

IMPRISONMENT WHEN AN OFFENDER CANNOT PAY A FINE

According to a common-law rule in place since the 1993 case of *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46, if the court is minded to impose a fine but the offender will clearly be unable to pay a fine, the offender should be sentenced to imprisonment instead (as opposed to a fine coupled with a default imprisonment term). While one can understand why the courts may apply this practice, the practice obscures the crucial distinction between: (a) being sentenced to a fine, then imprisoned in default of payment (which, it is submitted, is the correct course of action); and (b) being sentenced to imprisonment. Further, blurring this distinction can result in a mis-labelling of the punishment, leading to various consequences for the offender in future. There is room for legislative reform to broaden the courts' discretion relating to default sentences, as well as for courts to more strongly embrace various flexible means by which an offender can be given the opportunity to pay a fine.

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I. Introduction

1 What happens if someone commits a criminal offence and is to be punished by a fine, but cannot afford to pay the fine? The court can seek to lighten the burden on the offender, while ensuring that the offender is duly punished, by extending the payment deadline or allowing payment in instalments.² This is not infrequently done, but does not guarantee that payment may be made. The court also has the power to exact payment by other means: it can order the offender's person be searched and any money seized; that the offender's property be seized

1 The writer is grateful to several anonymous persons involved in the practice of criminal law for bringing to his attention various issues which are discussed in this article.

2 Criminal Procedure Code 2010 (2020 Rev Ed) ss 319(1)(b)(i)–319(1)(b)(ii).

and sold, or that debts due to the offender be garnished.³ However, these powers are seldom, if ever, used in practice; and even if they are, the fine might still not be recovered.

2 It may well be that the offender simply has no means at all to pay a fine. The law assumes that, in such a case, the offender is to be punished by imprisonment instead.

3 One might think that this is done through the court's power to impose a default term of imprisonment which the offender must serve if he or she does not pay the fine on time.⁴ However, in the case of impecunious offenders, there are cases that have adopted a different practice. In these cases, instead of sentencing the impecunious offender to a fine and then having the offender serve the default imprisonment term, the courts simply sentence the offender to imprisonment. This has taken place on the basis of the following statement from the High Court's judgment in *Low Meng Chay v Public Prosecutor*⁵ ("*Low Meng Chay*"): "When it is unambiguously clear that a defendant cannot pay a fine, realistic and reasonable though it may be, the fine should not be imposed even though the court would have preferred to impose a fine rather than a short term of imprisonment."⁶ Let the court's application of this statement be called the "*Low Meng Chay* practice".

4 While one High Court case has since "doubt[ed] that *Low Meng Chay* stands for a *general* proposition that so long as an individual cannot pay a fine, the court should impose upon him a custodial sentence instead";⁷ others have continued to follow the *Low Meng Chay* practice,⁸ and the Court of Appeal appears to have endorsed the *Low Meng Chay* practice.⁹

5 It appears that there has been no empirical study on whether, when the court is minded to impose a fine, but the offender is impecunious, the court: (a) imposes a fine with a default imprisonment term; or (b) imposes a sentence of imprisonment in accordance with the *Low Meng Chay* practice.

3 Criminal Procedure Code 2010 (2020 Rev Ed) ss 319(1)(b)(iii)–319(1)(b)(iv) and 319(1)(b)(vi).

4 Criminal Procedure Code 2010 (2020 Rev Ed) s 319(1)(b)(v).

5 *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46.

6 *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 at [13].

7 *Attorney-General v Wham Kwok Han Jolovan* [2020] 3 SLR 482 at [111].

8 *Tan Yan Qi Chelsea v Public Prosecutor* [2022] SGHC 275 at [21]–[22]; *Yap Ah Lai v Public Prosecutor* [2014] SGHC 70 at [17]–[18].

9 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [57]–[58].

6 One might think that it makes no difference: either way, the offender is imprisoned. However, this article argues that there is a major difference in principle between an offender who is sentenced to imprisonment and an offender who is fined and subsequently serves the default imprisonment term. Further, this moral difference has practical implications for the accused person. Therefore, if the court is minded to impose a fine on an offender, but the offender is impecunious, the court should impose the fine with a default imprisonment term, and *not* simply sentence the offender to imprisonment.

7 This article argues that the courts should depart from the *Low Meng Chay* practice. If an impecunious offender is fined, he deserves just that – to be fined. He does not deserve to be imprisoned. The reason for imprisoning him is not that imprisonment is the most fitting punishment, but instead simply that there is no other means to punish him.

