

‘DANGEROUS’ AND ‘DEVIOUS’: EXPLORING JUDICIAL RATIONALES WHEN IMPOSING DISCRETIONARY SENTENCES OF LIFE IMPRISONMENT

Abstract: Existing research on life imprisonment focuses on interrogating the sentence from a human rights perspective, exploring lived experiences, and examining release processes. There are few studies that analyse the judicial practice of imposing life imprisonment. This article examines judicial rationales in imposing and upholding discretionary sentences of life imprisonment in Ireland, from 1987 to 2022. The findings indicate that it is selectively imposed (primarily for sexual or homicide offences). Sentence selection is frequently influenced by the multiplicity of offending, the exceptional nature of the crime(s) and the vulnerability of the victim(s). Factors such as the risk of reoffending and previous criminal history also appeared to influence sentence outcomes. The indeterminate nature of the sentence was viewed as beneficial in addressing concerns relating to public protection.

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Introduction

Life imprisonment has begun to attract considerable academic interest with empirical research focusing on exceptional versions of the sentence (such as life without parole),¹ lived experiences of the sentence² and assessments of release processes.³ Yet there is a real lack of empirical studies that focus on the judicial practice in imposing life imprisonment.⁴ Official data may record the offences for which a life sentence has been imposed, but this can often be of limited illustrative or interpretive value when exploring the threshold of severity required to warrant the imposition of life imprisonment. For example, in Ireland the penalty for a number of sexual offences can range from a community service order to life imprisonment depending on the severity of the offending. Identifying that 3.5 per cent of the life sentence prisoner population have been sentenced to life imprisonment for a sexual offence tells us little about the type of offending that merited an exceptional departure from a largely determinate sentencing system.⁵ This article provides an in-depth exploration of identified cases where a discretionary life sentence was imposed in Ireland, from the first time a judge imposed the maximum penalty in 1987 to 2022 (n = 32). The analysis sheds light on judicial perceptions of the type of offending and offender that justifies the imposition of an indeterminate life sentence. This exploration of judicial decision-making contributes to the growing literature emphasising the importance of examining the impact of multi-level actors on criminal justice policy and practice.⁶ It also underlines the value in

¹Ashley Nellis, ‘Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States’ (2010) 23 *Federal Sentencing Reporter* 1; Marion Vannier, ‘The power of the pen: Prisoners’ letters to explore extreme imprisonment’ (2020) 20 *Criminology & Criminal Justice* 3.

²Ben Crewe, Susie Hulley and Serena Wright, ‘The Gendered Pains of Life Imprisonment’ (2017) 57 *The British Journal of Criminology* 6; Ben Jarman, ‘Only One Way To Swim? The Offence and the Life Course in Accounts of Adaptation to Life Imprisonment’ (2020) 60 *The British Journal of Criminology* 6.

³Robin Fitzgerald and others 1, ‘Building Public Confidence in Parole Boards: Findings From a Four-Country Study’ (2022) 62 *The British Journal of Criminology* 6; Diarmuid Griffin, *Killing time: Life Imprisonment and Parole in Ireland* (Springer International Publishing 2018).

⁴Brian Johnson, Cassia Spohn and Anat Kimchi, ‘Life lessons: Examining sources of racial and ethnic disparity in federal life without parole sentences’ (2021), 59(4) *Criminology* 704.

⁵Griffin (n 3).

⁶Ashely Rubin and Michelle Phelps, ‘Fracturing the penal state: State actors and the role of conflict in penal change’ (2017) 21 *Theoretical Criminology* 4.

employing methodologies that produce complex and nuanced analyses that are reflective of a wide range of potential variables.⁷

The ‘most serious crimes’

The United Nations, in its report on life imprisonment, states that the sentence should only be imposed for the ‘most serious crimes’.⁸ It did not, however, specify what those crimes should be. Murder is an offence that most obviously falls into the ‘most serious’ crime category and almost all countries that have life imprisonment as an ultimate penalty make it available for this offence.⁹ In terms of imposing a life sentence, there are a variety of approaches, but many countries place limitations on the discretion of sentencing judges in cases of murder. Some countries remove judicial discretion completely, requiring a mandatory life sentence for murder, while other jurisdictions limit judicial discretion, rendering a sentence of life imprisonment likely, although not mandatory (for example, mitigating factors may result in a reduction to a determinate sentence instead). Although global data on the offences of those serving life sentences in prison is patchy, prisoners are predominantly serving their sentence for offences of homicide, and more specifically murder.¹⁰

Many countries make legal provision to impose life imprisonment across a wide range of offences outside of murder. These offences largely fall within the category of crimes against the person (e.g. manslaughter, rape, kidnapping) but also include crime against public order (e.g. treason, genocide, war crimes, crimes against humanity, public violence); crimes against property (e.g. theft, arson, extortion, burglary); and crimes against the community (e.g. the trading, manufacturing and possession of drugs).¹¹ There are also countries where life imprisonment is available as a sanction for habitual offenders or those that present a risk of reoffending. Such an expansive list muddies the water on the idea that life imprisonment should be reserved for the ‘most serious crimes’, and indicates that perceptions of what is ‘most serious’ can vary significantly from country-to-country. There is certainly cause for scrutiny. van Zyl Smit and Appleton estimate that in 2000, there were 261,000 life sentence prisoners across the world and this increased to 479,000 by 2014.¹² Despite the global increase in the use of the penalty, there are significant variations when adopting a comparative analysis. Countries such as the United States, United Kingdom, India, Turkey, and South Africa disproportionately contribute to the global figure while a number of European countries maintain comparatively low levels of life sentence prisoners.¹³ Countries in Europe make provision for life imprisonment for offences outside of murder, yet it is rarely imposed in practice.¹⁴ In 2014, there were only two life sentence prisoners serving a sentence for a sexual offence in Germany and in Finland there was just one person serving a life sentence for genocide.¹⁵ In the UK, France and Ireland, the imposition of life imprisonment for a broader range of offences occurs on a more frequent basis.¹⁶

⁷ Michael Tonry, ‘Determinants of Penal Policies’ (2007) 36 *Crime and Justice* 1; Deirdre Healy and Diarmuid Griffin, ‘Unnesting the Matryoshka Doll: An Ecological Model of Probation and Parole Decision-Making in Ireland’ (2023) 39 *Journal of Contemporary Criminal Justice* 1.

⁸ United Nations Centre for Social Development and Humanitarian Affairs, Crime Prevention and Criminal Justice Branch, *Life Imprisonment* (Vienna, 1994).

⁹ Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press 2019) 87.

¹⁰ *ibid* 140-141.

¹¹ *ibid* 127.

¹² *ibid* 97.

¹³ *ibid* 98-99.

¹⁴ *ibid* 141.

¹⁵ *ibid* 142, 381.

¹⁶ *ibid*. 142.

