
The constitutionality of minimum mandatory sentencing regimes – Part II

Anthony Gray and Gerard Elmore*

In a 2012 issue of the Journal of Judicial Administration, the authors argued that there were real constitutional questions surrounding the increased use of minimum mandatory sentencing regimes. In 2013, Andrew Hemming wrote a rejoinder challenging aspects of the authors' reasoning in the earlier article. In the interests of public debate on such an important contemporary and contentious public issue, the authors now respond to Mr Hemming's rejoinder.

INTRODUCTION

In the 2012 article,¹ the authors summarised the increased use of mandatory sentencing regimes by governments around Australia, and placed their use in the context of real questions regarding the efficacy of such regimes as a response to criminal behaviour. There are real questions regarding whether the threat of mandatory sentencing in Australia is known to, and taken into account by, those involved in so-called “people smuggling”, which is the target of one recent example of the use of mandatory sentencing. It is hard to believe that, for example, a poor Indonesian fisherman, tempted by the offer of large amounts of cash to move some “cargo”, only to be later informed that the cargo he or she will be carrying is human cargo bound for Australia, and who might go along with it because they don't feel they can back out,² has read the Australian customs legislation containing the mandatory sentencing provisions, and so makes an informed decision. The authors mention this because Mr Hemming's response refers to the “need for consistency to maximise the deterrent effect of the [mandatory sentencing] legislation”.³ Deterrence is hardly an issue with respect to people such as Mr Bahar who would be most unlikely to be aware of the mandatory sentencing regime.

However, this article will focus not on the utility of such schemes in terms of criminal justice,⁴ but on the constitutional arguments that arise; and will particularly respond to the arguments presented by Mr Hemming. On a sidenote, as academics we always wonder about the extent to which our work is read by others.⁵ At the very least, Mr Hemming's contribution shows that the authors' work is being read by some. For that, the authors are grateful.

REFERENCE TO 19TH CENTURY PRACTICE IN THE COLONIES

Mr Hemming first makes reference to the use of mandatory sentencing in the colonies prior to federation. He uses this evidence to conclude that “there can be no suggestion that from the earliest colonial days, which predated the Australian *Constitution* by 113 years ... the administrators of the colonies and the Parliaments of the States could not mandate capital punishment, and now life

* Professor Anthony Gray, Deputy Head, University of Southern Queensland Law School and Gerry Elmore, Legal Research Officer, Office of the Director of Public Prosecutions and PhD candidate, University of Southern Queensland.

¹ Gray A and Elmore G, “The Constitutionality of Minimum Mandatory Sentencing Regimes” (2012) 22 JJA 37.

² This is not a naïve caricature, but taken from the facts in *Bahar v The Queen* [2011] WASCA 249, a case where the mandatory sentencing provisions relating to “people smuggling” were applied. The offenders were Indonesian nationals offered between one and three and a half million rupees for work involving moving “cargo”. They were not aware that the cargo involved were asylum seekers, or that the work would involve attempting to travel to Australia. When they agreed, they boarded a boat, and were taken to deep waters, where the cargo was loaded. The instigators gave the accused a map of Australia. The offenders had little education and were described as “economically vulnerable”.

³ Hemming A, “The Constitutionality of Minimum Mandatory Sentencing Regimes: A Rejoinder” (2012) 22 JJA 224 at 230.

⁴ Trotter A and Garozzo M, “Mandatory Sentencing for People Smuggling: Issues of Law and Policy” (2012) 36 MULR 553.

⁵ French R, “Judges and Academics: Dialogue of the Hard of Hearing” (2013) 87(2) ALJ 96.

imprisonment, for murder”.⁶ This is important to Mr Hemming’s argument given his assertion that “the *Constitution* was not written on a tabula rasa”.⁷ It appears the argument then is that if the colonies had mandatory sentencing pre-federation, the States (and the Commonwealth; for reasons that will follow it makes no relevant difference) can have mandatory sentencing post-federation.

