AS I STAND BEFORE YOU: THE EMERGENCE AND EXISTENCE OF INDIVIDUAL JUSTICE

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A INTRODUCTION

This article seeks to explain the concept of individual justice which has been identified in theories of penology. It will begin by setting out the historical practices of punishment and then move on to trace the changing attitudes which led to the recognition of individuality by the criminal justice system. Finally the application of the concept will be noted in the context of contemporary Ireland.

B PUNISHMENT IN THE PAST

Prior to the nineteenth century persons guilty of a serious offence were typically subjected to harsh physical punishment, which could include torture, branding or even dismembering of their body. Various structural elements were devised to assist with these punishments, such as the stake, the wheel or the scaffold for hanging. Foucault notes that the tortures used were often symbolic in nature; that is the form of the punishment referred to the crime itself. He notes, for example, that the 'tongues of blasphemers were pierced, the impure were burnt, the right hand of murderers was cut off.'[1] Furthermore, even where the primary punishment was non-corporal, such as banishment or the payment of a fine, a 'degree of torture' might also be included in the penalty.[2] Thus banishment might be preceded by public exhibition or branding, while the payment of a fine could be accompanied by a flogging. These horrific acts were carried out for several reasons. The first was so that the crime of the offender was acknowledged, both by himself and by society. Therefore, the body of the offender was used to proclaim that a crime had been committed, acknowledged and now condemned. The physical punishment (or death) was essentially a moment of truth and confession.[3] Secondly, the punishment was a public display of the power of the sovereign. As the law was the will of the sovereign, by committing the crime the offender had not only offended society, but also the sovereign himself. The public punishment of the offender was not only retribution for the offence, but it also reasserted the power of the sovereign. The act of the punishment was a clear message to all that it was the sovereign who held the ultimate power, and that this power would be used to punish those who offended the sovereign. The fact that painful methods were used to punish the offender may also have served to convey that the sovereign was a far greater force that any individual, it was stronger and more resilient and so could inflict suffering in a way that no other could. Thirdly, the public spectacle of punishing an offender was a means of public deterrence. By carrying out these punishments in public, it was a message to the all that the same fate would befall them if they were to commit a crime. As Foucault puts it, punishment by torture and execution had to be ' … spectacular, it must be seen by all as [the law's] triumph.'[4]

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[1] Foucault *Discipline and Punish: The Birth of the Prison* (Gallimard France 1975) 45.

[2] ibid 33.

[3] *Foucault* (n 1) 43.

[4] *Foucault* (n 1) 34.

C PUNISHMENT AND THE NINETEENTH CENTURY

However, as the 1900's dawned Victorian society adopted a more humane sensibility in respect of criminal retribution. This appeared to be the result of society becoming more 'civilized' and refined.[5] People no longer wanted to be spectators to the gory results of punishment. Foucault has commented that '[p]unishment had gradually ceased to be a spectacle ... It was as if the punishment was thought to equal, if not to exceed, in savagery the crime itself.'[6] Garland observes that the range of capital offences had been greatly reduced by the beginning of the nineteenth century and that corporal punishment was also a rarely used sanction by this time.[7] When punishment was to be carried out, it was now removed to a far more private realm. Thus executions were done behind closed doors, while offenders guilty of crimes not so serious as to warrant execution were generally removed from the view of society by incarceration. This change in attitude was further fuelled by the market economy which had emerged with the birth of industrialisation. The concept of freedom was now core to Victorian society - freedom of choice, freedom to trade, to work, to earn money and most of all freedom to be successful within the market. Garland has observed that this society 'effectively transferred the concepts of economic liberalism into the realm of punishment.'[8] Two things followed from this. Firstly was the concept that Garland refers to as the 'social contract.' This contract was believed to exist between the State and each citizen, and conferred rights and duties upon them. Just like a market trading contract, if its terms were breached, that is if the citizen did not comply with his obligation not to offend the State, repercussions would follow. Second, the concepts of *individual responsibility* and *presumed rationality*, which were greatly valued within the market, were also applied to the criminal offender. Thus when a breach of the social contract did occur, it was held that the individual himself was solely to blame. The idea was that the individual was in total control of his own destiny - he was a rational actor who was responsible for his own behaviour. In comparing the criminal actor with 'his economic counterpart' in the free market society, 'illegality, like poverty, [became] an effect of individual choice.'[9]