Discretionary life imprisonment

In Ireland, life imprisonment is mandatory for the offence of murder, meaning that a sentencing judge has no discretion when a person is convicted of murder – they must be sentenced to life imprisonment. The mandatory nature of the sentence has contributed significantly to Ireland's life sentence prisoner population. Ireland is ranked third amongst Council of Europe countries in terms of life sentence prisoners as a percentage of the sentenced prison population (12.1 per cent of sentenced prisoners).¹⁷ Ninety-five per cent of the life sentence prisoner population is made up of those serving life imprisonment for murder.¹⁸

Outside of the mandatory life sentence for murder, 25 offences were identified where life imprisonment may be imposed as a maximum penalty (see Table 1.). These offences primarily relate to crimes against the person but also include crimes against property, crimes against the community and crimes against public order.¹⁹ Ireland is not unique in this respect as many countries make legal provision for the imposition of life imprisonment for certain offences.²⁰ But in practice, maximum sentences of life imprisonment have only been imposed across ten of these offences in Ireland (see Table 2.).

Discretion and constraint in sentencing

In their global study on life imprisonment, van Zyl Smit and Appleton ask an important question: 'To what extent do the offenses carrying possible life imprisonment provide a constraint that ensures a life sentence is imposed only for the most serious offences?'²¹ A uniform answer to this is impossible as the matter is contingent on the legal framework of the individual country and the level of discretion afforded to judicial decision-makers. A country with limited offences where life imprisonment may be imposed is exercising greater restraint than a country with a permissive list. But where the list is expansive, as is the case in Ireland, an examination of legal rules and judicial practice is required to determine the extent of the constraints on decision-makers.

¹⁷ Council of Europe, *Annual Penal Statistics: SPACE I Report* (Strasbourg, Council of Europe 2022) 52.

¹⁸ Diarmuid Griffin, 'Life imprisonment and the Parole Act 2019: Assessing the Potential Impact on Parole Decision-Making' (2020) 4(1) *Irish Judicial Studies Journal* 25; *Killing time* (n 3) 48.

¹⁹ These offences are categorised to reflect the categories used in the global study of life imprisonment and domestic interpretations may differ. van Zyl Smit and Appleton (n 9) 127.

²⁰ van Zyl Smit and Appleton (n 9) 127.

²¹ *ibid* 130.

Crimes against the Person	Crimes against Property	Crimes against the Community	Crimes against Public Order
Murder	Robbery	Possession of controlled drugs for unlawful sale or supply	Treason
Manslaughter	Aggravated burglary	Importation of controlled drugs for unlawful sale or supply	Trafficking of children
Attempted murder	Arson		Trafficking of mentally impaired persons
Rape			Trafficking of children for sexual exploitation
Rape under s. 4 of the Criminal Law (Rape) (Amendment) Act 1990			Possession of firearms with intent to endanger life
Aggravated sexual assault			Use of firearms to assist or aid escape
Defilement of a child under 15 years			Genocide
Sexual act with a protected person			Crimes against humanity
Assault causing serious harm			War crime
False imprisonment			
Syringe attack			
Intentionally placing a contaminated syringe causing injury			

Table 1: Offences for which life imprisonment can be imposed in Ireland

Comparatively speaking, the practice of Irish sentencing appears highly discretionary and unstructured with judicially-developed principles ‘cast in general terms’.²² Many countries have adopted reforms designed to fetter discretion and reduce sentencing inconsistencies over the last number of decades.²³ This has manifested itself in different ways but sentencing guidelines created through a statutory body has proven to be a popular approach.²⁴ By contrast, in Ireland the appellate courts seemed set against judicially-developed guidance on specific offences.²⁵ There has been a departure from this position since 2014 with the appellate courts providing guidance for a number of specific offences. A statutory body established to formulate guidelines to enhance consistency in sentencing was established in Ireland in 2019.²⁶ It has not issued guidelines to date.

Despite a framework facilitating broad discretion, there are constraints that place limitations on the use of life imprisonment. The courts have stated that the imposition of the sentence should be rare and an instance of it being upheld on appeal would be ‘extremely rare’.²⁷ Sentencing judges are strongly encouraged to opt for a determinate sentence, even in cases where the offending warrants a life sentence. The rationale for this is that it is unsatisfactory for a court, in exercising its sentencing powers, to not know the period of imprisonment that

²² Thomas O’Malley, *Sentencing Law and Practice* (2nd edn, Thomson Round Hall 2006) 53.

²³ Arie Freiberg and Julian V Roberts, ‘Sentencing Commissions and Guidelines: A Case Study in Policy Transfer’ (2023) 34(1) *Criminal Law Forum*, 87; Niamh Maguire, ‘Consistency in sentencing’ (2010) 10 *Judicial Studies Institute Journal* 2, 15.

²⁴ *ibid.*

²⁵ *DPP v Edward Tiernan* [1988] WJSC-SC 1067, [1989] ILRM 149.

²⁶ The Sentencing Guidelines and Information Committee was established via the Judicial Council Act 2019.

²⁷ *DPP v O’Neill* [2015] IECA 327.

the person will serve.²⁸ The offence does not have to be the worst possible variation as it is always possible to ‘envisage a worse case’ where the abuse persisted for longer, against more victims or is of a more depraved nature, but ultimately, the offending must ‘not only be of a very serious type . . . but be so in an exceptional way’.²⁹ In terms of what this means, the courts have outlined that cases that involve ‘prolonged and depraved sexual and physical violence against persons who were entitled to place their trust in the perpetrator’ might justify a maximum term of life imprisonment.³⁰

The life sentence is indeterminate in nature. A life sentence prisoner is required to serve 12 years in prison prior to becoming eligible for review by the Parole Board.³¹ The Parole Board may make a parole order for release where an applicant does not present ‘an undue risk to the safety and security of members of the public’, has been rehabilitated, is capable of reintegrating into society on release and it is appropriate in all circumstances to do so.³² Data on the release of life sentence prisoners indicates that a ‘lifer’ can currently expect to serve approximately 19 years prior to release.³³ Legally, the sentence has been interpreted as ‘wholly punitive’ and judges do not have the discretion to impose a tariff or minimum term when sentencing.³⁴ This means that it is the Parole Board that determines the length of time served in real terms beyond the 12 year threshold.

Judges must apply the judicially-developed principle of proportionality, namely that the sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender.³⁵ While this is a long established principle, its meaning has been developed and elaborated upon over time through the decisions of the appellate courts.³⁶ This has helped to shape how judges present their sentencing remarks and outcomes. Over the course of the time period covered in this study, it is evident that the sentencing remarks of judges have become more detailed and this is, in part, as a result of the appellate courts providing a structure to the principle and a process to follow when sentencing.

In order to ensure that the sentence is consistent with the principle of proportionality, it is considered best practice that the sentencing judge complete a two-step process.³⁷ First, the judge must examine where the offending falls within ‘the range of penalties applicable to the offence’.³⁸ Known as the headline or presumptive sentence, this will include an assessment of the harm caused, the culpability of the offender, as well as incorporating any aggravating factors in the case. If there is judicially developed guidance specific to the offence, the sentencing judge should assess whether the offending falls in the ‘uppermost band’ of the offence and then consider whether it is at the top end of this band prior to imposing life imprisonment.³⁹ Having selected the penalty to be imposed based on the seriousness of the

²⁸ *DPP v McC and CD* [2007] IESC 47, [2008] 1 ILRM 321.

²⁹ *DPP v Z* [2014] IECCA 13, [2014] 2 ILRM 132.

³⁰ *ibid.*

³¹ Parole Act 2019, s 24(1)(a). Prior to 2019, there was a policy that the interim Parole Board would not review a life sentence prisoner until a minimum of seven years had been served in custody; Diarmuid Griffin, ‘The release and recall of life sentence prisoners: Policy, practice and politics’ (2015) 53 *Irish Jurist* 1.

