for the additional years they were sentenced to under the three strikes law represents a substantial liability to the State. We estimated that the additional years imposed by the three strikes law represent \$19.2 billion in additional costs over the duration of the incarceration of striker inmates identified as of April 2009.”¹³

However, such is the level to which incarceration rates in the US had risen that, despite reductions in many of their jurisdictions, the rates are still well above anything experienced in Western Europe, or indeed Kazakhstan.

Potential measures to increase the use of fines in Kazakhstan as an alternative to imprisonment

I – ENSURING THAT FINES ARE GENERALLY AVAILABLE AS A PENALTY FOR OFFENCES

For fines to be imposed, they need to be available as a penalty for the various offences for which they might be thought suitable punishment. As will be apparent from the high proportion of offenders fined in some Western European jurisdictions, fines are generally very widely available in those places.

In England and Wales, for example, fines are available for any offence other than murder, which is the only offence for which there is a mandatory sentence (of life imprisonment). In France, fines are available for *délits and contraventions*, with only the most serious (and numerically smallest) category of *crimes* excluded. Similarly, in Germany, crimes (*verbrechen*), the most serious offences, are the only ones that cannot be punished by a fine; the much larger category of misdemeanours (*vergehen*) can all attract a fine.

The fact that fines are available as punishment for relatively serious offences does not, of course, mean that they will be used in that way. Different jurisdictions vary widely in their use of fines for middle ranking offences, even where they are available to the courts as an option. The following tables from the *Sourcebook*¹⁴ illustrate the point:

¹¹ *Ibid*, pp 15-16

¹² A rigid sentencing structure can, however, have the opposite effect, as has been seen in many jurisdictions within the United States – see below for discussion.

¹³ California State Auditor: *Report 2009 – 107.2*, Sacramento, California, USA 2010

¹⁴ *Op cit*, pp 200, 206, 214



**Table 3.2.3.5 Total persons receiving sanctions/asures in 2010 – Bodily injury
(Assault): Total**

	Total sanctions and measures per 100 000 pop.			Of which: % non-custodial sanctions and measures				Of which: % suspended custodial sanctions and measures			Of which: % unsuspended custodial sanctions and measures			
	Total	% verdict / admonition only	% fines	Total	% community service	% supervision	% probation as a sanction of its own right	Total	% with community service	% with supervision	Total	% partially suspended	% psychiatric hospital	% other measures
Albania	16	35.4	64.6	..	..	..	..	..	..	..	..	..	..	..
Armenia	7	..	19.6	19.6	0.0	0.0	..	..	..	..	..	..	..	0.0
Austria	72	..	46.9	..	..	..	..	40.1	..	..	52.0	4.6	..	..
Bulgaria	15	..	5.1	..	..	..	..	..	..	..	49.5	..	..	2.5
Croatia	27	1.3	3.6	3.2	84.2	15.8	..	59.8	..	..	10.7	..	..	24.5
Cyprus	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Czech Republic	26	2.2	2.3	..	..	..	..	72.8	..	..	12.1	..	..	..
Denmark	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Estonia	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Finland	192	0.0	62.0	3.9	98.8	1.2	..	22.5	2.3	..	9.9	..	..	1.7
France	118	1.7	19.8	15.0	..	..	..	40.5	3.8	36.3	23.0	42.9	..	..
Georgia	9	..	..	..	..	..	..	..	..	..	..	..	..	..
Germany	98	1.3	41.3	25.9	..	..	..	24.0	..	..	7.5	..	..	..
Greece	14	..	0.2	121.1	..	..	..	1.6	..	..	..	..	..	..
Hungary	55	0.9	21.7	54.9	15.4	..	43.0	2.4	354.5	..	11.1	..	..	..
Ireland	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Italy	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Kosovo (UNR)	60	3.3	46.3	..	..	..	..	..	..	..	..	..	..	..
Latvia	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Lithuania	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Malta	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Netherlands	71	1.7	26.1	40.0	99.8	..	..	15.8	77.5	..	15.3	54.4	1.7	1.1
Poland	90	..	6.9	8.1	100.0	..	..	74.4	..	57.8	10.6	..	..	0.0
Portugal	68	0.6	57.8	1.9	3.6	..	..	31.8	..	57.2	3.2	..	1.3	0.2
Serbia	16	0.6	10.3	67.5	0.2	..	..	66.3	..	..	21.7	..	..	..
Slovakia	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Slovenia	23	5.2	3.9	0.0	..	..	..	..	..	..	4.6	..	..	0.9
Spain	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Sweden	102	5.5	12.0	14.3	30.6	..	..	32.0	68.4	..	17.7	2.4	3.9	18.5
Switzerland	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Turkey	146	..	40.2	14.1	..	..	..	13.5	..	..	20.7	..	..	11.5
Ukraine	19	..	..	..	..	..	..	..	..	..	..	..	..	..
UK: E & W	76	..	4.8	69.8	..	..	..	20.3	..	..	30.2	..	..	7.7
UK: N. Ireland	46	..	10.0	19.4	46.3	43.8	..	32.9	..	..	28.8	..	..	..
UK: Scotland	293	18.5	33.7	28.3	41.3	0.7	47.5	..	..	..	19.4	..	0.1	..
Mean	69	5.6	24.5	29.8	47.3	12.3	45.2	34.4	101.3	50.5	19.3	26.1	1.7	6.2
Median	58	1.7	19.7	19.4	41.3	1.2	45.2	31.9	68.4	57.2	16.5	23.7	1.5	1.7
Minimum	7	0.0	0.2	0.0	0.0	0.0	43.0	1.6	2.3	36.3	3.2	2.4	0.1	0.0
Maximum	293	35.4	64.6	121.1	100.0	43.8	47.5	74.4	354.5	57.8	52.0	54.4	3.9	24.5