This newly adopted market mentality also resulted in a change of the type of punishment which was enforced. There was now a far greater concern for the moral being of the person and so a substitution of the object to be punished came about. As Foucault puts it '[t]he expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations.'[10] He goes on to say that 'punitive justice [would] now bite into [the] bodiless reality'[11] of the soul. Thus instead of

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[5] In this respect one might look to the thesis of Norbert Elias, who observed that social attitudes changed at this time so that things which had once been openly carried out and accepted were now moved into private areas, no longer to be observed by the public. For example, Elias noted that such privatisation emerged in respect of bodily functions and sexual behaviour. Meanwhile standards and expectations developed in respect of table manners and speech. In addition, violent behaviour became lass acceptable and more shameful. See generally Elias and E Jephcott (tr) *The Civilizing Process: The History of Manners* (Blackwell Oxford 1978); *The civilizing process: state formation and civilization* (Blackwell Oxford 1982).

[6] *Foucault* (n 1) 9.

[7] Garland notes that the reduction in the use of corporal punishment was more concerned with adults; children were still subjected to birching and other such physical punishment. See Garland *Punishment and Welfare: A History of Penal Strategies* (Gower Aldershot 1985) 6-7.

[8] ibid 17.

[9] Garland 'The Birth of the Welfare Sanction' (1981) 8(1) British Journal of Law and Society 29 31.

[10] *Foucault* (n 1) 16.

[11] ibid 17.

inflicting punishment on the physical being, retribution was intended to offer the offender the opportunity to look inward, to contemplate the wrongdoing and, ideally, to readjust their moral being. On this point Garland has observed that prison architecture,[12] the use of solitary confinement and the existence of a rigorous silence, 'interrupted only by the softly spoken exhortations of governors, chaplains and philanthropic visitations' offered the offender the ideal setting for this self-assessment and contemplation. This approach would then 'allow [the offender's] essential reason to prevail.'[13] Furthermore, considering how freedom was held in the highest esteem by Victorian society, it seemed fitting that punishment be struck at the essence of the free subject and that the offender be reprimanded by the removal of much of his liberty.[14] Therefore the ideal solution to encompass these new ideas was the prison system and it soon became the central method of punishment at this time. Essentially the prison offered the ideal opportunity for control of the individual - this was achieved by uniform treatment of all prisoners, who were placed in standard cells, offered a controlled amount of food and treated in a consistent way with schedules for meal times, labour and sleep.[15]

D BIRTH OF THE 'WELFARE STATE'

With the dawning of the twentieth century came even greater change. This transition involved the breakdown of the free market form of social organisation and the birth of the welfare complex. Garland has greatly credited the emergence of new human sciences and discourse as being the primary cause for this shift.[16] Disciples such as psychiatry, medicine and science all presented methods of evaluation in respect of the true character of an individual. What resulted then was a move away from the one-dimensional examination of the person; which was in terms of physical characteristics one's age or sex; to a much deeper three-dimensional evaluation. As Foucault explains, a 'whole set of assessing, diagnostic, pronognostic, normative judgments' concerning the offender became 'lodged in the framework of the penal judgment.'[17] This contrasted greatly with the nineteenth century approach of penality which was 'an exclusively legal event [when] the crime, its causes, its trial and punishment were all established and understood entirely within the categories of the law.'[18] Society now began to look at the conditions and surrounding circumstances of the individual's life and sought to address these.[19] This led to the emergence of the welfarist approach and a number of consequences may be noted.

