THE USE OF CRIMINAL FINES – LESSONS FROM THE INTERNATIONAL EXPERIENCE: SUPPLEMENTARY NOTE

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ENHANCING CRIMINAL JUSTICE – KAZAKHSTAN

MODERNISING SENTENCING

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SUPPLEMENTARY NOTE

Keir Hopley

Following a meeting with the General Prosecutor's Office on 20 October, I thought it might be helpful if I were to produce this Supplementary Note to my earlier paper as a means of addressing some of the additional questions raised then.

Determining the levels of fines

Principles of sentencing

In order to understand how best to set the level of fines, it is important to understand the principles of sentencing (whether to a fine or any other penalty). In Western Europe, sentencing for any offence is generally done according to the seriousness of the crime.

Seriousness is generally regarded as a combination of culpability and harm:

- *culpability* is the degree of criminal intent of the offender;
- *harm* is the amount of damage caused.

There can be a large range on both these components; and they can point in different directions. For example, if I choose to ride a bus in London and avoid paying my fare, I have a high degree of culpability: I know that I am required to buy a ticket for the ride; I am more than capable of affording to pay for the ticket; and I have deliberately set out to defraud the bus company of the revenue owing to it. But the level of harm is low: no-one has been hurt; and one missed fare payment will not make much of a dent in the bus company's income.

On the other hand, if, when driving my car, I divert my attention from the road momentarily to change channels on the radio and run into and kill someone, my culpability is low: I had absolutely no intention to injure or kill anyone; my loss of attention to my driving was only

very short; and I was otherwise driving within the speed limit and with all the necessary documents to drive. But the level of harm here is enormous: a person has been killed.

The combination of culpability and harm so as to determine the seriousness of the offence is an art rather than a science: there is no absolutely right answer as to how to do it; and different countries tend to treat various offences with greater or lesser degrees of seriousness depending on their historical traditions and moral values. So, for example, domestic burglary tends to be treated far more seriously in England and Wales than in Germany: the maximum sentence in England and Wales is imprisonment for 14 years[1] whereas in Germany the maximum is imprisonment for one year.[2] Similarly, penalties for the sale of illegal drugs are more severe in France – a maximum of 10 years' imprisonment[3] - than in Turkey – a maximum of five years' imprisonment.[4]

And considerations of seriousness apply on two levels: to the category of offence as a whole; and to each individual commission of each individual offence. The maximum penalty needs to be set at a level that is sufficient to punish the most serious case that can be imagined. The relative levels of maximum penalties reflect that jurisdiction's view of the relative seriousness of one offence category compared with another. So, for example, in England and Wales the maximum penalty for an offence of malicious wounding (the most serious non-fatal category of assault) is life imprisonment[5] whereas the maximum penalty for common assault (the least such category) is imprisonment for six months.[6]

Then, within each individual offence category, particular offences will be punished according to their level of seriousness compared with the possible range of offences that can be committed. So, for example, an assault might be considered more serious if it is upon an elderly woman who is unable to defend herself as compared with an athletically built young man who would be in a much better position to do so.

The need for the maximum penalty to cater for the worst case and the existence of various levels of seriousness within offences together explain why very few offences receive the maximum penalty and why the average penalty tends to be much lower than the maximum. So, for example, of those convicted of simple theft, in Austria 71.9% received an immediate custodial sentence whilst in Sweden only 7.5% did so.[7]

Taking into account the means of the offender

In respect of imprisonment, the effect on every offender is serious: he is deprived of his liberty, the ability to continue his employment, family and social life. That is not the case for fines: a fine of €200 is a very large sum for someone who is unemployed or in very low-paid work; to

[1] Theft Act 1968, s 9(3)(a)
[2] Strafgesetzbuches, § 123(1)
[3] Code Pénal, a 222-37
[4] Ceza Kanunu, s 186(1)
[5] Offences against the Person Act 1861, s 18
[6] Criminal Justice Act 1988, s 39
[7] *European Sourcebook of Crime and Criminal Justice Statistics 2014*, p 206

a wealthy company director it is loose change. That is why many countries in Western Europe take account of differences in means, so as to try to ensure that the punishment is equally painful for the rich and the poor. They take the view that that is both right in principle and, more pragmatically, it enhances the likelihood that the fine will be paid. That is an important consideration when imposing fines: fines bring an income to the State; every other punishment, including measures taken as a consequence of the non-payment of fines, costs the State.

The most overt way of doing this is to use day fines.[8] Germany is a classic example of a country using day fines. It does so using the following formula:

Amount of daily unit x Number of units

Before setting a fine, the court is required to assess the means of the offender. The amount of the daily unit is the amount of income that the offender could acquire in a day, after taking account of his need to pay taxes, rent, food etc. The minimum daily unit is €1 and the maximum daily unit is €30,000. The number of units is set according to the seriousness of the offence and is a minimum of five and a maximum of 360. So, for example an offender sentenced to 30 day fine units with a qualifying income of €30 a day would be fined €900, whereas an offender with a qualifying income of €100 a day would be fined €3,000.