³² *ibid* s.27.

³³ Griffin (n 18) 26.

³⁴ *Lynch and Whelan v Minister for Justice* [2010] IESC 34, [2012] 1 IR 1.

³⁵ *Attorney General v O’Driscoll* [1965] WJSC-CCA 461, [1972] 1 Frewen 351.

³⁶ *ibid.*

³⁷ Sentencing can also be imposed through instinctive synthesis, where the judge does not state the penalty arising from the gravity of the offence or the level of discount attached to the mitigating factors. *DPP v K.C.* [2019] IECA 126; *DPP v. J McD* [2021] IECA 31.

³⁸ *DPP v M* [1994] WJSC-SC 2641, [1994] 3 IR 306.

³⁹ *DPP v FE* [2019] IESC 85, [2020] 1 ILRM 517.

offence, the second step requires the court to assess the personal circumstances of the offender and any mitigating factors arising. Mitigating factors can include: offence-related mitigation (e.g. partial excuse for the behaviour); response to charges (e.g. guilty plea, remorse, cooperation with investigation); and personal mitigation (e.g. absence of previous convictions, disability, age). An appropriate reduction should then be applied to the headline sentence to arrive at the sentence outcome.⁴⁰

Sentencing principles are not static and have evolved significantly during the period under examination (1987-2022). For example, there was a lack of clarity as to whether previous criminal history could be incorporated as an aggravating factor in sentencing up until 2008.⁴¹ The position was clarified by the Court of Criminal Appeal where a sentence of life imprisonment for aggravated sexual assault was challenged. The court held that ‘previous convictions are relevant . . . in aggravation of the offence’ and ‘form part of the matrix of circumstances to which the court should have regard in determining an appropriate sentence’.⁴² Relatedly, a longstanding principle that preventative detention does not form part of the legal system in Ireland means that the risk of reoffending cannot be a primary rationale in sentencing.⁴³ This has created a predicament as the courts may, on occasion, be faced with a person that poses ‘a real and serious threat to the public’.⁴⁴ Nonetheless, a series of decisions have indicated that considerations of dangerousness may form a component of the overall sentence, so long as this does not go above and beyond what is appropriate in sentencing.⁴⁵ This is a fine line that must be drawn by sentencing judges and evaluating when this line has been crossed is challenging. The development of judicial guidance for specific offences has also assisted the structuring of sentencing.⁴⁶ Taken in their totality, the principles that shape sentencing practice, while more permissive of judicial discretion than many other sentencing systems, render life imprisonment a remote prospect even in the most serious of cases.

Methodology

There are ‘profound’ limitations in accessing high quality sentencing information in Ireland although a number of judicial-led initiatives have made some progress in this area.⁴⁷ Scholarship has tended to employ legal methodologies that focus on the doctrine of precedent, namely that cases are bound to follow principles established in previous cases of the appellate courts.⁴⁸ This presents a linear development of caselaw. Ordinarily, only a portion of cases will actually result in an appeal, thus providing a partial perspective when examining sentencing practice. Furthermore, principle and practice make strange bedfellows and the articulation of the rules by the higher courts may differ from their application by sentencing judges. Tata argues that empirical analyses by sentencing scholars often reflect a top-down approach that focus on the impact of policy change with less attention paid to what is happening at trial level.⁴⁹

⁴⁰ *M* (n 38).

⁴¹ O’Malley (n 22) 143.

⁴² *DPP v K* [2008] IECCA 110.

⁴³ *People (Attorney General) v O’Callaghan* [1966] IR 501; *DPP v Carmody* [1988] IILRM 370.

⁴⁴ *DPP v McMabon* [2011] IECCA 94.

⁴⁵ *DPP v Daniels* [2014] IESC 64, [2015] 1 IILRM 99.

⁴⁶ *DPP v Kieran Ryan* [2014] IECCA 11; *DPP v Fitzgibbon* [2014] IECCA 25, [2014] 2 IILRM 116; *DPP v Z* (n 29).

⁴⁷ Jay Gormley and others, *Assessing Methodological Approaches to Sentencing Data & Analysis* (2022) Sentencing Guidelines and Information Committee <<https://judicialcouncil.ie/assets/uploads/Strathclyde%20Final%20Report.pdf>> accessed 28 March 2024.

⁴⁸ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 1.

⁴⁹ Cyrus Tata, ‘Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process’ (2007) 16 *Social and Legal Studies* 3.

In terms of criminological research on sentencing, the literature in Ireland is limited.⁵⁰ Methodological frameworks are more developed in other jurisdictions. In the criminological sphere, disparities in sentencing outcomes are often analysed by employing the ‘focal concerns’ framework, namely that judges are primarily concerned with culpability and blameworthiness, community safety and the practical consequences of the sentencing outcome.⁵¹ This body of work tends to focus on decision-making and outcomes at trial level. Studies often rely on rich data generated by sentencing commissions as a result of sentencing guidelines where judges may be required to provide detailed rationales for decision-making.⁵² This data is simply not available in Ireland.

The methodology employed here allows for a bottom-up approach. This is achieved through analysing cases from the sentencing hearing through to the outcome of the appellate process. Adopting this method is possible due to the rarity of imposing a discretionary life sentence. A total of 32 cases were identified over more than three decades (1987-2022).⁵³ Almost all discretionary life imprisonment cases were appealed (28 of 32) with 26 applicants seeking a reduction in the severity of their sentence.⁵⁴ Cases were sourced through appellate judgments (accessed through subscriber-based and freely available legal databases: Westlaw, Lexis, Justis) and newspaper reporting (accessed through newspaper archives *via* ProQuest). It is possible that there are additional discretionary life sentence cases that could not be sourced and included in this study. There is no published record of sentencing remarks however; as the majority of appeals related to sentence severity, considerable portions of the original text from the sentencing hearing were referred to or cited in the judgments of the appellate courts. The analysis of this material was supplemented with information from newspaper reports. All cases were reported in the national press, often with substantial coverage. Healy and O’Donnell note the value of using newspaper reporting to explore sentencing patterns where official data is limited or lacking.⁵⁵ Concerns relating to representativeness of cases reported in the media is not as much an issue in this study as cases were verified *via* official sources where possible.⁵⁶ The potential for bias and partiality within those reports was addressed through adopting a rule of relying on sentencing remarks cited in appellate judgments over newspaper articles where a conflict of information arose. The ‘quest to uncover the ‘real’ reason behind decision making’ in sentencing is challenging, as the articulation of reasons will rarely reflect reality.⁵⁷ Nonetheless, there is value in exploring decision-making in terms of an assessment of judicial perceptions of offence seriousness, sentence severity and the selection of indeterminacy. This small-scale study provides an opportunity for insight into the imposition of the ultimate penalty where judges retain considerable discretion.

⁵⁰ For examples see: Avril Margaret Brandon and Michael O’Connell, ‘Same Crime: Different Punishment? Investigating Sentencing Disparities Between Irish and Non-Irish Nationals in the Irish Criminal Justice System’ (2018) 58 *The Journal of British Criminology* 5; Niamh Maguire and Nicola Carr, ‘Pre-sentence Reports and Individualised Justice: Consistency, Temporality and Contingency’ (2017) 14 *Irish Probation Journal* 1.