Such an argument involves, in colloquial terms, comparing apples with oranges. The most fundamental difference in the current context is that colonial and State constitutions did not/do not contain a formal separation of powers.⁸ In that light, it would have been impossible to argue prior to federation that a mandatory sentencing regime breached separation of powers principles, by involving a legislature in what was a judicial function. Things changed in 1901 with the introduction of the *Australian Constitution*, which clearly does embody a formal separation of powers, and from which State parliaments’ ability to pass laws now derives.⁹ Many things that were constitutionally possible prior to 1901 became constitutionally impossible after it. Colonial customs and excise duties, and border tariffs, spring to mind. No-one seriously suggests that because colonies could levy excise prior to 1901, that States can levy them after 1901. Of course, State laws are subject to the *Commonwealth Constitution*, and there are numerous examples of State laws being found to be inconsistent with the separation of powers for which Ch III of the *Australian Constitution* provides.¹⁰

It is also true that constitutional doctrine develops. The 1996 decision in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 was a landmark in recognising that State laws could be declared invalid due to a breach of separation of powers principles; previously it had been believed that such a doctrine was limited to striking down federal laws. The court asserted the importance of an integrated court structure in Australia, not permitting different grades or qualities of justice depending on the court and the jurisdiction in which one happened to be,¹¹ and that the principle of an independent judiciary, and its role in preserving public confidence in our legal system,¹² was not of narrow application, but to be universally applied throughout our legal structure. This reasoning was certainly contentious, but clearly would have been considered to be anathema in the 19th century, when in any event there was no federal level of government, such that issues about the universality of legal principles across tiers of government could not have arisen. As a result, it seems odd to rely on “the way it was” in the 19th century to claim that that is the way it is, or should be, in the 21st century. Constitutional principle develops over time, as of course it should. We are not, and should not be, locked into 19th century practices, most especially when our constitutional structure, and case law, has fundamentally altered in the meantime. Just because something may have been constitutionally acceptable in the 19th century, does not mean that it is acceptable today.

DISAGREEMENT WITH OR ATTEMPTS TO MINIMISE THE KABLE DOCTRINE

Mr Hemming appears to disapprove of the *Kable* doctrine, though he does not say so in such terms. The authors draw this conclusion because of his direct quoting of a dissenting judge in that case,

⁶ Hemming, n 3 at 225.

⁷ Hemming, n 3 at 224.

⁸ “It is well accepted that the State constitutions do not entrench the position of State courts or the separation of judicial power”: *Hanks’ Australian Constitutional Law: Materials and Commentary* (9th ed, Lexis Nexis, 2013) p 1062; *Builders Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *South Australia v Totani* (2010) 242 CLR 1 at 45 (French CJ).

⁹ As French CJ said in *South Australia v Totani* (2010) 242 CLR 1 at 45: “the absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States”.

¹⁰ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1.

¹¹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J), 116 (McHugh J), 127 (Gummow J) (the other majority judge, Toohey J, did not refer to this issue). This reasoning was recently reiterated by six members of the High Court in *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 (French CJ and Kiefel J) and 229 (Gummow, Hayne, Crennan and Bell JJ).

¹² *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 98 (Toohey J), 107 (Gaudron J), 116 (McHugh J), 133 (Gummow J).

before a reference to the “powerful dissents” in the case. He then refers to a throwaway line by McHugh J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601 that the *Kable* principle is of limited application, followed by an apparent attack on the *Kable* doctrine by now-retired Heydon J.¹³ He uses these two sources for the conclusion that our earlier argument “faces High Court authority [emphasis added] that *Kable* is of ‘very limited application’ and that, as in the United States model, each State Parliament has a plenary power for ‘the peace, welfare and good government’ of its State”.¹⁴ Mr Hemming also finds it necessary to claim that, under the *Constitution*, the States have the (sole) constitutional responsibility for legislating with respect to crime.¹⁵