One such consequence was the development of the 'interventionist welfare state,' whereby the State now became involved in the private lives of persons in need by providing housing, pensions and other such assistance. Essentially what came about was the State taking on the role of provision, which during the free market era had been left to the

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[12] That is, singular cells which were basic in nature and contained no distracting features.
[13] *Garland* (n 9) 31. See also generally Garland (n 7) 12-15.
[14] Garland has commented that in its 'deprivation of liberty the prison struck directly at the essence of the free subject and thus repeated that this liberty was after all contingent upon a tenuous social bond. *Garland* (n 7) 31.
[15] See generally *Foucault* (n 1) 16-17.
[16] See also *Garland* (n 9) 38.
[17] *Foucault* (n 1) 19.
[18] *Garland* (n 7) 18.
[19] O'Dea has referred to this as 'an eclectic theoretical approach.' See O'Dea 'The Probation and Welfare Service: Its Role in Criminal Justice' in O'Mahony (ed) *Criminal Justice In Ireland* (Institute of Public Administration Dublin 2002) 638.

individual himself. As society now looked at all persons as individuals, considering their personal needs, weaknesses and inabilities, it sought to offer assistance and support. Garland takes the view that in the new system 'there no longer exists a universe of free and equal subjects … Now there are categories which pose exceptions to the rule, classes which exhibit only limited degrees of freedom and a large population of "special cases."'[20] Therefore greater protection, support and assistance were offered to those who had previously suffered their misfortune alone as 'free subjects.'

A second consequence was greater categorisation of individuals. Where society had once simply tagged the individual who did not conform as 'bad,' the new mentality of assessing the entire structure of the individual led to the identification of other issues which caused the individual's 'undesirable' behaviour. By identifying these issues, the State was enabled to categorise individuals accordingly. Kilcommins has noted that now 'emphasis was placed on discriminating between different categories ... and prescribing bespoke treatment for the various types.'[21] Thus the criminal structure was no longer used as a hold-all for any person who failed to conform; rather specific categories of individuals were moved into alternative structures and facilities.[22] Garland has commented that:

> the penal realm was extended to provide facilities for those whose "irregular mode of life" invite[d] administrative intervention and segregation – for the inebriate, the vagrant, the feeble minded, as well as the habitual criminal. In a matter of a few years the punitive regime was transformed into a complex apparatus which produced normative regulation, supervision and administrative segregation in addition to the punishment of offences.[23]

Particular institutions then emerged and came to be relied upon as a result of this new categorisation, such as inebriate reformatories; which under the Inebriates Act 1898 could be a substitution for imprisonment in cases of drunkenness and alcohol related crime;[24] borstals and reformatory schools to deal with young people, lunatic asylums and mental hospitals, mother and baby homes for unmarried mothers and Magdalen asylums for so-called 'fallen' women.[25]

A third consequence was the succession of moralism by causalism. Davies has provided a useful summary on this matter in stating that 'moral responses to criminal acts were now outdated. The scientific professionals were the new priests, dispensing knowledge, not morality.'[26] Other commentators have also noted this change. Pound has stated that '[w]hat the past left to the home and to the church, we [were] compelled more and more to commit to the law and to the courts.'[27] While Kilcommins has noted that by this time

[20] *Garland* (n 7) 25. See also generally *Garland* (n 9) 35.
[21] Kilcommins O'Donnell O'Sullivan & Vaughan *Crime, Punishment and the Search for Order in Ireland* (Institute of Public Administration Dublin 2004) 9.
[22] Garland has commented that the prison became decentred; it was 'shifted from its position as the central and predominant sanction to become one institution in among many in an extended grid of sanctions.' *Garland* (n 7) 23.
[23] *Garland* (n 9) 40.
[24] *Kilcommins* (n 21) 21.
[25] See generally *Kilcommins* (n 21) 21-22 38-41.
[26] Davies *Punishing Criminals. Developing Community Based Intermediate Sanctions* (Greenwood Press USA 1993) 30.
[27] Pound 'The Administration of Justice in the Modern City' (1912-1913) 26 Harvard Law Review 302, 321.