⁵¹ Darrell Steffensmeier, Jeffrey Ulmer and John Kramer, ‘The Interaction of Race, Gender and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black and Male’ (1998) 36 *Criminology* 4.

⁵² Rodney Engen and Randy Gainey, ‘Modelling the effects of legally relevant and extralegal factors under sentencing guidelines: The rules have changed’ (2000) 38 *Criminology* 4; Jose Pina-Sanchez and Robin Linacre, ‘Sentencing Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey’ (2013) 53 *British Journal of Criminology* 6.

⁵³ The analysis does not include discretionary life sentences that have been imposed concurrent to a mandatory life sentence for murder as the murder offence is the principal offence in those cases.

⁵⁴ There were four cases where there was no appeal identified.

⁵⁵ Deirdre Healy and Ian O’Donnell, ‘Crime, Consequences and court reports’ (2010) 20 *Criminal Law Journal* 1.

⁵⁶ Yvonne Jewkes, ‘Media representations of the causes of crime’ (2004) 55 *Criminal Justice Matters* 1.

⁵⁷ Tata (n 49) 440.

The multiplicity and totality of offending

A total of 91 sentences of life imprisonment were imposed on 32 offenders. The vast majority of these sentences related to crimes against the person (see Table 2). In over half of cases (17) the sentencing judge imposed multiple concurrent sentences of life imprisonment (ranging from 2 to 12). Determinate sentences were also imposed alongside these multiple life sentences (12) as well as in cases involving a single life sentence (5). Two-thirds of cases involved either multiple victims, multiple incidents or both. In six of the 32 cases the convictions reflected only a sample of the total charges. In one case where the offender was sentenced to twelve concurrent life sentences there were originally over 400 charges. He was convicted of a sample of these charges following a guilty plea. The case involved multiple victims (3) of child sexual abuse and victimisation that extended over a period of six years.⁵⁸

In official data on sentencing, there is a tendency to only record the principal offence for the sentence imposed.⁵⁹ Sexual and homicide offences were clearly the principal offences in cases resulting in life imprisonment. This approach can have the effect of masking the breadth and range of offending in an individual case, as is evident in the data here. For example, an offender was sentenced to eight concurrent life sentences for sexual offences (6), false imprisonment (1) and aggravated burglary (1).⁶⁰ But the official data will only record a single entry of life imprisonment for a sexual offence for this case.

Offences	Life imprisonment imposed at sentencing hearing	Life imprisonment outcome post appeal ⁶¹
Manslaughter	5	2
Attempted murder	3	2
Rape ⁶²	9	6
Rape under s. 4	7	5
Aggravated sexual assault	4	2
Child sexual abuse ⁶³	57	31
Assault causing serious harm	2	0
False imprisonment	2	1
Possession of a firearm with intent to endanger life	1	0
Aggravated burglary	1	1
Total	91	50

Table 2: Sentencing outcomes by offence at sentencing and post appeal (1987 - 2022)

Where multiple sentences were imposed, they were ordered to run concurrently (or all together) rather than consecutively (or one after the other). As a result of this practice, the

⁵⁸ *DPP v G* 1993 WJSC-SC 3440, [1994] 1 IR 587.

⁵⁹ Gormley (n 47).

⁶⁰ *DPP v Michael O'Brien* [2018] IECA 333.

⁶¹ Includes life sentences where there was no appeal identified.

⁶² In two cases the number of life sentences was not specified other than that it was multiple. In these cases, '2' was entered as the number of life sentences imposed.

⁶³ 'Child sexual abuse' includes all sexual offences where children are the victims including 'defilement of a child under 15 years', 'rape', 'rape under section 4' and 'aggravated sexual assault'. Figures in the categories of 'rape', rape under section 4, and 'aggravated sexual assault' refer to offences involving adult victims only.

court, in calculating a sentence that is proportionate, may reflect the totality of offending across the offences in the principal sentence.⁶⁴ This was a contributing factor in elevating a sentence into one of life imprisonment where there were multiple offences and/or multiple victims. There are no ‘hard and fast’ rules in terms of judges imposing concurrent or consecutive sentences,⁶⁵ but it is considered judicial policy that consecutive sentences should be imposed sparingly as there is a risk that they may result in a disproportionately long sentence.⁶⁶ Were the judge to impose consecutive determinate sentences, given the volume of offending in many of these cases, the effect would be an outcome that would far exceed the average time served by a life sentence prisoner prior to release. In this respect, imposing the ultimate penalty was a means of reflecting the breadth and volume of offending committed against multiple victims in these cases.

Offence seriousness and the nature of victimisation

The cases, due to their seriousness, were all heard in the Central Criminal Court which has a small number of judges that have extensive experience in dealing with serious crime. Since 1987, a total of eleven different judges imposed discretionary sentences of life imprisonment. One judge was responsible for sentencing in over half of all cases (19 of 32). It was reported that this judge was the only permanent judge assigned to the Central Criminal Court for a significant period, and that he heard seven out of ten rape cases at the time.⁶⁷ Judges frequently used their own professional experiences as a barometer in assessing exceptionalism. One judge described the offending as ‘the most grievous sexual assault I have ever come across in my career’.⁶⁸ Others made similar references in assessing seriousness and expressing abhorrence: ‘In my 40 years of practice . . . I have never heard of a more brutal crime’.⁶⁹ This, alongside the use of evocative and emotive language (such as ‘unscrupulous’, ‘revolting’, ‘savage’), was a common thread in sentencing remarks across the decades under review.

The harm caused to the victim was a key component in assessing the gravity of the offence. As O’Malley notes, ‘consequences that were reasonably foreseeable and that actually occurred may be taken into account when assessing harm’.⁷⁰ Harm caused may include consideration of the physical, emotional, mental or economic effects in the immediate aftermath of the offending, up to and including the medium- and long-term consequences of the victimisation. Judges emphasised the severity of the consequences arising from the offending, resulting in the victims being ‘severely traumatised’.⁷¹ Evidence from expert witnesses, including psychologists and psychiatrists, as well as victim impact statements were instructive in assessing the harm caused.

To capture an accurate picture of offending that warrants the imposition of a life sentence it is useful to focus exclusively on cases where explicit reference to the exceptional nature of the offending could be identified. Of the 32 cases, there were 21 where it was possible to

⁶⁴ *DPP v G. McC* [2003] 3 IR 609; *DPP v Casey & Casey* [2018] IECA 121 [2018] 2 IR 337.

⁶⁵ *DPP v S.C.* [2019] IECA 348.

⁶⁶ *DPP v K.C.* [2019] IECA 126.

⁶⁷ ‘Controversial judge who is not afraid to speak out’ *Irish Independent* (11 October 2007) <<https://www.independent.ie/irish-news/controversial-judge-who-is-not-afraid-to-speak-out/26324172.html>> accessed 28 March 2024.

⁶⁸ Sonya McLean and Grainne Cunningham, ‘Rapist gets five life sentences for “insane, horrible” attack on woman’ *Irish Independent* (30 January 2010) <<https://m.independent.ie/irish-news/courts/rapist-gets-five-life-sentences-for-insane-horrible-attack-on-woman/26627458.html>> accessed 28 March 2024.

⁶⁹ *DPP v Conroy* (No.2) [1989] ILRM 139.