8 Yet, as will be seen, there have been good reasons why the courts have followed the *Low Meng Chay* practice. The problem is that these good reasons do not apply to *every* case involving an impecunious offender.

9 It is submitted that the following should be done:

(a) If a person would ordinarily be sentenced to a fine, but cannot afford to pay the fine, the court should not sentence the person to imprisonment. Instead, the court should record the sentence as one of a fine with a default imprisonment term. The person will still go to prison, but this will be clearly on the basis that imprisonment is a second-best alternative punishment to being fined (since it is impossible for the person to be fined), and not on the basis that the person deserves to be imprisoned.

(b) The Legislature should amend s 319(1)(b)(v) of the Criminal Procedure Code 2010¹⁰ (“CPC”) to give the courts broader discretion as to the length of a default imprisonment term, including the power to order that multiple default imprisonment terms run concurrently and to order longer default imprisonment terms.

(c) The courts should make greater use of the various possible steps set out in s 319(1)(b) of the CPC to secure the payment of a fine.

10 2020 Rev Ed.

II. Purpose of default terms of imprisonment

10 It would be useful to begin this article’s analysis with *Low Meng Chay* itself. There, the offender was “unable to pay any fine commensurate with the gravity of his offences”,¹¹ so the High Court sentenced him to imprisonment instead. The High Court’s reason for this was as follows:¹²

Default terms of imprisonment are intended to prevent evasion of the payment of fines imposed, not to punish those who are genuinely unable to pay. When it is unambiguously clear that a defendant cannot pay a fine, realistic and reasonable though it may be, the fine should not be imposed even though the court would have preferred to impose a fine rather than a short term of imprisonment.

It is respectfully submitted that this passage is problematic for the following reasons.

11 Firstly, the phrase “prevent evasion of the payment of fines imposed” carries the undertone that imposing a fine is an end in itself which a person must not be allowed to “eva[de]”. It is not. The aim is to punish; the fine is merely the means by which this aim is achieved.

12 Secondly, the phrase “... not to punish those who are genuinely unable to pay” is ambiguous because it does not state what default terms of imprisonment would be punishing such offenders *for*. The High Court could not have meant that “those who are genuinely unable to pay” are not to be punished at all. If it meant that “those who are genuinely unable to pay” should not be punished for their offence by a default term of imprisonment, then the reasoning is circular. So, it appears that the High Court meant that “those who are genuinely unable to pay” should not be punished by a default term of imprisonment *for the act of non-payment*. This is problematic because it assumes that: (a) the act of non-payment is a blameworthy one; and (b) the purpose of a default term of imprisonment is to punish the act of non-payment.

13 The courts have since adopted this last assumption more explicitly. In *Yap Ah Lai v Public Prosecutor*,¹³ the High Court held that the purpose of a default term of imprisonment is to “prevent the evasion of the fine”¹⁴ and to “punish the non-payment of a fine”.¹⁵ That latter phrase clearly implies that the mere act of not paying a fine is a wrongful one that is *in*

11 *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 at [14].

12 *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 at [13].

13 [2014] 3 SLR 180.

14 *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [18].

15 *Yap Ah Lai v Public Prosecutor* [2014] 3 SLR 180 at [57(a)]; *Public Prosecutor v Xu Yuanchen* [2024] 2 SLR 344 at [29].

itself deserving of “punish[ment]”. This is not necessarily true. A person who has the means to pay, and yet refuses to pay, is indeed blameworthy. But a person who fails to pay a fine because he simply cannot afford to is not.

14 The courts have made this point in the context of the offence of contempt of court by disobeying a court order to pay a sum of money (say, damages). The courts have held that what amounts to contempt is “refus[ing]” or “neglect[ing]” to pay, in a manner that involves a “conscious act of volition”.¹⁶ By contrast, a mere inability to pay is not contempt.

15 Similarly, it is submitted, the “non-payment of a fine” is only deserving of “punish[ment]” when it involves a deliberate act – for example, concealing assets from the court, or simply refusing to pay despite clearly having the financial means to. A person should not be punished for doing something which is not reasonably possible for them to do, such as for not paying a fine which he simply cannot afford to pay (or which he can afford to pay only by suffering severe hardship).

16 Finally, it is incongruous for the courts to say that default imprisonment terms are “not to punish those who are genuinely unable to pay”, and yet go on to say that a regular imprisonment term *is* a means to punish the impecunious defendant who is genuinely unable to pay a fine.