Table 3.2.3.11 Total persons receiving sanctions/asures in 2010 – Theft: Total

	Total sanctions and measures per 100 000 pop.	Of which: % verdict / admonition only		Of which: % non-custodial sanctions and measures				Of which: % suspended custodial sanctions and measures			Of which: % unsuspended custodial sanctions and measures			
				Total	Of which: % community service	Of which: % supervision	Of which: % probation as a sanction of its own right	Total	Of which: % with community service	Of which: % with supervision	Total	Of which: % partially suspended	Of which: % psychiatric hospital	Of which: % other measures
Albania	55	98.5	1.5	...	...	...	...	...	...	...	...	...	...	...
Armenia	28	...	2.8	2.8	0.0	176.9	...	...	...	...	...	...	...	0.0
Austria	82	...	27.6	...	...	...	...	39.1	...	...	71.9	27.0	...	...
Bulgaria	163	...	2.2	...	...	...	...	...	...	...	70.8	...	...	4.3
Croatia	136	0.3	0.6	8.2	48.5	51.5	...	59.1	...	...	21.8	...	...	18.2
Cyprus	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Czech Republic	148	5.4	0.9	...	...	...	...	46.8	...	...	30.1	...	...	...
Denmark	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Estonia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Finland	715	0.0	92.6	0.5	99.5	0.5	...	2.5	0.3	...	2.5	...	...	1.8
France	137	1.2	11.3	21.2	...	...	...	32.6	9.1	21.8	33.6	28.6	...	...
Georgia	81	...	...	...	...	...	...	...	...	...	...	...	...	...
Germany	169	0.4	57.4	17.4	...	...	...	15.1	...	...	9.7	...	...	...
Greece	14	...	47.7	7.7	...	...	...	17.6	...	...	...	...	...	...
Hungary	226	0.2	19.9	61.8	27.5	...	39.3	3.1	547.3	...	18.1	...	...	...
Ireland	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Italy	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Kosovo (UNR)	85	2.8	59.8	...	...	...	...	...	...	...	...	...	...	...
Latvia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Lithuania	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Malta	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Netherlands	130	0.7	26.6	25.2	99.7	...	...	12.3	72.7	...	34.8	23.8	0.1	0.4
Poland	156	...	7.6	11.6	100.0	...	...	65.1	...	42.9	15.7	...	...	0.0
Portugal	55	0.8	37.8	0.1	100.0	...	...	33.2	...	55.0	22.5	...	...	0.2
Serbia	15	0.1	9.1	52.8	2.0	...	...	51.5	...	...	38.0	...	...	...
Slovakia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Slovenia	89	0.3	2.5	0.0	...	...	...	...	...	...	22.2	...	...	0.4
Spain	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Sweden	284	52.9	17.5	5.9	7.4	...	...	9.6	3.6	...	7.5	0.9	0.5	6.5
Switzerland	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Turkey	149	...	9.7	24.2	...	...	...	15.4	...	...	37.3	...	...	13.4
Ukraine	133	...	...	...	...	...	...	...	...	...	24.3	...	...	...
UK: E & W	219	...	13.8	81.6	...	...	...	6.7	...	...	18.4	...	...	25.8
UK: N. Ireland	121	...	19.1	18.1	39.2	47.8	...	19.0	...	...	25.3	...	...	18.5
UK: Scotland	255	20.8	26.5	22.2	44.0	1.8	44.2	...	...	...	30.6	...	0.0	...
Mean	152	13.2	22.5	21.3	51.6	55.7	41.7	26.8	126.6	39.9	28.2	20.1	0.2	7.4
Median	134	0.7	15.7	17.4	44.0	47.8	41.7	18.3	9.1	42.9	24.3	25.4	0.1	3.0
Minimum	14	0.0	0.6	0.0	0.0	0.5	39.3	2.5	0.3	21.8	2.5	0.9	0.0	0.0
Maximum	715	98.5	92.6	81.6	100.0	176.9	44.2	65.1	547.3	55.0	71.9	28.6	0.5	25.8