⁷⁰ O’Malley (n 22) 92.

⁷¹ *DPP v Griffin* [2011] IECCA 62.

confirm that both the sentencing judge and the appellate court agreed that the offending was exceptional and warranted a sentence of life imprisonment. These cases will now be examined.

Sexual offences

In three quarters of cases (16 of 21), life imprisonment was imposed for sexual offences. Many of these cases (10) involved the victimisation of children, the majority of whom were under 15 years of age, with the youngest victimised between the ages of three and six. All perpetrators of sexual offences with child victims were male while victims were primarily female, though there were three cases involving male victims and one case where there was a male and female victim. These cases were characterised by the length of victimisation which ranged from less than a year up to 20 years. As well as sustained and serious abuse, the cases also involved multiple victims. In fact, while there were only ten offenders, there were a total of 32 victims. In remarks relating to the assessment of the headline sentence the vernacular employed by judges, in sentencing and on appeal, is indicative of the seriousness of the offences and the levels of degradation involved. Judges described the offending as ‘truly shocking’,⁷² ‘so disgusting’⁷³ and ‘very depraved’.⁷⁴ The Supreme Court, in upholding life sentences in two cases, referred to ‘the horrific nature of the rapes and the prolonged period during which the ‘campaign’ of offences took place, involving . . . multiple victims of tender years’.⁷⁵ The majority of offending occurred in the home of the victim and was perpetrated by a person abusing a position of trust or misusing a dominant position. A father (4), uncle (3), neighbour, friend or acquaintance (2) perpetrated these crimes, with only a single incident committed by a stranger. In this latter case, two children were lured to the perpetrator’s flat and were subjected to a twenty-minute sexual attack that included oral, vaginal and anal penetration.⁷⁶ On appeal, the court noted that while it did not involve sustained abuse by a person in a position of trust, the offending was exceptional nonetheless and a sentence of life imprisonment was justified.

A different set of profiles and circumstances are evident when examining sexual offences perpetrated against adult victims (6). These offences related primarily to a single incident and single victim. In a case where it was more than a single incident, the offending occurred over a number of days rather than the prolonged and sustained nature of the abuse evident in cases involving children.⁷⁷ A single incident does not necessarily translate into a single offence and sentencing judges imposed multiple concurrent life sentences in four cases. A single incident might also involve a prolonged period of offending with one case involving a ‘horrifying’ two and a half-hour ordeal of sexual violence.⁷⁸ The language employed in expressing the exceptionalism of the offending was evocative and included phrases such as

⁷² ‘Father gets life for rape of daughters and abuse of son’ *The Irish Times* (5 October 2010) <<https://www.irishtimes.com/news/father-gets-life-for-rape-of-daughters-and-abuse-of-son-1.659312>> accessed 28 March 2024.

⁷³ ‘Man (42) is jailed for life for raping boy’ *The Irish Times* (Dublin, 12 October 2002). <<https://www.irishtimes.com/news/man-42-is-jailed-for-life-for-raping-boy-1.1098928>> accessed 15 April 2024.

⁷⁴ ‘Child-abuser loses appeal against four life sentences’ *The Irish Times* (22 December 2004) <<https://www.irishtimes.com/news/child-abuser-loses-appeal-against-four-life-sentences-1.1170923>> accessed 28 March 2024.

⁷⁵ *DPP v McC and CD* [2007] IESC 47, [2008] 1 ILRM 321.

⁷⁶ *O’Neill* (n 27).

⁷⁷ *O’Brien* (n 60).

⁷⁸ Bernard Condon, ‘Life sentence not available where manslaughter plea is accepted by DPP’ *The Irish Times* (7 October 1996) <<https://www.irishtimes.com/sport/life-sentence-not-available-where-manslaughter-plea-is-accepted-by-dpp-1.93236>> accessed 28 March 2023.

‘truly appalling’⁷⁹ and ‘ghastly’.⁸⁰ Life imprisonment was imposed more frequently in cases where the perpetrator was a stranger to the victim, a contrast to the nature of the relationship in child sexual abuse cases. These cases involved random attacks on female victims in public spaces.

In 2019, the Supreme Court established sentencing guidance for the offence of rape, setting out four bands when determining the headline sentence.⁸¹ A sentencing band of fifteen years to life imprisonment was established for the most serious offending for this offence. The Supreme Court provided a non-exhaustive list of factors that might elevate the offending into this band when determining the headline sentence. These factors included the level of violence and culpability of the offender (special violence; additional sexual perversions; coldly engaging in a campaign of rape; use of death threats), the relationship between the parties (abusing a position of trust; misusing a dominant position in the family) and characteristics of the victim (abusing a particularly young or vulnerable person). A combination of a number of these factors was evident in cases where life imprisonment was imposed. This is unsurprising as guidance judgments issued by the Court of Appeal and Supreme Court are informed by existing and past practice in terms of sentencing for the particular offence under examination, as well as established legal principle.

Homicide

Five life sentences were imposed in the homicide category that were deemed to be at the top level of offending at trial level and on appeal – three for manslaughter and two for attempted murder. Life imprisonment is mandatory for murder, yet the courts have stated that a maximum penalty can be imposed in cases of homicide outside of murder where the offending is of exceptional seriousness.⁸² In 2019, the Supreme Court issued guidance on sentencing for assault manslaughter, with a sentencing band of 15 to 20 years for cases of the worst culpability and the possibility of life imprisonment in certain cases.⁸³ Unlawful killing that is almost indistinguishable from murder in terms of culpability might be an instance where life imprisonment would be appropriate in determining the headline sentence. In the cases in this study, a single life sentence was imposed for a single incident. Perpetrators were male and victims were also male except in one case. Similar to sexual offences, age and vulnerability of the victim was a factor in the assessment of exceptionalism. In one case, the offender was on trial for the murder of a 14-year-old girl but he was convicted of manslaughter.⁸⁴ At sentencing, the judge described the offender as ‘disdainful and scornful’ and the appellate court, in upholding the life sentence, referenced ‘the deception, the vulnerability of the victim, the breach of trust, the age disparity, the fragile and disturbed childhood of the victim’ as aggravating factors.

Serious but not exceptional

Of the 91 sentences of life imprisonment identified across all cases, 50 were upheld following the outcome of the appeals process (see Table 2). Twenty-six appeals related to the severity of the sentence. In 12 cases the sentences were upheld while in 14 cases the sentences were reduced to determinate sentences. The primary rationales for the reduction to a determinate

⁷⁹ ‘Escaped serial offender gets life for rape’ *The Irish Times* (Dublin, 11 June 2009) < [⁸⁰ Condon \(n 78\).](https://www.irishtimes.com/news/escaped-serial-offender-gets-life-for-rape-1.781316#:~:text=2009%20%2D%2001%3A00,A%20PSYCHOPATHIC%20rapist%20who%20escaped%20from%20a%20life%20sentence%20and,invited%20back%20to%20her%20room.> accessed 15 April 2024.</p></div><div data-bbox=)

⁸¹ *DPP v FE* (n 39).

⁸² *DPP v McManus* [2011] IECCA 68, [2011] 10 JIC 1902.

⁸³ *DPP v Mahon* [2019] IESC 24.