17 Therefore, it is submitted that the possible functions of a default term of imprisonment are properly understood as follows:

- (a) to punish an offender *who has the ability to pay a fine* for not paying it, and hence deter non-payment;
- (b) to incentivise an offender *who does not have the ability to pay a fine* to find a means to pay it in order to avoid having to go to prison – *eg*, by selling assets to raise funds to pay the fine; or
- (c) to provide an alternative means to punish an offender who deserves to be fined, but *simply has no means to pay the fine*.

18 If this is correct, then there is nothing wrong with a court sentencing someone to a fine which they do not have the ability to pay, knowing that they will instead serve a default term of imprisonment. This would be in line with function (c) above.

16 *P J Holdings Inc v Ariel Singapore Pte Ltd* [2009] 3 SLR(R) 582 at [7].

19 But why should the courts do this, rather than simply passing a sentence of imprisonment? One may ask: would the result – that the person goes to prison – not be the same? They are *not* the same; the two would have different results beyond the literal fact of the offender being imprisoned.

III. Default terms of imprisonment *in lieu* of payment of fines, *versus* sentences of imprisonment

20 As a matter of fair labelling, there is a huge difference between: (a) a person being sent to prison because they are deserving of imprisonment; and (b) a person being sent to prison not because they deserve to be imprisoned, but because imprisonment is the next-best viable punishment given that it is impossible to give the person the punishment they deserve (namely, a fine).¹⁷

21 The difference becomes apparent when one imagines someone asking a person whether they have ever been sentenced to imprisonment. Why would one ask such a question, instead of simply asking the person whether they had been convicted of a crime? The answer must be that the asker wishes to know if the person has been convicted of a crime *of a certain level of seriousness*, and assumes – not wrongly – that crimes punished by a sentence of imprisonment are more serious than crimes punished by a fine. That being so, the asker would end up misjudging the person.

22 Who would ask such a question? The law does. As an example, consider Art 45(1)(e) of the Constitution of the Republic of Singapore,¹⁸ which provides that a person cannot be a Member of Parliament (or, for that matter, President)¹⁹ if the person has been “convicted of an offence ... and sentenced to imprisonment for a term of not less than one year or to a fine of not less than \$10,000”. Note that the figure of \$10,000 used to be \$2,000 before it was changed to \$10,000 in 2022. Now consider the case of John Tan Liang Joo, who was fined \$5,000 for contempt of court in 2019. On appeal, Tan asked that he be sentenced to imprisonment (presumably

17 For examples of cases where this difference might have been salient, see *Public Prosecutor v Abdul Aziz bin Osman* [2008] SGDC 303; *Public Prosecutor v Foo Fang Juang* [2024] SGM 45 at [27]: “This is a proper case to impose short sentences of imprisonment on the charges instead even though I would have imposed fines on them.”

18 2020 Rev Ed.

19 Article 19(2)(d) of the Constitution of the Republic of Singapore (2020 Rev Ed) requires that a candidate in a Presidential election not be subject to any of the “disqualifications” that would disqualify a person from being a Member of Parliament.

of up to a few months) instead: while this would be a “harsher sentence” than a fine [emphasis in original omitted],²⁰ it would not disqualify Tan from standing in a general election. The Court of Appeal rightly held that “an offender should not be allowed to choose a particular sentence on account of his political aspirations”,²¹ and so dismissed Tan’s appeal.

23 The point, for present purposes, is not to criticise the outcome of the case, but rather to make the following observation: If it had been “unambiguously clear” that Tan could not pay the fine,²² then according to the *Low Meng Chay* practice, he would be sentenced to imprisonment instead. The term of imprisonment would probably be less than a year long, considering the relative gravity (or lack thereof) of the offending. Tan would therefore have been qualified to stand in the election. Strangely, therefore, Tan’s ability to give effect to his “political aspirations” depended, in practice, on his level of financial means.²³ Surely, this should have been irrelevant.

24 Qualification to stand in elections is not the only area in which it matters whether a person has been sentenced to imprisonment or he has been sentenced to a fine and served the default imprisonment term. Examples of other areas of law where the difference matters are as follows.