Table 3.2.3.19 Total persons receiving sanctions/asures in 2010 – Drug offences: Drug trafficking

	Total sanctions and measures per 100 000 pop.			Of which: % non-custodial sanctions and measures				Of which: % suspended custodial sanctions and measures		Of which: % unsuspended custodial sanctions and measures				
	Total	Of which: % verdict/ admission only	Of which: % fines	Total	Of which: % community service	Of which: % supervision	Of which: % probation as a sanction of its own right	Total	Of which: % with community service	Of which: % with supervision	Total	Of which: % partially suspended	Of which: % psychiatric hospital	Of which: % other measures
Albania	12	100.0	0.0	...	...	...	...	...	...	...	...	...	...	...
Armenia	6	...	1.1	1.1	0.0	0.0	...	...	...	...	...	...	...	0.0
Austria	16	...	0.1	...	...	...	...	...	...	...	...	...	...	...
Bulgaria	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Croatia	27	0.1	...	4.5	100.0	...	...	7.2	...	...	55.0	...	...	37.7
Cyprus	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Czech Republic	13	2.3	0.8	...	...	...	...	59.5	...	...	33.3	...	...	...
Denmark	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Estonia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Finland	63	0.0	57.8	3.3	100.0	0.0	...	20.4	3.5	...	17.3	...	...	0.4
France	17	0.1	3.1	5.3	...	...	...	33.6	4.8	38.0	57.8	47.8	...	...
Georgia	2	...	...	...	...	...	...	...	...	...	...	...	...	...
Germany	11	0.2	2.2	1.7	...	...	...	54.9	...	...	41.0	...	...	...
Greece	5	...	16.7	...	...	...	...	65.7	...	...	...	...	...	...
Hungary	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Ireland	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Italy	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Kosovo (UNR)	5	0.0	6.1	...	...	...	...	...	...	...	...	...	...	...
Latvia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Lithuania	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Malta	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Netherlands	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Poland	5	...	6.5	1.3	100.0	...	...	47.0	...	43.0	45.3	...	...	0.0
Portugal	20	...	6.5	...	...	...	...	43.5	...	64.2	47.0	...	...	0.2
Serbia	33	0.1	15.3	38.0	0.9	...	...	34.1	...	...	46.7	...	...	...
Slovakia	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Slovenia	17	0.0	0.0	0.6	...	...	...	...	...	...	36.3	...	...	0.0
Spain	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Sweden	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Switzerland	...	...	...	...	...	...	...	...	...	...	...	...	...	...
Turkey	48	...	32.6	29.7	...	...	...	0.4	...	...	33.4	...	...	3.8
Ukraine	12	...	...	...	...	...	...	...	...	...	54.6	...	...	...
UK: E & W	1	...	0.3	6.5	...	...	...	3.7	...	...	93.5	...	...	0.8
UK: N. Ireland	...	...	...	...	...	...	...	...	...	...	...	...	...	...
UK: Scotland	45	3.8	12.5	34.5	67.7	0.0	31.4	...	...	...	49.4	...	0.0	...
Mean	19	10.6	10.1	11.5	61.4	0.0	31.4	33.6	4.1	48.4	47.0	47.8	0.0	5.4
Median	13	0.1	4.6	4.5	83.9	0.0	31.4	34.1	4.1	43.0	46.7	47.8	0.0	0.3
Minimum	1	0.0	0.0	0.6	0.0	0.0	31.4	0.4	3.5	38.0	17.3	47.8	0.0	0.0
Maximum	63	100.0	57.8	38.0	100.0	0.0	31.4	65.7	4.8	64.2	93.5	47.8	0.0	37.7

Notes on tables 3.2.3.1 to 3.2.3.19

Croatia: Data relate to the year 2011 (instead of 2010).

Greece: Data relate to the year 2009 (instead of 2010).

UK: Northern Ireland: Data relate to the year 2008 (instead of 2010).



Whilst Finland is consistently amongst the highest users of the fine for all three categories of offences, England and Wales uses them far less despite being generally a high user of fines. This reflects the differences in national views and culture in respect of different types of offence. Drug trafficking, for example, is regarded as a very serious offence in England and Wales.