'criminal behaviour was seen less as a product of sin, and more as a result of natural causes which could be discerned by scientific observation and then corrected.'[28] Essentially the change that came about was that the criminal justice system began to look beyond the offence to observe the offender.[29] The question of 'what did the offender do?' was replaced by the question 'why did the offender commit the act?' Thus offenders were no longer to be seen purely as bad and immoral criminals but rather as persons with fundamental character defects which caused, or at least contributed to, their wrongdoings. Regard was also had under the welfare system for circumstances such as poverty, lack of education, poor health and inadequate housing. Therefore, instead of focusing on the moral aspects of a crime, or offensive behaviour, there was now a concern to look to the circumstances which were thought to have led to or caused the individual to behave in the way he did. This was certainly a more practical approach, as the State sought to address the casual factors with a view to preventing further offences by the individual.

E TWENTY-FIRST CENTURY POSITION

Although the fundamental values of the welfare complex continued to be recognised towards the end of the twentieth century and in the beginning of the twenty-first century, there has been further development and a branching off from the traditional welfarist approach. It may be contended that the contemporary approach is one of reform and restorative justice. As the word 'reform' would suggest, this approach seeks to help an individual to overcome certain factors so that he himself can change as a person, and hopefully no longer offend society by his behaviour. Rather than merely identifying and accepting an individual's so-called flaws, there has been a move towards providing rehabilitative treatment so that the individual will overcome these personal challenges. Of course this approach is not suitable for all individuals. There are certainly many cases whereby the individual experiences particular inherent conditions which cannot simply be remedied away. However, in situations where treatments exist which can eradicate or, at least, ease these challenges, the criminal justice system quite often turns to these for assistance in addressing the individual's needs.[30] As regards the restorative approach; this essentially involves the individual accepting responsibility for his conduct and making amends. Sharpe explains that 'the values ascribed to restorative justice tend to cluster around concepts like inclusion, democracy, responsibility, reparation, safety, healing and reintegration.'[31] Meanwhile Zehr comments that the core underlying value is that of respect.[32] This would essentially be respect for society, the law, for others and for oneself.

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[28] *Kilcommins* (n 21) 8. They note that the, since discredited, sciences of eugenics (the investigation of human breeding) and phrenology (the study of skulls as an indicator of character) formed part of the non-legal discourses which emerged at that time for the examination of individual factors. Kilcommins has elsewhere commented that '[t]he human being was increasingly viewed as a product of natural phenomena as opposed to the sacrosanct will of God.' See Kilcommins 'Reconstructing the Image of the Habitual Drunkard' in Kilcommins and O'Donnell (eds) *Alcohol, Law and Society* (Barry Rose Law Publishers Chichester 2003) 71.

[29] O'Malley has commented that the crime itself was no longer seen as the 'dominant consideration.' O'Malley *Sentencing, Law and Practice* (2nd edn Thompson Roundhall Dublin 2006) 19.

[30] For example counselling or treatment for substance abuse and/or dependency.

[31] Sharpe 'How Large Should the Restorative 'Tent' Be?' in Zehr and Toews (eds) *Critical Issues in Restorative Justice* (Criminal Justice Press 2004) 19.

[32] Zehr 'Evaluation and Restorative Justice Principles' in Elliott and Gordon (eds) *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Cullompton Willan 2005) 302.