25 Firstly, records of a person’s past criminal offence can, in general, be rendered spent if the person stays “crime-free” for five years,²⁴ but not (among other things) if the sentence for the offence included more than three months’ imprisonment (excluding an imprisonment term in default of a fine²⁵) or a fine of more than \$2,000.²⁶ Again, therefore, under the *Low Meng Chay* practice, a person’s financial means could well have an impact on whether the person is sentenced to imprisonment or a fine, and, depending on the magnitude of the sentence, could well have an impact on whether the person’s criminal record can be spent. This would, in turn, have implications for the person’s reputation, since a person with a spent criminal record can truthfully say that they have no criminal record.²⁷

20 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [57].

21 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [61].

22 *Wham Kwok Han Jolovan v Attorney-General* [2020] 1 SLR 804 at [57].

23 Poverty does not disqualify a person from standing in a Parliamentary (or, indeed, Presidential) election, unless the person is an “undischarged bankrupt”: Constitution of the Republic of Singapore (2020 Rev Ed) Art 45(1)(b).

24 Registration of Criminals Act 1949 (2020 Rev Ed) s 7B.

25 Registration of Criminals Act 1949 (2020 Rev Ed) s 7A(1) (definition of “term of imprisonment”).

26 Registration of Criminals Act 1949 (2020 Rev Ed) s 7C(b).

27 Registration of Criminals Act 1949 (2020 Rev Ed) s 7E.

26 Secondly, a person who commits a criminal offence cannot receive a community sentence if they have “previously been sentenced to a term of imprisonment exceeding 3 months, other than a term of imprisonment served by him or her in default of payment of a fine”.²⁸ This clearly shows that the difference matters.

27 Thirdly, when sentencing an offender, the offender’s past convictions – including the punishments imposed – are relevant.²⁹ Suppose a court imposes on a person a sentence of imprisonment where it would have been minded to impose a fine but for the offender’s impecuniosity. Some time later, the person commits another criminal offence. From the fact that the person had once been sentenced to imprisonment, the second sentencing judge might be misled into thinking that the person’s history of offending is more serious than it really is.

28 Finally, there may be implications relating to what privileges people in prison have. The precise conditions of imprisonment are up to executive discretion: the Prisons Regulations³⁰ allow the Commissioner of Prisons to “separate prisoners into different categories to be subject to different regimes to facilitate the rehabilitation of prisoners and the maintenance of good order and discipline in the prison”.³¹ It is not inconceivable, then, that the Commissioner may see fit to impose a different “regim[e]” on those serving a default sentence of imprisonment compared to those who are not. Therefore, if a court sentences a person to imprisonment instead of a fine with imprisonment *in lieu*, it is not clear whether the Commissioner will have an official record stating why the person is in prison.

29 In this regard, the position of a person serving a default sentence is, morally speaking, not unlike that of a person who has been imprisoned under the Debtors Act 1934³² for (in essence) evading a judgment debt despite having the means to pay.³³ While those serving a default sentence are not in exactly the same position – they, unlike civil debtors, are guilty of a crime – the point is that the Prisons Regulations do contemplate that how a prisoner is to be treated must depend on why the person is in prison. For example, a “debtor” cannot be “confined in association with convicted criminals”; cannot be “required to do any labour other than what is required to keep the specified prisoner’s room, furniture and utensils clean”; and may have greater privileges of “receiv[ing] items

28 Criminal Procedure Code 2010 (2020 Rev Ed) s 337(1)(d).

29 I am grateful to an anonymous person for this point.

30 2002 Rev Ed.

31 Prisons Regulations (2002 Rev Ed) reg 79(2).

32 2020 Rev Ed.

33 Debtors Act 1934 (2020 Rev Ed) ss 3 and 6; note especially s 6(4).

such as books, papers and food” compared to others.³⁴ While there are no such express provisions about the treatment of those serving default sentences, these provisions do remind us that it would not be appropriate to treat every imprisoned person in the exact same way: it depends, for one thing, on whether they deserve to be imprisoned as a punishment for a crime. Yet, under the *Low Meng Chay* practice, there would not necessarily be a way for prison officials to tell whether a person sentenced to imprisonment has been so sentenced because imprisonment is the punishment he deserves, or because a fine is the punishment he deserves but he is unable to pay the fine.

30 These examples call into question the *Low Meng Chay* practice, under which an impecunious offender will be labelled as having been sentenced to imprisonment (instead of having been sentenced to a fine and then served the default imprisonment term) – a label which has both moral and legal implications. An additional problem is that the *Low Meng Chay* practice only comes into operation in the case of an offence that is punishable by a fine *or imprisonment*; this introduces an additional layer of potential inconsistency.