The Criminal Code of the Republic of Kazakhstan already makes fines available for a good many crimes. Nonetheless, I would recommend that consideration should be given to extending the list of offences for which fines are available so as to give the courts the maximum opportunity to use them: even for relatively serious offences, there may be exceptional cases where the courts would find a fine of use.

➤ **Recommendation 1 – that consideration be given to extending the list of offences for which a fine should be available as a penalty.**

But, given that fines are already widely available and not being used currently, that measure on its own will clearly not be enough.

II – LEGISLATING TO REMOVE IMPRISONMENT AS A PENALTY FOR APPROPRIATE OFFENCES

This was the West German approach post-Second World War (see above). It is the most effective way to stop prison being used where it is no longer thought appropriate for that to happen. Once imprisonment is no longer available as a penalty for a particular offence, courts have no option but to impose an alternative penalty.

The usual question is whether and to what extent it can be achieved. As explained above, the particular conditions that prevailed in post-Second World War West Germany and Finland, the two clear examples of where Western European countries have managed substantially to reduce their levels of incarceration, were highly unusual. Attempts to disapply the possibility of imprisonment have been much harder to achieve in other countries. The present author has personal experience of trying, with the then Secretary of State for Justice, to disapply imprisonment to certain offences. Our efforts were rebuffed by the then Prime Minister as he and his office considered that it would be too politically difficult to achieve given the general tendency of the media in the UK to portray justice as “soft” (when in fact, measured by incarceration rates it is one of the harshest in Western Europe).¹⁵

To be successful, there would need to be buy in to the idea from, at least, Ministers, parliamentarians, judges and prosecutors. A first step would be to examine the extent to which there is the appetite for it. If there is, then there can be a detailed examination of the offences from which imprisonment can be removed as a punitive option.

¹⁵ See *World Prison Brief*, cited above



- **Recommendation 2a – that the appetite of Ministers, parliamentarians, judges and prosecutors for the principle of removing imprisonment as a penalty for various less serious offences be tested.**
- **Recommendation 2b – that, subject to the outcome of that, a detailed examination of the statute book be conducted to determine which offences should be so amended.**

III – FINE LEVELS AND METHODS OF APPLYING

There is no standard system for determining the level of the fine. What is in place in different jurisdictions depends on history and culture. Apart from fixed monetary amounts for minor infractions, especially minor road traffic offences, which are largely excluded from consideration in this paper, most jurisdictions provide for a range of fines to be available to the courts. These tend to be specified either in pecuniary amounts or in day units. Some jurisdictions also specify a minimum fine. For example:

- i. in England and Wales, the Crown Court (which deals with the more serious cases) has the power to fine an unlimited amount, whilst the magistrates' courts (which deal with the less serious cases) can fine up to the "level" specified for the offence. Levels run from 1 at the lower end to 5 at the higher end. Level 5 fines are now unlimited but the other four levels are subject to a maximum. Fines are specified in legislation according to level¹⁶ rather than specific pecuniary amount so as to make amendment and updating easier. Minimum fines are not specified;
- ii. in France, the courts may fine in respect of a *délit* on a day fine basis, with the amount to be paid determined according to the offender's income subject to a maximum of €1,000 a day and 360 days. In respect of a *contravention*, the amount is specified in pecuniary terms, with a maximum of €3,000 and a **minimum** ranging from €38 to €1,500 depending on the class (ranging from 1-5) the offence belongs¹⁷;
- iii. in Germany, fines are always imposed in day fine units. As with France, the maximum number of units is 360; but in Germany the amount of the day unit is to be set with a minimum of €1 and a maximum of €30,000¹⁸;
- iv. in Portugal, fines are imposed in day fine units. The minimum number of units is generally 10 and the maximum 360. The amount of the day unit is a minimum of €5 and a maximum of €500¹⁹;
- v. in Finland, fines are also imposed as day fine units. The minimum number of units is 1 and the maximum 120. The basis for setting the amount of the fine is set out in some detail in the Finnish Criminal Code²⁰:

Section 2 - Amount of a day fine (808/2007)

(1) The amount of a day fine shall be set so that it is reasonable in view of the solvency of the person fined.

¹⁶ Criminal Justice Act 1982, s37 (as amended)

¹⁷ Code Pénal, a 131

¹⁸ Strafgesetzbuches, §40

¹⁹ Código Penal Português, a 47

²⁰ Rikoslaki, Ch 2(a)



(2) One sixtieth of the average monthly income of the person fined, less the taxes and fees defined by a Decree and a fixed deduction for basic consumption, is deemed to be a reasonable amount of a day fine. The maintenance liability of the person fined may decrease the day fine.