⁸⁴ *McManus* (n 82).

sentence related to: the offence(s) not being at the level of seriousness necessary; a failure to properly account for mitigating factors (such as a plea of guilty and rehabilitation work); and an error in incorporating preventative detention as an aggravating factor.⁸⁵ Of the cases that were assessed as not being at the top level of offending, the majority involved a single adult victim resulting in a single life sentence. In one case, the appellant had been convicted of a single incident of aggravated sexual assault where the adult victim was subject to a 70-minute attack involving the offender performing oral sex on the victim and digitally penetrating her vagina.⁸⁶ Threats to ‘slice her’ and ‘cut her throat’ were made to the victim during the attack. On appeal, the court found that while the offences were very serious, they did not reach the level of indignity, physical abuse and depravity of other aggravated sexual assaults in order to be characterised as ‘exceptional’ in nature and warrant a sentence of life imprisonment. This provides further evidence that the multiplicity and totality of offending alongside the age and vulnerability of the victim are central in the sentence being imposed and upheld. Across all fourteen cases where life imprisonment was reduced to a determinate sentence, the average (mean) sentence imposed was 16 years (with sentences ranging from ten to 20 years). Standard remission of 25 per cent would apply to these sentences reducing the average term of imprisonment from 16 to 12 years in terms of time served in custody.⁸⁷

Risk, records and release

In addition to the exceptional nature of the offending, it is clear that concerns in relation to public protection played a role in decision-making. References to public protection featured prominently in sentencing judges’ remarks prefacing the imposition of life imprisonment. Judges determined that offenders presented a ‘continuing danger to society’,⁸⁸ that there was a ‘duty to protect the people of Ireland’⁸⁹ as well as a need to protect specific categories of victims – ‘protect women, protect prostitutes’.⁹⁰ Offenders were described by judges as being ‘highly dangerous’, ‘delusional’ and ‘devious’.⁹¹ As one judge stated in sentencing an offender: ‘I will not be adequately protecting the community and in particular . . . ‘anonymous young women’ by imposing anything less than a life sentence’.⁹² In some instances, the instrument of public protection was the discretionary sentence of life imprisonment.

Assessing risk

In assessing the risk of reoffending, references to expert evidence and reports indicating a risk of reoffending from the Probation Service and/or another professional assessment were identified in some cases. Judges ordinarily have access to a report from the Probation Service that includes an assessment of risk for consideration prior to sentencing. Past conduct was often viewed as predictive of potential future offending and contributed to the rationale for

⁸⁵ Two additional cases were reduced as the judge had incorrectly imposed a consecutive sentence and failed to properly account for an accepted plea of diminished responsibility. In a further case the court found that while the offending was appalling in nature and at the top level of offending, the offender was a foreign national and may apply to serve his sentence in Poland. Given the challenges in the cross-jurisdictional transfer of sentences, and the added layer of complication that might arise from transferring a life sentence, a sentence of 18 years was imposed. This was a sentence, in the courts view, that was of an equivalence to that of life imprisonment. See *DPP v Edward Piotrowski* [2014] IECCA 17, [2014] 4 JIC 3012.

⁸⁶ *K* (n 42).

⁸⁷ Prison Rules 2007, SI 2007/252, r 59; Prisons Act 2007 s 35.

⁸⁸ Ronan McGreevy, ‘Riedo killer given two life terms for raping student’ *The Irish Times* (25 July 2009) <<https://www.irishtimes.com/news/riedo-killer-given-life-for-rape-1.843820>> accessed 28 March 2024.

⁸⁹ *DPP v Robert Duffly* [2009] IECCA 20.

⁹⁰ ‘Judge says life sentence not open’ *The Irish Times* (25 January 1997) <<https://www.irishtimes.com/news/judge-says-life-sentence-not-open-1.25415>> accessed 28 March 2024.

⁹¹ ‘Unscrupulous” rapist jailed for life’ *The Irish Times* (10 December 1996)

<<https://www.irishtimes.com/news/unscrupulous-rapist-jailed-for-life-1.114458>> accessed 28 March 2024.

⁹² *K* (n 42).

the imposition of the sentence, with judges referencing previous criminal history similar to the principal offence as an indicator of the likelihood of reoffending at a serious level.

In 16 of the 32 cases, judges referenced previous convictions that were described as significant in sentencing. In twelve of these cases the offender had committed offences similar to the offence(s) for which he was being sentenced. In addition, there were four cases where the offender had previous offences of a minor to medium level.⁹³ In terms of criminal history, seriousness was categorised by judges through the number of offences committed, the level of the offending and the similarity to the current offence(s). The language and terminology employed when referencing the offender and previous convictions included phrases such as ‘previous bad character’ and ‘career criminal’.⁹⁴ In ten cases involving sexual offences, the offender had a serious record of previous convictions and in nine of those cases the offending was similar to the offences before the court for sentencing. For example, in one case the offender had previously been convicted of nine sample counts of raping his daughter (aged 12 to 15) over a four-year period.⁹⁵ Further, the offender had violently raped both his girlfriend and her mother while he was on bail for serious offences relating to the victimisation of that same girlfriend. A lack of previous criminal history may be somewhat misleading given the pattern of sustained abuse in a number of cases. For example, while there were six cases involving child sexual abuse where the offender had no previous criminal history, five of those cases involved multiple victims (two to six) and sustained offending ranging from three to 20 years. As articulated by one judge, this is ‘hardly indicative of good character’.⁹⁶

Previous criminal history was linked to an assessment of offence seriousness as well as to public protection. Judges noted that ‘the nature of the previous offending indicates that the offender represents a continuing danger to the public’⁹⁷ and expressed concern in relation to the offender’s ‘proclivity to rape and kill again’.⁹⁸ In some cases, the issue of protection related specifically to the risk of re-victimising the current victim with one judge concerned as to the ‘credible threat’ made to one of the victims that ‘no matter how long a sentence the accused man got, he would find her and kill her’.⁹⁹ Age was sometimes referenced when determining indeterminacy, with concern expressed in relation to the young age of some offenders. Half of all offenders were under the age of 34 at the time of offending (with a range from 18 to 62). In one case, the sentencing judge noted that the offender was a ‘relatively young man’ and there was ‘extensive evidence’ of a ‘propensity to re-offend . . . even after a lengthy determinate sentence’.¹⁰⁰

The pragmatism of parole

Given the exceptional nature of the offending alongside a pattern of previous criminal history and concerns in relation to reoffending, sentencing judges appeared to take comfort in the indeterminate nature of life imprisonment. Parole decision-makers that determine release back into the community are in receipt of information that focuses on assessing the risk of reoffending, amongst other information. Life sentence prisoners must engage with the parole process in order to secure release, which is not guaranteed. While the average time served prior to being released is approximately 19 years, there are some life sentence

⁹³ Of the remaining cases there were either no previous convictions or previous convictions were not referred to.

⁹⁴ *McManus* (n 80); *DPP v Ward* [2012] IECCA 15, [2012] 1 JIC 1601.

⁹⁵ *O’Brien* (n 60).

⁹⁶ *DPP v D* [2004] IECCA 8.

⁹⁷ *DPP v PS* [2009] IECCA 1.

⁹⁸ *McGreevy* (n 88).

⁹⁹ *Z* (n 29).