IV. Explaining the *Low Meng Chay* practice

A. *Difficulties in ‘conversion’ between a fine and default imprisonment: more apparent than real*

31 One can see why the courts may be reluctant to impose a fine when it is clear that the offender will not be able to pay and will end up serving the default imprisonment term. For one thing, it is strange to think of an imprisonment term as an alternative to a fine, given that the two are “different qualitatively, with imprisonment regarded generally as a more severe punishment than fine”;³⁵ this is to say nothing of the difficulty of coming up with a “conversion rate” between the two.³⁶ By contrast, the *Low Meng Chay* practice does not run up against this theoretical difficulty because it is premised on the idea that the imprisonment term is a punishment for “evading” the fine, and not a substitute for the fine.

32 But the CPC *does* contemplate that there can be a “conversion” between a monetary fine and a term of default imprisonment. Section 319(1)(g) provides that “if, before the end of the period of

34 Prisons Regulations (2002 Rev Ed) regs 152, 152A, 153 and 155.

35 *Mao Xuezhong v Public Prosecutor* [2020] 5 SLR 580 at [55].

36 *Mao Xuezhong v Public Prosecutor* [2020] 5 SLR 580 at [55]; *Public Prosecutor v Lim Yung Keng Adam* [2023] SLR(StC) 416 at [60(b)].

imprisonment imposed in default of payment of a fine, such a proportion of the fine is paid or levied that the term of imprisonment already suffered in default of payment is at least equivalent to the part of the fine still unpaid”, then “the imprisonment must end”.

33 Yet, this is not to say that there is a fixed “exchange rate” between default imprisonment terms and fines. Rather, a default imprisonment term is a *second-best* means to punish an offender who cannot pay. In other words, when deciding on a default imprisonment term, the question for the court should not be what term of imprisonment has the same effect as a fine, but rather what term of imprisonment would be appropriate to punish an offender who cannot afford to pay. For example, it may be that in the case of offender A, the objectives of punishment may be met to the same extent by either a fine of \$1,000 or imprisonment of ten days. But it does not follow that there is an “exchange rate” of one day to \$100. It may well be that in the case of offender B, the objectives of punishment would be met to the same extent by either a fine of \$2,000 or imprisonment of five days. Everything depends on the particular circumstances of the case and of the offender.

34 This question may be difficult, but it must be remembered that even under the *Low Meng Chay* practice, the courts *already* have to answer this question when they decide what duration of imprisonment to impose on an offender who cannot afford to pay a fine.

35 An analogy may be drawn with the law on caning. If an offender is “convicted of one or more offences punishable with caning”, but the offender cannot be caned,³⁷ the court has the power to impose additional imprisonment *in lieu* of caning. But the court does not simply convert caning to imprisonment based on a fixed “exchange rate”. Rather, the court must “consider the matter holistically and assess whether there are any factors which could militate against the imposition of an additional term of imprisonment”,³⁸ without applying a “pro-rated approach”.³⁹ As a result, it may well be offender A (who is unfit to be caned) would ordinarily be sentenced to more strokes of the cane than offender B (who is also unfit to be caned), yet B is sentenced to a longer term of imprisonment *in lieu* of caning compared to A.

37 This may be because the offender is a woman, a man who is more than 50 years old, a man on death row (Criminal Procedure Code 2010 (2020 Rev Ed) s 325(1)), or medically unfit to be caned (Criminal Procedure Code 2010 (2020 Rev Ed) s 332(2)).

38 *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [60]; see generally at [58]–[60].

39 *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904 at [89]; see generally at [89]–[91].

36 To sum up: The *Low Meng Chay* practice aims to avoid sending the signal that a fine is interchangeable with imprisonment. But if “interchangeable with” means that there is a fixed “conversion rate” between the two, this is simply not true; and if “interchangeable with” means that imprisonment has to do what a fine cannot do, this is inevitable.