(3) The primary basis for the calculation of the monthly income is the income of the person fined as indicated in the most recent taxation. If the income of the person fined cannot be reliably ascertained from the tax records or it has essentially changed since the most recent taxation, it may be assessed also on the basis of other information.

(4) In court, the day fine is set on the basis of the information available at the time of the court proceedings, and in proceedings on the basis of the Summary Penal Fee Act (754/2010), the day fine is set on the basis of the information available at the time when the fine is set or when the request for a summary penal fee is made. However, the prosecutor shall set the day fine on the basis of the information available at the time the summary penal fee is issued, if it has become evident that the solvency of the person for whom the summary penal fee has been requested has in the meantime essentially changed. (755/2010)
[subsection 4 has been amended by the Act of 755/2010 and enters into force on a date to be set by an Act. The earlier wording is as follows:]

(4) In court, the day fine is set on the basis of the information available at the court proceedings, and in penal order proceedings, the day fine is set on the basis of the information available when the request for a penal order is being made. However, the prosecutor shall set the day fine on the basis of the information available at the time the penal order is issued, if it has become evident that the solvency of the person for whom the penal order has been requested has in the meantime essentially changed.

(5) More detailed provisions on the calculation of the average monthly income, the rounding-off of the amount of the day fine, the amount of the fixed deduction for basic consumption, the manner in which the maintenance liability is to be taken into account, and the minimum amount of a day fine shall be issued by a Decree.

The advantage of day fines over pecuniary levels is that they are seen to relate directly to the offender's income and so those offenders who are relatively poor are not punished disproportionately to those who are financially better off. That can lead to some striking headlines, as in 2002 when a director of Nokia was fined €116,000 for speeding on his motorbike in Helsinki.²¹ It also led to the abandonment of a very short-lived experiment in unit fines (day fines by another name) in England and Wales in 2003 when a man was fined £1,200 for dropping a potato crisp packet.²²

In practice, it probably does not make much difference whether fines are specified in day fines or in pecuniary amounts provided that there is provision to ensure that offenders are fined

²¹ <http://news.bbc.co.uk/1/hi/world/europe/1759791.stm>

²² <http://www.independent.co.uk/news/uk/magistrates-to-see-reform-of-unit-fines-talks-with-clarke-could-lead-to-changes-in-means-related-2320839.html>



amounts that they can reasonably afford. There is no advantage to anyone in setting fine levels so high that they are unaffordable.

In practice, this means that fines are often imposed at far lower levels than the maximum available. In England and Wales, when the summary maximum was set at £5,000, the overall mean fine was in the order of £120.²³

But given that there are already provisions in respect of calculated units in the Criminal Code of the Republic of Kazakhstan, it would seem to make sense for all fines to be specified in day units.

- **Recommendation 3a – that all fines should be specified as day fines.**
- **Recommendation 3b – that the maximum number of units should be specified for each category of offence, not to exceed 360.**
- **Recommendation 3c – that the legislation should clearly specify that when imposing the fine the courts have a duty to take into account the offender’s financial means and obligations.**
- **Recommendation 3d – that consideration should be given as to how to calculate the amount of the day fine in respect of each offender.**

IV – SENTENCING PRINCIPLES

Several jurisdictions have adopted sentencing principles that require the courts to take into account what Parliament has decided should be the objectives of sentencing. In Germany, for example, the Criminal Code specifies that “the effects which the sentence can be expected to have on the offender’s future life in society shall be taken into account”.²⁴ Similarly, in Finland, “the sentence shall be determined so that it is in just proportion to the harmfulness and dangerousness of the offence, the motives for the act and the other culpability of the offender manifest in the offence.”²⁵

Some countries go further and include a presumption of minimum punishment. So, for example, in England and Wales:

“The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence.”²⁶

And:

²³ Present author’s recollection from his time as Head of Sentencing Policy at the UK Ministry of Justice; I have been unable to locate a published source of this information.

²⁴ Strafgesetzbuches, § 46

²⁵ Rikoslaki, Ch 6, s 4

²⁶ Criminal Justice Act 2003, s 152(2)



“A court must not pass a community sentence on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant such a sentence.”²⁷

The objective of these two provisions is to establish a hierarchy of punishments which the court must consider when imposing sentence, and that it needs to be satisfied that the offence is serious enough to warrant going from the first tier to the second and from the second to the third. This can be summarised as that an offence should be punished by a fine or a discharge unless it is **serious enough** for a community sentence to be imposed; and that a custodial sentence should only be imposed if an offence is **so serious** that only custody will satisfy the needs for punishment and deterrence.