¹⁰⁰ *G* (n 58).

prisoners serving over 30 years in prison.¹⁰¹ When released, life sentence prisoners are subject to supervision for the remainder of their lives. Breach of the conditions of release may result in being recalled to prison. These distinct features of the life sentence seemed to provide an incentive to opt for indeterminacy where there was a perception of significant risk to the community.

Sentencing judges referenced the benefits of a subsequent decision-making process that could operate to address issues of public protection:

‘The Parole Board would have a file on [the offender] and a future decision relating to him would be a matter for another authority than the courts.’¹⁰²

‘I can't look into the future but the Parole Board can’.¹⁰³

The benefit identified in the application of life imprisonment pivoted on the public interest in the offender being ‘reviewed by . . . very expert advisers’¹⁰⁴ ‘to see when it is safe for society’¹⁰⁵ to release the offender. Sentencing judges noted that the sentence comprises ‘rigorous supervision’¹⁰⁶ on release and that ‘the person is subject to recall’ for breach of conditions as well as an order precluding him ‘from going to certain places . . . where his victims might reside’.¹⁰⁷ The Supreme Court has expressed caution in relation to taking consideration in sentencing of a subsequent release process that may be subject to policy change.¹⁰⁸ However, even where a sentence was reduced to a determinate one on appeal, the appellate courts have acknowledged that the offender needed to be ‘incapacitated from reoffending for a long time’.¹⁰⁹ In some reduced cases, the danger to the public was dealt with through imposing a determinate sentence as well as a lengthy post-release supervision order.

Dangerousness on appeal

It is unsurprising that issues related to preventative detention and dangerousness were the subject of a number of appeals. Incorporating considerations of risk, dangerousness or anything akin to preventative detention in legal decision-making presents specific issues of compatibility with *Bunreacht na hÉireann* (the Irish Constitution).¹¹⁰ The matter appeared before the Supreme Court on two occasions but both cases were unsuccessful. The cases involved statements from the sentencing judges that the primary function in sentencing ‘was to protect the community’, that the ‘danger’ posed to the public meant that a ‘structured’ and ‘phased’ release *via* a life sentence was necessary and that this is what placed the offending in ‘the category of special and exceptional cases’.¹¹¹ The Supreme Court found that neither sentences were imposed on the basis of preventative detention. There were two cases where the sentence was reduced specifically on the basis that the sentencing judge erred in taking preventative detention into consideration in sentencing. In one case the judge made similar references to the cases above, noting that the offender would be under supervision in the

¹⁰¹ Griffin (n 18).

¹⁰² ‘Man claiming God made him rape loses appeal’ *The Irish Times* (Dublin, 7 April 2005) <<https://www.irishtimes.com/news/man-claiming-god-made-him-rape-loses-appeal-1.1175788>> accessed 15 April 2024.

¹⁰³ ‘Life for man who tried to murder girl’ *The Nationalist* (Carlow, 25 September 2005).

¹⁰⁴ G (n 58).

¹⁰⁵ Daniels (n 45).

¹⁰⁶ DPP v Egan [2017] IECA 95.

¹⁰⁷ McC and CD (n 75).

¹⁰⁸ *ibid.*

¹⁰⁹ K (n 42).

¹¹⁰ O'Malley (n 22) 41-43.

¹¹¹ Daniels (n 45); Egan (n 106) 138.

community and subject to recall.¹¹² In this instance, the appellate court noted that these statements suggested that what was being imposed was a sentence of preventative detention and given this, the court substituted two life sentences for two concurrent twenty-year sentences. Interpreting these decisions leads to the conclusion that considerations of preventative detention is permitted in sentencing as long as it is consistent with the proportionality principle. What this means in practice and how it will be interpreted on appeal remains opaque.

The impact of legal constraints

Due to the number of appeals, scrutiny of sentencing decisions is far higher than for many determinate sentences. This affords an opportunity to examine the influence of the appellate courts, alongside legislative reforms, on subsequent sentencing decision-making. All life sentences imposed by a sentencing judge between 1987 and 2002 were reduced when appealed on the basis of sentence severity. The first life sentence upheld was for a sentence imposed in 2003. A key issue during this period related to the application of mitigation arising from a guilty plea in cases where the offending was of an exceptional nature.

Given that the maximum sentence of life imprisonment was imposed in these cases, it would be plausible to conclude that there were no mitigating factors as this would, by necessity, result in a reduction to a determinate sentence. Even in a case where life imprisonment is the appropriate headline sentence based on an assessment of the gravity of the offence(s), the court is still required to complete the second step, an assessment of the personal circumstances of the offender and any mitigating factors arising. In fact, sentencing judges did identify mitigating factors in some cases but these did not result in a reduction. The rationale for this was dependent on the factors present in the individual case, but the serious and exceptional nature of the offending was key to the imposition of the maximum penalty despite the existence of some form of mitigation.

In Ireland, there is no numerical range or limit on the guilty plea discount, but if the court does not apply an appropriate credit for the guilty plea, it can be deemed an error of principle on appeal.¹¹³ The stage at which a defendant enters a guilty plea is of great importance in terms of the level of discount. A guilty plea entered early in the process should ordinarily attract a significant discount. However, the later the plea, the less likely a reduction will be applied. Pleading guilty during the course of a trial, for example, is of little value, especially when the defendant is ‘caught red-handed’.¹¹⁴ A late plea for sexual offences is a particular issue as it will result in the victim being subjected to the distress of the trial process.¹¹⁵ The level of reduction may also be impacted where the defendant pleads guilty earlier in the process but there is no realistic basis to contest guilt.¹¹⁶

An issue arose in the 1990s as to whether life imprisonment could be imposed where a defendant had committed exceptionally serious offences, but had entered a guilty plea early in the process. In 1991, an offender was sentenced to twelve concurrent life sentences for the sexual abuse of three children over a six-year period. The offender entered a guilty plea at an early stage. The sentencing judge stated that he was ‘giving total priority to the protection of the community’ in imposing life imprisonment.¹¹⁷ The Supreme Court, in

¹¹² *Ward* (n 94).

¹¹³ *O'Malley* (n 22), 126.

¹¹⁴ *Ward* (n 94).

¹¹⁵ *O'Malley* (n 22) 138; *Tierman* (n 25).

¹¹⁶ *ibid* 126.