B. Certain perverse results of not applying the Low Meng Chay practice

37 Another reason why the courts have applied the *Low Meng Chay* practice is that it sometimes makes for a more appropriate sentence on the facts. This can be seen from the facts of *Low Meng Chay* itself. The offender in that case had been convicted on numerous charges. At first instance, he was sentenced to a total of 32 months’ imprisonment and a fine of \$96,000. He was clearly unable to pay the fine. The total default imprisonment sentence was slightly more than 56 months’ imprisonment. On appeal, Yong Pung How CJ took the view that the total default term of imprisonment *in lieu* of the fines, coupled with the sentences of imprisonment, was manifestly excessive (totalling more than seven years’ imprisonment). Hence, in the name of the “totality principle”, Yong CJ substituted the fines with imprisonment sentences adding up to just two years and nine months.⁴⁰

38 As we have seen, this approach is theoretically problematic, but had it not been taken, the offender would have received a disproportionately severe punishment. The question, then, is how to avoid such disproportionality while avoiding the problems arising from the *Low Meng Chay* practice.

V. Addressing the problems with the *Low Meng Chay* practice

A. Amending Criminal Procedure Code 2010 to allow default sentences to run concurrently

39 One possible alternative way to give effect to the totality principle could be to have default sentences of imprisonment run concurrently. Yong CJ did this in the 1999 case of *Chia Kah Boon v Public Prosecutor*, a case where the offender’s “present financial means [were] limited” such

40 See also *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [58]–[61].

that the fines added up to “approximately 1,000 times his current annual income”.⁴¹

40 A possible criticism of this alternative is this:⁴²

... what incentive is there for an offender to pay all his fines if he is expected to serve default sentences for only some of them (those that have been ordered to run consecutively)? Can an offender discharge all his financial penalties by seeking to pay only the fines of those offences where the default sentences have been ordered to run consecutively? If the issue is answered in the affirmative, would the offender’s punishment commensurate with the gravity of his offences?

41 There is force in this criticism, but only if the offender *is* able to pay all of the fines – in which case, the purpose of the default imprisonment terms is to deter non-payment and not to act as a substitute punishment for the fines. But where the offender is unable to pay all of the fines, there is nothing wrong with the court’s ordering some or all of the default terms to run concurrently: applying the totality principle, *that* may be a fitting punishment. And where the offender is able to pay some of the fines but not all, the solution could be this: Divide the charges which attract fines into two groups, A (the fines the offender is able to pay) and B (the fines that the offender cannot pay). Impose a lengthier default term of imprisonment in respect of the fines for the group A charges (in order to deter non-payment), but a shorter one in respect of the fines for the group B charges (as a substitute for those fines), with the qualification that any fines paid by the offender are to be applied toward the fines for the group A charges.

42 Such possibilities are now foreclosed by s 319(1)(b)(v) of the CPC, which states that a default imprisonment term “must be consecutive with ... any other imprisonment term or terms imposed on the offender ... in default of payment of fine”.⁴³ For the reasons above, it is submitted that this should be changed.

41 *Chia Kah Boon v Public Prosecutor* [1999] 2 SLR(R) 1163 at [13].

42 Kow Keng Siong, *Sentencing Principles in Singapore* (2nd Ed, 2019) at para [26.086]. The criticism might perhaps be applied to cases like *Public Prosecutor v Giorgio Ferrari* [2009] SGDC 302 at [38], where the court, somewhat unusually, “was of the view that it would be appropriate to order some of the default terms to run concurrently” *because* the accused person was “willin[g] to pay the fine[s]”.

43 It is respectfully submitted that given the plain wording of s 319(1)(b)(v), the authors of *The Criminal Procedure Code of Singapore – Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir eds) (Academy Publishing, 2012) at para [16.117] have erred in suggesting to the contrary: see Kow Keng Siong, *Sentencing Principles in Singapore* (2nd Ed, 2019) at para [26.086].

B. *Amending Criminal Procedure Code 2010 to broaden court's discretion in relation to default terms of imprisonment*

43 There is a more general principle: The appropriate duration of the appropriate default term of imprisonment would differ depending on what the aim of default imprisonment is.⁴⁴ For example, if the court has determined that a fine would be an appropriate punishment, and an offender is clearly able to pay the fine, then there is nothing wrong in principle with imposing very long default terms of imprisonment to serve as a stiff deterrent against wilful non-payment. On the other hand, if the offender is clearly unable to pay the fine, then the function of the default term of imprisonment is to serve as an alternative punishment to the fine; in order to achieve the aims of punishment, a relatively shorter prison term would suffice.

44 To give effect to this principle, it may be worth amending s 319(1)(d) of the CPC to provide the court with greater discretion in relation to the duration of default terms of imprisonment.

C. *Alternatives to fines other than default terms of imprisonment*

45 Once it is accepted that default imprisonment for an impecunious offender is a second-best alternative to the fine that the offender would pay if he had the means to do so, the next question is whether there are more suitable alternatives.