It can be seen that the Irish criminal justice system has been seeking to deal with the individual with a view to reformatory and restorative justice. For example, probation orders are used to offer the offender an opportunity to remain out of prison so long as he is of good behaviour. He may also have to comply with other conditions which seek to address his character, for example treatment for addiction or counselling.[33] A Community Service Order may also be ordered by a court in place of a custodial sentence.[34] Here the offender is obliged to carry out a certain number of hours of voluntary work within the community. This essentially requires the individual to give something back to the community as a form of apology for his offending conduct.[35] In respect of youth justice, the Children Act 2001 put the Garda Siochána Juvenile Diversion Scheme on a statutory footing. Under this scheme a child (a person under 18 years of age) may be cautioned in place of being prosecuted by the Children Court. The child will then generally be monitored and mentored by a Juvenile Liaison Officer (JLO), who is a specially appointed member of the Garda Siochána. The scheme may also involve a conference, whereby the child, members of his family, the JLO and any other relevant individual meet to discuss the child's conduct and how to help the child so that he does not re-offend. A restorative forum may also be used under this scheme whereby the child meets with the victim(s) of his conduct to discuss the offense and offer an apology.[36] Meanwhile within the prison system drug rehabilitation programmes have been put in place, psychological treatment is offered to prisoners and various educational schemes are available, thus prisoners can be assisted within the scope of these areas.[37]

1 Popular Opinion in the Twenty–First Century

Although the contemporary systems and approaches that are in place support the recognition of individual justice, some dissatisfaction with the concept may be found within popular opinion. Towards the end of the twentieth century changes in society itself led to a lack of faith in the therapeutic approach and the re-emergence of the 'lock 'em up' attitude, rather than the assessment of individual needs and circumstances. Matters of criminal justice could certainly be said to have fuelled this turnabout. For example, the murders of journalist Veronica Guerin and Detective Garda Jerry McCabe, both in June 1996; the recognition of the existence of 'gangland' crime in Irish society; greater media coverage of criminal activity; and a general increase in the number of serious offences being committed. Events outside the direct scope of the criminal hand of the law made further contribution. The founding of various victim support services and programmes, such as 'community watch' at local level, served to remind people that offences could be committed right within their own communities and homes, something which was perhaps quite unsettling. While various scandals involving members of the clergy, the huge debate surrounding the X case and the general move away from traditional Irish notions of family life and the teachings of the Catholic church sparked fears that the 'Island of saints and scholars' was now one of dangerous and immoral sinners. Something of a moral panic spread through the State due to the heightened concern about crime and a lack of order at this time. Kilcommins has noted

[33] See generally Vaughan *Toward a Model Penal System* (Irish Penal Reform Trust Dublin 2001) 74.
[34] Community Service Orders were introduced in Ireland in 1983.
[35] See *Vaughan* (n 33) 75.
[36] See generally Kilkelly *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing England 2008) 538-539.
[37] See generally *Irish Prison Service Annual Report 2007* 18-24.

that during the general election campaign in 1997, law and order gained primacy of place as a relevant issue to the campaign in opinion polls. 41% of people now held this to be the main issue for concern; in 1992 crime, law and order was the most important issue for just 8% of those polled, while in 1989 this stood at just 6%.[38]

What appeared to emerge then was a discourse of 'us' versus 'them.' The concept of the 'criminal' as an evil and dangerous force was now very much in vogue, in place of the idea that he was an individual who committed an offence due to various causes. Calls for a tougher criminal justice system could be found in the media, public debate and in politics, fuelled by the desire to stand up to the criminals in our society and to put a stop to their activities. A number of developments came about which conveyed that society was serious about fighting back. By the end of 1996 a package of criminal legislation had been enacted. The Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996 sought to strike at the profits which were gained by crime. The Criminal Justice (Drug Trafficking) Act 1996 provided for a maximum period of seven days detention without charge for a person arrested under the Act and permitted inferences to be drawn from silence where a person was questioned under the Act and also empowered members of the Garda Siochána, not below the rank of Superintendent, to issue search warrants under the Act where they believed such to be necessary to properly investigate an offence. In November 1996, a Constitutional referendum to widen the grounds on which bail could be refused was successful. This was followed by the enactment of the Bail Act 1997. These developments afforded greater power for the investigation of crime and greater interference with the liberty of an accused individual. It seemed that society was so caught up with the fight against crime that it condoned broad measures without regard for the case of the individual.