¹¹⁷ *G* (n 58).

reducing the sentence to fifteen years noted that the fact that the maximum sentence was imposed across the offences meant that the guilty plea had not been properly taken into consideration. This decision, alongside others in sentencing for serious sexual offences caused some public comment and controversy as it appeared the maximum penalty could not be utilised even in the most serious of cases if mitigation existed. In 1995, a sentencing judge expressed frustration at not being able to impose a life sentence to reflect the 'heinousness and multiplicity' of offending but that this was 'not open' to him as a result of the binding decisions of the appellate courts.¹¹⁸ There appears to have been some misunderstanding and misinterpretation here, as the Supreme Court had clarified in 1987 that there could be no principle which inhibited the imposition of a lawful sentence merely because the defendant had entered a guilty plea.¹¹⁹

Whether real or perceived, the disquiet was subsequently addressed by the legislature via the Criminal Justice Act 1999, which permits a court to impose the maximum sentence notwithstanding a guilty plea. The court must be satisfied that there are such exceptional circumstances relating to the offence to warrant such a penalty.¹²⁰ The legislative change does appear to have impacted sentencing in practice and the likelihood of those sentences being upheld on appeal. In almost two-thirds of cases where life imprisonment (16 of 25) was imposed between 2000 and 2022 the offender had plead guilty (with the majority (11 of 16) doing so early in the process). Nine of the eleven appealed the sentence and the appellate courts upheld the life sentence in four of these cases despite an early guilty plea. In a 2004 decision, the Supreme Court stated that a maximum sentence may be imposed where there was a guilty plea, but the sentencing court should explicitly refer to the exceptional circumstances to make 'absolutely clear' why the maximum sentence has been imposed despite the presence of mitigation.¹²¹

Another significant development in sentencing emerged in 2014 when the appellate courts began to develop guidance on sentencing in a series of judgments.¹²² This was described as a 'quiet revolution' in sentencing.¹²³ Since then, the courts have provided guidance on a range of offences, including a number of those with a maximum penalty of life imprisonment (burglary in 2018, assault manslaughter and rape in 2019, robbery in 2020; defilement of a child in 2021). Interestingly, only one case where life imprisonment was imposed was sourced for this study from 2015 onwards. The provision of greater structure, alongside the considerable amount of jurisprudence generated from earlier life imprisonment cases (relating to preventative detention, exceptional offending, accounting for mitigation), may be having a cumulative effect in constraining sentencing practice.

Conclusion

The analysis in this article found that judicial discretion in Ireland is primarily exercised to limit the use of life imprisonment to sexual and homicide offences. Further examination, however, revealed that cases also included concurrent life sentences for offences outside of these categories. The findings shed light on the type of offending that results in the imposition of a discretionary life sentence, fleshing out the blunt measurement of the offence

¹¹⁸ Mark Brennock, 'Judge says prior rulings disallow life sentence on multiple child rapist', *The Irish Times* (6 December 1995). Cant find article. Hyperlink and access date needed if available online.

¹¹⁹ *Conroy* (n 69) [142].

¹²⁰ s.29.

¹²¹ *McC and CD* (n 75).

¹²² *Z* (n 29).

¹²³ Tom O'Malley, 'A quiet revolution occurred this month: Sentencing guidelines were introduced', *The Irish Times* (31 March 2014). <<https://www.irishtimes.com/news/crime-and-law/a-quiet-revolution-occurred-this-month-sentencing-guidelines-were-introduced-1.1741707>> accessed 28 March 2024.

record contained in official data. This can contribute to the wider discourse on the increase in the use of life imprisonment and the growing understanding of the importance in examining how local legal processes and culture can impact penal outcomes and patterns.¹²⁴

The findings revealed that judges in these cases are often sentencing offenders for multiple offences and, in some circumstances, multiple victims. In sentencing generally, multi-crime offenders can benefit from a 'bulk' discount as sentences ordinarily run concurrently.¹²⁵ This can result in the sentence being far shorter than if the offender was sentenced consecutively or if he was convicted for each individual offence at different times.¹²⁶ In an attempt to ameliorate the issues arising from dealing with a multi-offence, multi-victim offender at one hearing, judges imposed an indeterminate and maximum sentence, reflecting the breadth and depth of offending in totality.

In some jurisdictions it is possible to reflect the seriousness of the offending in a lengthy determinate sentence rather than a life sentence. The practical effect of the length of that sentence may mean that these sentences can be interpreted as *de facto* life sentences.¹²⁷ In Ireland, judicially developed guidance articulates that the top end of offending falls within a band of 15 years up to life imprisonment.¹²⁸ In a Supreme Court decision that established guidance for assault manslaughter cases, a determinate sentencing band of 15 to 20 years imprisonment was established for offending of the worst culpability.¹²⁹ In exceptional cases, a sentence of life may be imposed. This indicates that there is a threshold of 20 years in terms of the length of a determinate sentence. Given that time served for life sentence prisoners released back into the community is currently around the 19-year mark, there appears to be an understanding in practice that this operates as the benchmark of severity with determinate sentencing rarely going beyond 20 years. To exceed this and claim it was less than a life sentence would, according to one sentencing judge, be 'judicially dishonest and populist'.¹³⁰ So while Ireland has the third highest life sentence prisoner population (as a percentage of all sentenced prisoners) amongst Council of Europe countries, it has the sixth lowest rate of prisoners sentenced to 20 years or more.¹³¹ In 2022, Ireland reported just seven prisoners in custody serving a sentence of 20 years or more across all offences (excluding life imprisonment).¹³² If an offender's crimes cumulatively warrant far in excess of twenty years imprisonment, life imprisonment may be viewed as a practical alternative to an excessive determinate sentence.

A pattern of serious criminal history as well as concern in relation to the risk of reoffending was prevalent in the analysis. Some countries permit life sentences to be imposed in cases where there is a prior record of significant offending. Informal life sentences may also be in operation, through the use of post-conviction indefinite detention measures that seek to minimise the risk of reoffending.¹³³ Preventive measures such as these are not available in Ireland as there are legal constraints that prevent their incorporation in the sentencing framework. Nonetheless, these are clearly factors of importance for judges in sentencing an

¹²⁴ David Garland, 'Penality and the Penal State' (2013) 51 *Criminology* 3.

¹²⁵ Andrew Ashworth and Martin Wasik, 'Sentencing the multiple offender: In search of a 'just and proportionate' sentence' in Jan de Keijser, Julian V. Roberts and Jesper Ryberg (eds) *Sentencing for Multiple Crimes* (Oxford University Press, 2017).

¹²⁶ Jan de Keijser, Julian V. Roberts and Jesper Ryberg (eds) *Sentencing for Multiple Crimes* (Oxford University Press, 2017).

¹²⁷ van Zyl Smit and Appleton (n 9) 71-76.

¹²⁸ *FE* (n 39).

¹²⁹ *DPP v Mabon* [2019] IESC 24.

¹³⁰ Condon (n 78).

¹³¹ Marcelo F Aebi, Edoardo Cocco and Lorena Molnar, *SPACE I - 2022 - Annual Penal Statistics: Prison populations* (Strasbourg, Council of Europe and University of Lausanne 2022) 52.

¹³² *ibid.*

¹³³ van Zyl Smit and Appleton (n 9) 133-140.

offender to life imprisonment. This practice raises the question as to whether imposing an indeterminate discretionary life sentence is consistent with the principle that preventative detention cannot be a driving factor in determining the sentence. There is certainly evidence that dangerousness plays more than an incidental role in many of these decisions.

Finally, it is important to acknowledge the dynamic nature of judicially developed guidance and legislative change and its impact on sentencing patterns and practice. This is particularly relevant in this instance as the study spans a number of decades and the majority of the examined cases were appealed, meaning that there are a high volume of appellate judgments articulating sentencing principles in this specific area. There is certainly evidence of changing patterns as the decades progress. An assessment of the guilty plea discount was illuminative. Furthermore, in 2014 when the appellate courts began to develop guidance on sentencing in a series of judgments, some of which related to the type of cases where life imprisonment could be imposed.¹³⁴ Since then, the courts have provided guidance on a range of offences, including a number of those with a maximum penalty of life imprisonment. The provision of greater structure and clarity by the Court of Appeal and Supreme Court may be having an impact in constraining the use of the ultimate penalty in practice.

¹³⁴ Z (n 29).