- **Recommendation 4 – that there should be a provision in law to say that punishment should be the minimum required to meet the requirements of punishment and deterrence. It would be possible to go further and provide that fines should be used unless they are clearly inappropriate.**

V - SENTENCING GUIDELINES

Several jurisdictions have implemented sentencing guidelines. But care needs to be taken with this concept: their nature and form – and indeed the purpose for which they were introduced – varies significantly from country to country.²⁸

In New Zealand, the objective was openly to exert downward pressure on the prison population. The Sentencing Council Act 2007 established a Sentencing Council that was to be independent of the Government and charged with issuing guidance on sentencing. Section 9 of the Act sets out the functions of the Council:

“(1) The functions of the Council are—

- (a) to produce guidelines that are consistent with the [Sentencing Act 2002](#) relating to—
 - (i) sentencing principles:
 - (ii) sentencing levels:
 - (iii) particular types of sentences:
 - (iv) other matters relating to sentencing practice:
 - (v) grounds for departure from the sentencing guidelines:
- (b) to produce guidelines that are consistent with the [Parole Act 2002](#) about the granting of parole:
- (c) to assess and take account of the overall costs and benefits of the guidelines:

²⁷ *Ibid*, s 148(1)

²⁸ For a very helpful review of sentencing guidelines around the world see Sentencing Council for Scotland: *Sentencing Guidelines around the World*, Edinburgh, Scotland 2005, available at <https://www.scottishsentencingcouncil.org.uk/media/1109/paper-31a-sentencing-guidelines-around-the-world.pdf>



- (d) to provide, in relation to both draft and final guidelines, a statement of the guidelines' likely effect on the prison population:
- (e) to give advice on, and consider issues about, sentencing and parole as set out in this Act:
- (f) to collate information on sentencing practice, and on adherence to and departures from the sentencing guidelines, and provide this information to the judiciary:
- (g) to collate information on parole decisions, and on adherence to and departures from the parole guidelines, and provide this information to the Parole Board:
- (h) to provide information to the public about sentencing and parole:
- (i) any functions that are incidental and related to, or consequential on, its functions set out in paragraphs (a) to (h).

(2) Except as expressly provided in this Act or any other Act, the Council must carry out its functions and powers independently.”

The fact that the Council had been set up with a view to reducing the prison population was criticised in some quarters and at one point the Opposition pledged to repeal the Council.²⁹ It is still, however, in existence today.

Many of the sentencing councils in British Commonwealth countries publish narrative guidelines, that is to say guidelines that are expressed in terms of written guidance, either by way of generalisations about cases or by reference to specific cases.

So, for example, the Sentencing Council in England and Wales has produced comprehensive guidance for the magistrates' courts. This includes guidance as to the level of fines to be imposed in appropriate cases. To take a very common offence, simple theft, the guideline³⁰ operates in the following way:

- i. first, it deals with the question of culpability, setting out factors which would suggest low, medium or high culpability;
- ii. secondly, it deals with harm, assessed in this case by reference to monetary value and also to any additional harm that might be caused to the victim (for example by the theft of items of particular sentimental value such as family photographs). It identifies four categories of harm in this way;
- iii. it then offers starting points for the sentence by combining the results for culpability and harm (the two elements that go together to the seriousness of an offence) and possible ranges for the sentence;
- iv. it then provides a list of other factors that might tend to aggravate or mitigate the seriousness of the offence, such as whether the offender sought to place blame on others (aggravating) or was of previous good character (mitigating);
- v. next, the court needs to consider if there are particular factors to consider such as assistance to the prosecution;

²⁹ See, for example, <http://www.stuff.co.nz/national/politics/561695/National-to-scrap-sentencing-council>

³⁰ Sentencing Council: *Magistrates' Courts Sentencing Guidelines – Definitive Guideline*, London, England 208, pp 377-382



- vi. then, any discount for a guilty plea needs to be taken into account³¹
- vii. finally, the totality of the sentence needs to be examined (on which there is a separate guideline) and the final figure calculated;
- viii. if the offender has been held in prison on remand and a custodial sentence is imposed, then that time will need to be deducted from the sentence to be served. Alternatively, if a non-custodial punishment is imposed, then it will be reduced by the fact that the offender has been held on remand.