46 One possibility might simply be a smaller fine: for an offender with limited financial means, even a small fine can create a large impact. One can envisage a system in which the offender is entitled to present evidence of his impecuniosity to the court, upon which the court can reduce the fine to a level that still represents an appropriate financial impact on the offender. A more radical option might be to overhaul the system of fines, such that every person's fine depends on their income and/or wealth. Both options are easier said than done – offenders may attempt to hide assets, and it is difficult to ascertain informal workers' level of income⁴⁵ – but that has not stopped several countries from attempting to implement similar systems.

44 See para 17 above.

45 See generally Jean Galbraith *et al*, "Poverty Penalties as Human Rights Problems" (2023) 117 *American Journal of International Law* 397 at 407 and 436 and the sources cited therein.

47 Another possibility would be to consider other forms of punishment or penalty than imprisonment as alternatives to a fine. For instance, there could be a system of mandatory community service or other unpaid work *in lieu* of a fine.⁴⁶ Again, this would not be without its problems.⁴⁷ There would be the implication that whether an offender is compelled to perform labour – labour that benefits society, but labour nonetheless – indirectly depends on financial means. In addition, one might argue that if the work takes the form of community service, this might also be seen as watering down the value of community service by sending the message that a richer offender can “buy” his way out of performing community service. However, something similar can be said of other forms of work, and indeed of default imprisonment terms generally: they in essence involve paying to avoid a certain consequence, and are inevitably slanted in favour of those who can afford to pay.

48 While these solutions are not perfect, neither is imprisonment as an alternative to being fined. Imprisonment can have disproportionately disruptive consequences, such as disruptions to offenders’ work and childcare arrangements.⁴⁸

D. Other means to compel payment

49 Besides the impact on the accused person, it must not be forgotten that there are costs to the public in imprisoning a person.⁴⁹ It must also be remembered that whether or not someone can pay a fine is not a binary question. It might depend on the payment deadline, whether the person has assets that can be liquidated to pay the fine, whether the person is expecting to be paid money owed to them, *etc.*

50 For these reasons, it may be argued that the courts can afford to make greater use of the various powers set out in ss 319(1)(b)(iii)–

46 For extensive discussion, see Gill McIvor, Carlotta Pirnat & Christian Grafl, “Unpaid Work as an Alternative to Imprisonment for Fine Default in Austria and Scotland” (2013) 5 *European Journal of Probation* 3. See also Jean Galbraith *et al*, “Poverty Penalties as Human Rights Problems” (2023) 117 *American Journal of International Law* 397 at 412–413.

47 For examples of possible practical problems, consider, by analogy, the remarks on Work and Development Orders in New South Wales in Luke McNamara *et al*, “Homelessness and Contact with the Criminal Justice System: Insights from Specialist Lawyers and Allied Professionals in Australia” (2021) 10 *International Journal for Crime, Justice and Social Democracy* 111 at 122. (But see also the discussion at 125 of potential benefits.)

48 This point was inspired by the case studies discussed by Julia Quilter & Russell Hogg, “The Hidden Punitiveness of Fines” (2018) 7 *International Journal for Crime, Justice and Social Democracy* 9 at 20–21.

49 *Tate v Short* 401 US 395 (1971) at n 5.

319(1)(b)(iv) of the CPC, namely, to order that the offender's property be seized and sold or debts due to the offender be garnished to pay the fine. These, together with the powers in ss 319(1)(b)(i)–319(1)(b)(ii) to extend the payment deadline or allow payment in instalments, may furnish a means for the offender to be punished monetarily and hence avoid being imprisoned. This would conserve public resources while minimising disruption to the life (and, perhaps, the rehabilitative prospects) of the offender (whom – it must be remembered – has been found only to deserve to be punished by paying a fine and not by incarceration).

E. Determining whether accused person is impecunious

51 One “difficult matter”⁵⁰ remains: How is the court to tell whether an accused person is genuinely unable to pay a fine? While this is a fact-sensitive inquiry, a key principle is that the offender bears the burden of proving his impecuniosity.⁵¹ This makes sense: it is the offender who is “in possession of all material facts regarding her own wealth and is asserting a negative”.⁵² The fact that the offender bears the burden of proof ought to pre-empt the possible objection that the court will be bogged down in an inquiry into the offender's financial means. This implies that the offender should be given ample notice of the opportunity to provide evidence, as well as the various options available to the court (such as allowing payment by instalments or payment through garnishment of wages).