First, it is stretching language to describe McHugh J’s throwaway line that *Kable* is a doctrine of limited application as an “authority”. Further, virtually every principle has some limits to its application. Nor would we rely on Heydon J’s views on the *Kable* doctrine. The doctrine has been in existence for 17 years. It has recently been reaffirmed and applied by the High Court in striking down State legislation in South Australia (*South Australia v Totani* (2010) 242 CLR 1) and New South Wales (*Wainohu v New South Wales* (2011) 243 CLR 181; *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319). In *Totani*, this was essentially because the court was being commandeered by the legislature to participate in making a control order with respect to members of an organisation that the State attorney decided was dangerous. The court had no discretion. In *Wainohu*, the court was required to act in a non-judicial manner by not being able to provide reasons for its decisions. In *International Finance Trust*, the court was required to depart from procedural due process. In each case the State legislation was struck down by the High Court as being inconsistent with Ch III of the Commonwealth *Constitution*. In both cases the *Kable* principle was utilised. Mr Hemming does not refer to either of these cases in his article. We think most reasonable observers would suggest, in light of the 2009, 2010 and 2011 High Court decisions, that, if anything, the application of the *Kable* doctrine is expanding, rather than being in retreat as claimed. It may have been true at one time that the *Kable* doctrine was seen to be a “constitutional guard-dog that would bark but once”,¹⁶ but recent cases show a loosening of the vocal cords.

The other point that may be worth noting at this juncture is that Heydon J was in (sole) dissent in the *Totani* case. His Honour found no constitutional objection with legislation that *required* a court to make a control order against individual members of an organisation that had been declared by the State attorney-general to be a dangerous organisation, with no discretion in the court to refuse to make the order. The order would prevent, on pain of punishment, those subject to it from associating.

In this light, in our respectful view, it is dubious at best to rely on views of now-retired Heydon J as evidence of the acceptance or non-acceptance of the *Kable* doctrine in the current High Court, given High Court authority in 2009, 2010 and 2011.

Further, platitudes that States have plenary power to make laws for the peace, welfare and good government of the State do not advance the argument. No-one would disagree with such a principle. It

¹³ *Public Service Association and Professional Officers’ Association Amalgamated of NSW v Director of Public Employment* [2012] HCA 58 at [62] and [71] (the only judge in the case to do so).

¹⁴ Hemming, n 3 at 229.

¹⁵ In case the authors are accused of misquoting or misinterpretation, Mr Hemming’s own words: “There is no federal power under s 51 of the Australian *Constitution* to legislate for criminal laws which are the province of the States” (Hemming, n 3 at 227). First, this is not correct, as the existence of federal criminal legislation, such as the *Crimes Act 1914* (Cth), the *Criminal Code Act 1995* (Cth), *Anti-Terrorism Act 2004* (Cth) and *Anti-Terrorism Act (No 2) 2005* (Cth), to give some examples among many, will attest. Does Mr Hemming suggest that these laws are all constitutionally invalid, since they are clearly “criminal laws” of the Commonwealth, and are sourced from the powers listed in s 51? Second, it is of course not relevant to determine which level of government/s have power under the *Constitution* to legislate with respect to crime in the current context, since the *Kable* doctrine applies to courts (and parliaments) throughout Australia, including State courts and parliaments, as cases like *Kable* itself, *Totani* and *Wainohu* demonstrate.

¹⁶ *Baker v The Queen* (2004) 223 CLR 513 at 535 (Kirby J).

has State constitutional recognition. However, it does not render State laws immune from constitutional challenge, as 112 years of constitutional case law in Australia will attest.¹⁷

LIYANAGE PRINCIPLE

Mr Hemming attacks the authors' reliance on the *Liyanage* principle.¹⁸ He cites Brennan CJ in *Nicholas v The Queen* (1998) 193 CLR 173 at [28] for the proposition that the principle in that case applies only to legislation that is directed ad hominem, and does not apply to legislation of general application. In turn Brennan CJ cited three judges in *Leeth v Commonwealth* (1992) 174 CLR 455 at 469-470 for the proposition. With respect, the argument is misconceived. It is one thing to acknowledge, as the three judges did in *Leeth*, that ad hominem legislation was involved in *Liyanage*. It is quite another to claim, as Brennan CJ does in *Nicholas*, that the principles discussed in the case apply *only* to that context. With respect, this is argued to be an unduly narrow reading of the precedent. First, the case is classically known as a separation of powers case.¹⁹ Second, the Privy Council in *Liyanage* specifically stated that the mere fact that legislation is ad hominem in nature does not mean that the separation of powers principle has been breached.²⁰ As a result, it seems somewhat odd to these authors that it can be maintained that the precedent stands only for cases involving ad hominem legislation, when the Privy Council in that very case said that this was not a determining factor. The Privy Council went on to say that the legislation was invalid because:

the judges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment ... even though his part in the conspiracy might have been trivial.