References to fines in that document are to Bands A, B and C. That is another attempt by the Sentencing Council to introduce fines based on income that more readily reflect the ability of the offender to pay and the effect the fine will have on him. But the difference is that the guidelines are precisely that – guidelines rather than prescription – though the court is required to apply the guidelines unless it would not be in the interests of justice to do so.³²

US sentencing guidelines tend to be much more precise, determinative and tabular in nature. If anything, over the years, they have probably had a negative effect on the prison population. They are fairly inflexible instruments which give judges little room to manoeuvre to meet individual circumstances of offences and offending. They also tend to give undue prominence to previous offending, with the result that penalties are pushed upwards. At the very least, they have been ineffective in making significant reductions to the prison population in the United States though, as noted above, economic necessity is pushing some US jurisdictions in the right direction.³³

Many of the jurisdictions that have been most successful in diverting offenders from prison into fines and other non-custodial penalties³⁴ do not have Sentencing Councils. It is therefore an open question as to whether the chance of success in Kazakhstan would be enhanced by establishing a Sentencing Council or otherwise. If a Council were to be established, I would strongly recommend a narrative style of guidance rather than a tabular one. There would also be questions of composition of membership and whether it should attempt to issue sentencing guidelines across all offences from the start (as New Zealand did) or whether it should adopt an incremental approach (as England and Wales did). I can advise further if required.

- **Recommendation 5a – that careful consideration be given to whether or not it would be advantageous to establish a Sentencing Council.**
- **Recommendation 5b – if such a Council were established, it should issue guidelines in narrative form.**

VI – DISCOUNTS FOR AN EARLY GUILTY PLEA

In England and Wales, there is a system of discounts for early guilty pleas. An offender who pleads guilty at the earliest possible opportunity to do so in court is entitled to receive a discount of one third against his sentence. There is a reducing scale of discounts for later pleas. If the offender would otherwise have received a short custodial sentence, this may be converted to a

³¹ See below for further discussion of this

³² Coroners and Justice Act 2009, s 125(2)(b)

³³ For an insight into US sentencing issues see the work of the Sentencing Project: <http://www.sentencingproject.org/>

³⁴ For example Finland, Germany, Denmark, Sweden, France



community sentence or a fine. Similarly, a community sentence might be converted to a fine; or a sentence that was always going to be a fine reduced in quantum. The scheme is not statutory but contained in common law, that is in a binding decision of the higher courts.³⁵ It is criticised by many politicians on the right of the political spectrum and by some sentencers, but it undoubtedly makes a large difference to the prison population as well as saving resource on unnecessary court hearings and saving victims from having to relive the trauma of the crime by giving evidence in court.

- **Recommendation 6 – that consideration be given to establishing a scheme for automatic sentence discount for guilty pleas.**

VII – JUDICIAL DISCRETION; AND AMENAGEMENT DES PEINES

Those countries that do not have sentencing guidelines and are nonetheless successful in maximising the use of fines and other non-custodial sentences tend to rely heavily on the discretion of judges. That, crucially, as discussed above, requires judges to be in tune with a liberal approach to sentencing. It will be important, therefore, to engage judges and prosecutors in Kazakhstan to persuade them of the need to use fines rather than custodial sentences wherever possible.

France has a particular way of mitigating sentences: *aménagement des peines*.³⁶ This enables prison sentences of up to two years to be converted into lesser penalties by a special type of judge, who reviews the penalty imposed by the sentencing judge and considers whether it might better be served in the community. Consideration was given to introducing such a system in England and Wales³⁷ but the matter was not pursued as it was considered that the notion of one judge changing the sentence of another on a regular basis was not compatible with the legal system in England and Wales. But it certainly seems to work for France: despite 17.8% of French offenders being sent to prison compared with 7.5% in England and Wales, France has a prison population of 103 per 100,000 as compared with 146 per 100,000 in England and Wales.

- **Recommendation 7 – that consideration be given as to whether a system of *aménagement des peines* would fit with the justice system of the Republic of Kazakhstan.**

VIII – FINE COLLECTION

Fine collection is always a problem. Whilst motoring fines generally have a very high rate of collection, they are generally imposed on people who would not dream of breaking the law other than when they get behind the wheel of their car. Other fines are imposed on general criminals, who, to state the obvious, are criminal because they have a tendency to break to law. It is therefore inevitable that they will sometimes or often be reluctant to pay their fines.

³⁵ *R v Buffrey* 14 Cr App R (S) 511

³⁶Code Pénal, a 132

³⁷ The present author was personally involved when working at the Ministry of Justice



States need to ensure that sufficient fine income is collected to make fines credible to sentencers and to the public as a criminal penalty. Many jurisdictions have employed a mixture of incentives and sanctions in order to encourage payment.