Not all countries use day fines, but nonetheless they tend to take into account income. In England and Wales, for example, whilst there is nothing specifically in statute, the sentencing guidelines applicable to the magistrates' courts give a clear indication that fines should be imposed on the basis of the offender's income. The approach there is to define most fines in terms of one or three bands, A, B and C. Offenders' income is assessed on a weekly (rather than daily) basis taking into account similar factors to those used in Germany and subject to a minimum of £120. A Band A fine means 50% of the qualifying weekly income, Band B is 100% of it and Band C is 150% of it.[9]

Multiple fines

I was asked specifically to look at the use of multiple fines, that is to say where the amount of the fine imposed is determined by multiplying the value of the harm caused (however that is determined) by a given figure such as three. Whilst it is always possible that I may have missed something, I can find no instance of such fines being used in Western Europe. Indeed, such a mechanistic approach goes counter to the principles of seriousness and ability to pay that are described above.

I was referred specifically by the Chairman of the meeting at the General Prosecutor's Office to Japan. I have looked through the Japanese Criminal Code[10] and can find only one reference to multiple fines. This is in the case of passing to another person a bank note which the offender

[8] In some places referred to as "unit fines"
[9] *Magistrates' Courts Sentencing Guidelines*, p 148
[10] 刑法

knows to be fake, where the fine is set at three times the value of the counterfeit note.[11] Unless the bank note were of high value or there were many such notes, that would not amount to a great deal. Indeed, fines in Japan tend to be relatively low: the minimum fine is ¥1,000, which is the equivalent of about €8.5 at today's exchange rate.

Russia does use multiple fines for offences of bribery or criminal subornation, where the fine can be up to one hundred times the value of the advantage gained.[12] But fines in Russia tend to be high anyway: the minimum is normally ₹5,000 (about €75) and the maximum ₹1,000,000 (about €14,725). In any case, although Russia is not included in the *European Sourcebook* and therefore figures on fines are not available on a like-for-like basis, that country's use of fines has not resulted in a low prison population: on the latest information it stands at 447 per 100,000 population,[13] far more than anywhere in Western Europe, or, indeed, in Kazakhstan.

I would therefore recommend strongly against the use of multiple fines. It *may* be that an exceptional case could be made out for their use in respect of organised crime, where those high in the organisation tend to make decisions based on economic risk, rather in the manner of legitimate investors. But they are highly atypical: most offenders are chaotic and have low cognitive skills, which means that theories of severe punishment as a deterrent do not in practice work. That is why, contrary to the instincts of many politicians, increasing the severity of sentencing does not lead to a reduction in crime.[14]

Which agency should be responsible for collecting fines?

I was asked to consider which agency should collect fines. I am not sure I can give a definitive opinion. Practice across jurisdictions varies. In England and Wales and in Scotland, for example, the respective court services are responsible for collection and employ specialised fines enforcement staff for the purpose. In New South Wales (Australia), the responsibility belongs to the State Debt Recovery Office, which is responsible for all debts to the State. In Queensland (Australia), a special division of the Office of State Revenue, the State Penalties Enforcement Registry, is responsible. In New Zealand, the Ministry of Justice has a Collections Unit that does the job. Sweden has a "Special Enforcement Authority" (Kronofogemyndigheten)[15] that seeks to ensure that fines are paid. There is no real evidence to suggest that any one is better than the others at getting the job done.

I came across no instance where the probation service is responsible for enforcing fines. Whilst there is no technical reason why they could not do it, there are several reasons for not giving this responsibility to the probation service. First, probation is usually very busy working with offenders who can benefit from the skills the officers possess. It would seem a shame to divert the attention of these staff towards fine payers. Secondly, the probation service personnel are

[11] *Ibid*, a 148
[12] Уголовный кодекс, a 46
[13] *World Prison Brief*, http://www.prisonstudies.org/country/russian-federation
[14] There is a great deal of academic literature on the subject. See, for example, http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf
[15] https://www.kronofogden.se/InEnglish.html

not skilled in debt collection and may well be not very good at it and reluctant to take it on. Thirdly, if they did become responsible for fine collection, the need to collect the fines may not sit easily with the rest of the work they are doing with offenders.

I have myself no strong views on whether the involvement of the private sector in corrections is a good or a bad thing. I suspect it can be either. What is important, though, is that if the private sector is to be involved, the State needs to ensure that its contract management is first rate so as not to be outmanoeuvred by the contractors. That is a lesson we have learned rather hardly in England and Wales in respect of electronic monitoring contracts (electronically monitored restriction of liberty).

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