So, contrary to Mr Hemming's assertions that the case is irrelevant to the current discussion, the authors maintain that *Liyanage* is highly relevant for what it says about the principles of separation of powers, and its recognition that ordering courts to mandatorily impose minimum jail terms is an example of a type of law that can infringe the principle of separation of powers. It does not turn on whether the legislation is ad hominem or not. Ad hominem legislation may be a worse example of such an infringement, but not the only kind.

CRITICISM OF AUTHORS' RELIANCE ON UNITED KINGDOM "FAIR TRIAL" JURISPRUDENCE

Mr Hemming criticises the authors' reliance on the United Kingdom case of *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, in which the court upheld an appeal against legislation allowing the Home Secretary to "fix a tariff" (in other words, a minimum term of imprisonment) for particular offences. The House of Lords declared that this legislation was contrary to the right to a fair hearing contemplated by Art 6 of the *European Convention on Human Rights*. Mr Hemming then claims that "Australia has no equivalent to the *Convention*".²¹

¹⁷ French CJ makes the same point in *South Australia v Totani* (2010) 242 CLR 1 at 45-46: "Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics [having just referred to independence, impartiality, fairness and openness as essential characteristics of state courts]. ... The Parliament of a State does not have authority to enact a law which deprives a court of the State of one of its defining characteristics...".

¹⁸ Hemming, n 3 at 232; *Liyanage v The Queen* [1965] 1 All ER 768 (Privy Council).

¹⁹ For instance, the case is referred to in *Hanks' Australian Constitutional Law*, n 8, p 1062 in that context. Gummow J in *Nicholas v The Queen* (1998) 193 CLR 173 at 233 recounts that the "'pith and substance' of the legislation which gave rise to *Liyanage v The Queen* was an attempt by the legislature of Ceylon 'to circumscribe the judicial process on the trial of particular prisoners charged with particular offences on a particular occasion and to affect the way in which judicial discretion as to sentence was to be exercised so as to enhance the punishment of those prisoners'. That legislation was held to be invalid. There was a 'marked interference with the judicial process and [the legislation] circumscribed the judicial function and the discretions incidental to it'".

²⁰ For the record, "legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary", according to the Privy Council.

²¹ Hemming, n 3 at 233.

Australia is a signatory to the *International Covenant on Civil and Political Rights*, Art 14 of which confers a right to a fair hearing. Further, five members of the High Court of Australia in *Dietrich v The Queen* (1992) 177 CLR 292 found that the right to a fair trial was fundamental to the Australian legal system.²² Some of these judges based this right on the implicit requirement of Ch III of the *Constitution*.

In the recent High Court decision in *Wainohu*, French CJ and Kiefel J refer to procedural fairness as being a defining characteristic of a court. Gummow, Hayne, Crennan and Bell JJ expressly agreed with comments by Gaudron J in an earlier case that confidence in judicial officers depended on their acting in accordance with “fair and proper procedures”.²³ Heydon J assumed these statements were correct, for the purposes of argument. In *International Finance Trust* the High Court determined the regime to be offensive to the so-called *Kable* principle discussed above. Gummow and Bell JJ pointed to the conscription of the judiciary into mandatory ex parte sequestration of property, lack of full disclosure and a reverse onus. They concluded this involved the court in an activity “repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia”.²⁴ Another way of expressing this would have been to say that these features of the proceedings meant that the proceeding was not a “fair” one; in other words, the result and the reasoning is similar to what would have occurred if the *Dietrich* notion of a fair trial had been applied.

In another in this line of cases, *Totani*, French CJ repeatedly used the word “fair” in considering the requirements of the system of courts for which Ch III provides.²⁵ He indicated that fairness was a defining characteristic of courts.²⁶ His judgment in *International Finance Trust* similarly refers to requirements of “fairness” in invalidating, as contrary to Ch III of the *Constitution*, provisions requiring substantial departure from typical judicial process.²⁷ Fairness was also expressed as a relevant concept by the New South Wales Court of Appeal in a recent decision concerning mandatory sentencing laws.²⁸

With respect, then, it is misconceived to deny that fair trial jurisprudence is relevant to consideration of constitutional issues in Australia, when the High Court has repeatedly reaffirmed the fundamental importance of “fairness” as a defining characteristic of the way in which courts function

²² *Dietrich v The Queen* (1992) 177 CLR 292 at 298 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J) and 362 (Gaudron J).