F INDIVIDUAL JUSTICE AND THE CRIMINAL JUSTICE SYSTEM

While public opinion may influence policy and procedure, matters of law enforcement are, however, left to specialised agencies, and sentencing offenders remains a power exercised exclusively by the judiciary.[39] While the concept of the 'criminal,' and not the individual, appeared to be a core consideration for society in general, the functioning of our criminal justice system was not so swayed. Dealing with each individual has remained the focal point for the system.[40] The existence of judicial discretion within the Irish criminal justice system greatly enables the application of individualised justice to the sentencing process. According to O'Malley, the highly discretionary system in Ireland 'has the advantage of allowing the particular circumstances of each case to inform the choice of

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[38] *Kilcommins* (n 21) 137.

[39] Bacik points out that the exclusivity of the judicial role in sentencing is 'implicit' in Article 34 of the Constitution. Bacik 'The Practice of Sentencing in the Irish Courts' in O'Mahony (ed) *Criminal Justice In Ireland* (Institute of Public Administration Dublin 2002) 352. On the same point, it has been noted by O'Dalaigh CJ that '… the selection of punishment is an integral part of the administration of justice.' He went on to note that as our Constitution is so 'broadly based [upon] the doctrine of the separation of powers' it would be 'inconceivable' to think that administration of justice may be carried out by a branch other than the judiciary. *Deaton v Attorney General and Revenue Commission* [1963] IR 170 (SC) 183.

[40] O'Flaherty has commented that the 'principal aspects to be assessed in any individual case will be the seriousness of the offence, the background and record of the accused person' and whether the accused pleaded guilty. O'Flaherty 'Punishment and the Popular Mind: How Much is Enough?' in O'Mahony (ed) *Criminal Justice in Ireland* (Institute of Public Administration Dublin 2002) 376.

sentence.'[41] He also asserts that while the Irish sentencing system may have its critics at home, ' … abroad it has some admirers who approve of the authority still vested in our judges to consider the circumstances of the offender as well as the nature of the offence' when sentencing.[42] This situation has not, however, come about by virtue of chance but rather 'flows naturally' from our statutory framework.[43] Upon examination it is notable that it is common practice for the Irish Legislature to stipulate maximum rather than mandatory sentences.[44] What follows from this, therefore, is that while judges are contained by the set maximum periods, they are generally not obliged to apply a specifically set sanction to any offence which falls under an umbrella definition.[45] The 1996 Law Reform Commission Report on Sentencing expressly stated that 'the most important element of sentencing' was that of judicial determination[46] and opined that a statutory scheme of sentencing should not be introduced.[47]

Therefore, under the Irish criminal justice system, judges have the function of determining the appropriate sanction for each offender who comes before the court. In the High Court case of *The State (Healy) v Donoghue*[48] it was stated by O'Higgins CJ, that in imposing a sentence which is both fair and just in nature, regard should be had for 'the seriousness of the charge brought against the person and the consequences involved for him.'[49] In that same case Mr. Justice Henchy noted that where guilt has been established or admitted to, the accused should receive a sentence 'appropriate to his degree of guilt and his relevant personal circumstances.'[50] In *The People (DPP) v Tiernan*[51] Finlay CJ referred to the 'fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all the particular circumstances of the case.'[52] The Chief Justice further noted that very few criminal cases are particularly similar[53] thus conveying that offenders, even though they may have committed the same crime in title, will tend to have different factors and surrounding circumstances to be considered as part of their case. In *The People (DPP) v M* Denham J noted that:

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[41] O'Malley 'Principled Discretion: Towards the Development of a Sentencing Cannon' (2002) 7(3) Bar Review 135.
[42] ibid 135.
[43] *O'Malley* (n 29) 16.
[44] Particularly serious offences tend to be the exception to this rule. A minimum mandatory sentence is set out for both murder and attempted murder in section 4 of the Criminal Justice Act 1990. Section 5 of the Criminal Justice Act 1999, amending the penalty provision of the Misuse of Drugs Act 1997 in respect of an offence under section 15 of the 1977 Act, sets out that a minimum period of 10 years imprisonment shall apply. Section 35 of the Criminal Justice Act 2007, amending section 15 of the Firearms Act 1925, states that the minimum sentence shall be 10 years imprisonment for a person found guilty under that section.
[45] On this point *O'Malley* (n 29) refers the offence of theft- the unlawful taking of something without the owner's permission. He notes that under a strict definition any theft would simply be treated in a uniform manner. However he goes onto compare examples of the theft of a bar of chocolate to the theft of a valuable painting to illustrate that in reality offences can often be quite different. *O'Malley* (n 29).
[46] The Law Reform Commission *Report on Sentencing* (LRC53-1996) ch 1, para 1.
[47] ibid ch 2, para 11. The report also showed its continued support for the principle of proportionality in sentencing (ch 2), as well as recommending that a 'sentence of imprisonment should be regarded as a sanction of last resort' (ch 1).
[48] [1976] IR 325.
[49] ibid 350.
[50] *Donoghue* (n 48) 353.
[51] [1988] IR 250.
[52] ibid.
[53] *Tiernan* (n 51) 254.

> sentencing is a complex matter in which principles, sometimes being in conflict, must be considered as part of the total situation. Thus, while on the one hand a grave crime should be reflected by a long sentence, attention must also be paid to individual factors, which include remorse and rehabilitation, often expressed *inter alia* in a plea of guilty, which in principle reduce the sentence.[54]

More recent cases serve to illustrate that this judicial attitude has continued. In *The People (DPP) v McCormack*[55] Mr. Justice Barron quite strongly supported the concept of individual justice. He stated that '[e]ach case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also on the personal circumstances of the accused.'[56] While in *The People (DPP) v Kelly*[57] the Court of Criminal Appeal noted that under the Irish sentencing regime sentences must be proportionate not only to the crime but to the individual offender. Therefore, while support for the individualised approach may be somewhat lacking amongst the public it has certainly not been abandoned by those who are entrusted with the task of deciding on how to punish offenders within our society.

G CONCLUSION

Penality has certainly evolved over time. In the eighteenth century penality was concerned with physical punishment, which generally amounted to torture. During the Victorian era punishment by torture was abandoned in favour of punishment which took the offender out of common society and placed him within the confines of the prison. This system sought to encourage him to focus on his moral being so that he would repent and reform his character. With the twentieth century came the emergence of the 'Welfare State,' where it was recognised that persons should be treated according to their own individual circumstances. A whole grid of institutions and agencies developed which aimed to address the needs of various individuals. By the twenty-first century the welfarist approach was supplemented by the rehabilitative approach, as the desire to 'fix' people appeared to gain strength. However, some divergence has emerged. A heightened awareness of crime and disorder led to a notable public desire to treat criminals as criminals, to discover their activities, to limit their rights and to take away their power. Thus it seemed that support for the concept of the individual in need of rehabilitation was lost, at least to a certain degree, within the public domain as favour was shown for harsher punishments of those who offended society. Yet, it is the criminal justice system itself which determines how offenders should be dealt with. The judiciary continue to confirm that the assessment of each individual case is a fundamental aspect of our criminal justice system. Therefore, while popular opinion may not have faith in the concept of individualised justice, it nonetheless seems to be well established within our contemporary penal approach. What remains to be seen is whether society as whole will come full circle in its attitude towards the offender so that it may once again accept that individual justice is essential for a truly just and effective penal system.

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[54] [1994] 3 IR 306.
[55] [2000] 4 IR 356.
[56] ibid 359. Justice Barron went on to say that the sentence to be imposed 'is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.'
[57] [2005] 1 ILRM 19.