The Research and Information Service of the Northern Ireland Assembly produced a briefing to Members of the Assembly in 2015.³⁸ The Key Points helpfully set out what is available:

“The paper examined the systems of fine collection and enforcement in a number of jurisdictions including England and Wales, Scotland, Republic of Ireland, Australia and New Zealand and the research identified a number of common features in the systems as follows:

- Civilian fine enforcement models - All of the systems are primarily civilian fine enforcement systems. Some of the systems include fines enforcement officers or equivalent with a range of powers and functions in relation to fine recovery (England and Wales, Scotland, Queensland and South Australia);
- Deductions from bank accounts/earnings - A number of the systems allow for deductions from earnings or bank accounts to discharge fine debt (England and Wales, Scotland, Republic of Ireland, New South Wales, Queensland, South Australia, Northern Territory and New Zealand);
- Deductions from Benefits - A number of the system have arrangements in place to allow for deductions from benefits in order to pay fines (England and Wales, Scotland and New South Wales);
- Seizure of property and vehicles - one of the enforcement methods used by a number of jurisdictions is the seizure of property or vehicles (England and Wales, Scotland, Queensland, South Australia, Northern Territory and New Zealand);
- Suspension of drivers licence - some jurisdictions allow for suspension of driver’s licence as an enforcement method (New South Wales, Queensland, South Australia, Northern Territory, New Zealand);
- Payment by Instalments - a number of the systems examined allow for additional time to pay or to allow fined persons to make payment by instalments (England and Wales, Scotland, Republic of Ireland, New South Wales, Queensland, South Australia, Northern Territory, New Zealand);
- Community Service Orders - Most of the systems contain community service orders as alternatives to prison for fine default (England and Wales, Republic of Ireland, New South Wales, Queensland, South Australia, Northern Territory and New Zealand).”³⁹

Consideration should be given to which of those methods might be employed in Kazakhstan, bearing in mind that the objective is to take people out of prison, not to put them in it for fine default rather than for a substantive offence.

- **Recommendation 8 – consideration should be given to which of the measures listed in the pre-preceding paragraph be employed in Kazakhstan.**

³⁸ O’Connell, Fiona and Todd, Dione: *Fine Collection and Enforcement Mechanisms*, NIAR 49-2015, Belfast, Northern Ireland 2015

³⁹ *Ibid*, p 1



Summary of Recommendations

- Recommendation 1 – that consideration be given to extending the list of offences for which a fine should be available as a penalty.
- Recommendation 2a – that the appetite of Ministers, parliamentarians, judges and prosecutors for the principle of removing imprisonment as a penalty for various less serious offences be tested.
- Recommendation 2b – that, subject to the outcome of that, a detailed examination of the statute book be conducted to determine which offences should be so amended.
- Recommendation 3a – that all fines should be specified as day fines.
- Recommendation 3b – that the maximum number of units should be specified for each category of offence, not to exceed 360.
- Recommendation 3c – that the legislation should clearly specify that when imposing the fine the courts have a duty to take into account the offender’s financial means and obligations.
- Recommendation 3d – that consideration should be given as to how to calculate the amount of the day fine in respect of each offender.
- Recommendation 4 – that there should be a provision in law to say that punishment should be the minimum required to meet the requirements of punishment and deterrence. It would be possible to go further and provide that fines should be used unless they are clearly inappropriate.
- Recommendation 5a – that careful consideration be given to whether or not it would be advantageous to establish a Sentencing Council.
- Recommendation 5b – if such a Council were established, it should issue guidelines in narrative form.
- Recommendation 6 – that consideration be given to establishing a scheme for automatic sentence discount for guilty pleas.
- Recommendation 7 – that consideration be given as to whether a system of *aménagement des peines* would fit with the justice system of the Republic of Kazakhstan.
- Recommendation 8 – consideration should be given to which of the measures listed at the pre-preceding paragraph [to where the recommendation appear in the text] should be employed in Kazakhstan.

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London

14 October 2016



Acknowledgements

I am grateful to Professor Chris Lewis, a former colleague in the Home Office and now at the University of Portsmouth, a member of the *Sourcebook* Steering Board, for his assistance in locating the necessary statistics used in this paper and in explaining them to me.

I am also grateful that so many countries' criminal codes are readily available online at www.legislationonline.org.

Biographical note

The author was a UK civil servant for 33 years, including 15 in the Senior Civil Service. He held a variety of senior policy positions at the Home Office and the Ministry of Justice, including as Head of Probation Policy, Head of Sentencing Policy, Head of Criminal and Civil Law Policy; and he led a project into new ways of responding to crime. During his civil service career, he advised 14 Secretaries of State and oversaw the passage of much justice legislation. He is now an independent consultant advising on justice and governance matters at home and abroad.