²³ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 22: “the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the court in which that power is vested. And public confidence depends on ... their acting openly, impartially and in accordance with fair and proper procedures”.

²⁴ *International Finance Trust v New South Wales Crime Commission* (2010) 240 CLR 319 at 367.

²⁵ *South Australia v Totani* (2010) 242 CLR 1 at 43.

²⁶ *South Australia v Totani* (2010) 242 CLR 1 at 43 (“courts of the States continue to bear the defining characteristics of courts, and in particular ... fairness”), 45 (referring to “fairness” as an essential characteristic of courts), 47 (referring to “procedural fairness” as being central to the judicial function); in the Full Court of South Australia decision in *Totani*, Bleby J, with whom Kelly J agreed, referred in his reasons for invalidating the legislation the fact that the control order regime denied “the right to a fair hearing” (2009) 105 SASR 244 at 283. In *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at 447 Fry LJ spoke of fairness as characteristic of proceedings in courts; see also *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 (Gaudron J).

²⁷ *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 at 338 (explaining that the section was invalid because it “restricts the application of procedural fairness in the judicial process”), 354 (“procedural fairness lies at the heart of the judicial function”). See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at [177] (Gageler J describing procedural fairness as an immutable characteristic of courts).

²⁸ *Karim v R* [2013] NSWCCA 23 at [120-121] where Allsop P alluded to possible constitutional arguments against mandatory sentencing on the basis that their arbitrary, gross disproportionality and cruelty offended the kind of fairness, justice and equality inherent in the exercise of judicial power. All other members of the New South Wales Court of Criminal Appeal agreed (Bathurst CJ, McClellan CJ at CL, Hall and Bellew JJ); see also French R: “contentious questions of public policy can arise when judicial discretion is reduced or removed as in the case of so-called mandatory minimum sentences which can produce unintended injustices because they do not allow, as justice requires, different cases to be treated differently”: “Essential and Defining Characteristics of Courts in an Age of Institutional Change” (21 January 2013).

in Australia. Does Mr Hemming doubt the correctness of any of the above statements, or argue that individuals do not have, or should not have, the right to a fair hearing in Australia?

Mr Hemming then claims that despite the “fair trial” requirement of the European Convention not being applicable to Australia, even if it were, “a tribunal which did meet the criteria spelt out in Article 6 would suffice”.²⁹ We are not entirely sure of the criteria to which Mr Hemming refers – it may be the reference in Art 6 to the need for an independent and impartial tribunal established by law, since no other parts of the Art 6 refer to characteristics of the tribunal. But this begs the question – the argument, accepted by the House of Lords in *Anderson*,³⁰ was that when it is not the court that imposes the sentence, but in effect someone other than a member of the judiciary, the requirement of a fair hearing before an *independent and impartial* tribunal is not met. That cannot be fixed.

Nor are Mr Hemming’s efforts to distinguish the *Anderson* precedent from minimum mandatory sentencing (“one is in camera, ad hominem and ex post, while the other is subject to the full glare of Parliamentary scrutiny, is of general application and is ex ante”)³¹ convincing. First, the court in that case specifically equated “fixing the tariff” with imposition of sentence.³² It is not just these authors who have done so. Second, at the risk of labouring the point once again, and expressing it in terms as simply as possible – the problem is that a body that is not the judiciary is telling the judiciary what to do, and generally that is not favoured, for a number of very good reasons. This principle is consistent through the *International Covenant on Civil and Political Rights*, the *European Convention*, the *Universal Declaration of Human Rights* and the *Australian Constitution*. It really does not matter whether the invasion of that principle occurs in camera or is subject to parliamentary scrutiny, whether it applies to one person or a number, or whether it applies before the fact or after. They are all red herrings. The existence of parliamentary scrutiny, of course, did not save the legislation in *Kable* or *Totani* or *International Finance Trust* from constitutional invalidity. Nor could it, unless the High Court is to abandon its role in interpreting the *Constitution* and in assessing constitutional validity to some parliamentary committee.³³ For example, the legislation in *Totani* was apparently broad on its face, not applicable to any named individual or group. And that legislation was “ex ante”. Correctly, with respect, the High Court declared that law bad. Evidently, these factors are inconclusive in terms of constitutionality. The principle remains the same regardless of parliamentary scrutiny, and the principle must be protected and respected.