52 On this note, the same can be said of evidence that the offender has debts owed to him or her or property that can be sold to raise funds to pay the fine: the offender should bear the burden of adducing such evidence, and also be put on notice of the opportunity to do so.

50 *Low Meng Chay v Public Prosecutor* [1993] 1 SLR(R) 46 at [13].

51 *Koh Jaw Hung v Public Prosecutor* [2019] 3 SLR 516 at [55]; *Attorney-General v Wham Kwok Han Jolovan* [2020] 3 SLR 482 at [112]; *Takaaki Masui v Public Prosecutor* [2021] 4 SLR 160 at [317]; *Tan Yan Qi Chelsea v Public Prosecutor* [2022] SGHC 275 at [17].

52 *Commonwealth [of Massachusetts] v Porter* 462 Mass 724 at 732–733 (2016), cited in *Commonwealth [of Massachusetts] v Kim Henry* 55 NE 3d 943 at 949 (2016), in turn cited in Cristina Rodrigues, “The Cost of Justice: The Importance of a Criminal Defendant's Ability to Pay in the Era of *Commonwealth v Henry*” (2018) 10 *Northeastern University Law Review* 204 at 238. The statutory context is quite different from that in Singapore, but the general principle stands. (The issue in the Massachusetts cases arose from a system where the courts would sentence offenders to probation, one condition of which was that the offenders pay certain sums as restitution. The problem was that offenders who were unable to pay would therefore be in violation of the terms of their probation, and therefore could face consequences such as having their probation revoked and subsequently being imprisoned: see Rodrigues at 245 *ff.*)

53 How can this evidence be received by the court in a relatively speedy manner? One possibility might be that the offender could be given the opportunity to fill in a form similar to the existing Affidavit of Assets and Means (in divorce cases) or Examination of Enforcement Respondent (formerly known as Examination of Judgment Debtor) questionnaire (in civil cases). This need not be made compulsory, but an offender who does not complete it runs the risk that the court assumes that the offender can afford to pay the fine (and, hence, imposes a relatively long default imprisonment term).

VI. Conclusion

54 There are much broader, much more complex conversations to be had about the appropriateness of fines as punishment,⁵³ as well as the appropriateness of imprisonment for those who cannot afford to pay fines.⁵⁴ It has not been the role of this article to address these questions, save that a few suggestions on the latter question have been made above in passing. It does, however, bear noting that in Singapore, even assuming it is not *per se* unconstitutional (as in the US) to “impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent, and cannot forthwith pay the fine in full”,⁵⁵ case law from the US does remind us that the value of equality – a principle no less significant in Singapore – is engaged. Society should, at the least, feel a tinge of regret when an impecunious person is imprisoned, not because the law says that he deserves to be imprisoned, but because the law says that he deserves to pay a fine which he cannot pay.

55 In response, this article has called for alternatives to be considered, and has made a small plea: that if imprisoning the offender is nonetheless the only possible way to punish him, the accused person’s sentence should nonetheless be recorded as a fine with a default imprisonment term, and not a sentence of imprisonment. That way, it will be clear that

53 See generally Julia Quilter & Russell Hogg, “The Hidden Punitiveness of Fines” (2018) 7 *International Journal for Crime, Justice and Social Democracy* 9 at 12–17.

54 For a flavour of possible arguments, see Milton J Valencia, “Scores of Indebted Become ‘Fine-Time’ Inmates”, *The Boston Globe* (6 November 2016). Of course, whether or not such arguments are in fact applicable in Singapore can only be established with further research.

55 *Morris v Schoonfield* 299 US 508 (1970) at 509, cited in *Tate v Short* 401 US 95 (1971) at 398. It is different if the accused person has “wilfully refused to pay the fine ... when he has the means to pay”, in which case “the State is perfectly justified in using imprisonment as a sanction to enforce collection”: *Bearden v Georgia* 461 US 660 (1983), cited in Cristina Rodrigues, “The Cost of Justice: The Importance of a Criminal Defendant’s Ability to Pay in the Era of *Commonwealth v Henry*” (2018) 10 *Northeastern University Law Review* 204 at 241.

the offender's imprisonment was *not* because the custodial threshold had been crossed for reasons relating to (say) the nature of the offence, and that what the offender deserved in the eyes of the law was simply to be fined.