SENTENCING AS AN EXCLUSIVELY JUDICIAL FUNCTION

Surprisingly to these authors, Mr Hemming appears to dispute the view of sentencing as an exclusively judicial function. He cites one judge, McHugh J, who in *Fardon* did claim that there was no constitutional objection to allowing non-judicial tribunals to sentence offenders.³⁴ Again, after referring to United States authority, Mr Hemming concludes “there is nothing sacrosanct in sentencing being the exclusive preserve of the judiciary”,³⁵ and also claims “there is nothing in the *Australian Constitution* ... and Ch III in particular, to indicate parliamentary control of sentencing impacts in any way on the ‘autochthonous expedient’”.³⁶

On the other hand, there is weighty authority pointing in the other direction. McHugh J himself in *Nicholas v The Queen* referred to the courts having an “*exclusive* [emphasis added] function of the

²⁹ Hemming, n 3 at 233.

³⁰ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [50] (Lord Bingham).

³¹ Hemming, n 3 at 233.

³² *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [50] (Lord Bingham).

³³ The analogy of placing the wolf in charge of the chicken pen comes to mind.

³⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 600.

³⁵ Hemming, n 3 at 232.

³⁶ Hemming, n 3 at 227.

adjudgement and punishment of criminal guilt”,³⁷ and he has noted that a “proceeding which requires ... the imposition of punishment following ... determination [of guilt] is a traditional exercise of judicial power”.³⁸ Griffith CJ spoke of impositions of penalties and punishments as being matters “appertaining *exclusively* [emphasis added] to [judicial] power”.³⁹ In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ refer to the “*exclusively* [emphasis added] judicial function of adjudging and punishing criminal guilt”.⁴⁰ In *Reyes v The Queen* [2002] UKPC 11 at [47], Lord Bingham, for the court, concluded “a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for a crime he has committed”. Does Mr Hemming suggest that these authorities are incorrect? They are surely inconsistent with his claim that “there is nothing sacrosanct in sentencing being the exclusive preserve of the judiciary”. Would Mr Hemming be comfortable with the abolition of courts, followed by an introduction of measures allowing Parliament and/or the Executive to administer powers traditionally carried out by the judiciary, of which sentencing, together with assessment of innocence or guilt, is traditionally paramount?

The related point is that, generally, courts don’t like being told by Parliament what to do, as decisions like *Lim* and *Totani* demonstrate. As Gummow, Hayne, Heydon, and Kiefel JJ put it in *Gypsy Jokers Inc v Commissioner of Police* (2008) 234 CLR 532 at 560:

Legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of courts as independent and impartial tribunals.

The same objection arose in *International Finance Trust v New South Wales Crime Commission*.⁴¹

The joint reasons in *Lim* drew the following distinction:

It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the *Constitution* to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the *Constitution*, including Chapter III itself, entrusts to the

³⁷ *Nicholas v The Queen* (1998) 193 CLR 173 at 220; in the same case at 186, Brennan CJ: “one of the exclusively judicial functions of government is the adjudgement and punishment of criminal guilt”; Gummow J (at 231) (“the imposition of penalties and punishments are matters appertaining exclusively to the judicial power” (quoting Griffith CJ in *Waterside Workers*) and Hayne J (at 278) (“nothing in [the Act] purports to take any question of adjudging or punishing criminal guilt under a law of the Commonwealth away from the courts”). Mr Hemming seems to think it makes a difference that these comments made by McHugh J were in the context of a federal law (Hemming, n 3 at 228). Surely the point of the *Kable* decision is that these principles are of universal application; we don’t have different rules applicable at federal and State level in terms of fundamental questions such as separation of powers. Obviously, separation of powers includes questions like what courts do, and what parliaments do. Brennan CJ recognised this expressly in *Nicholas*: “the function of adjudication and punishment of criminal guilt under a law of the Commonwealth can be exercised only by those courts in which the necessary jurisdiction is vested pursuant to Chapter III of the Constitution. Those courts include, relevantly for present purposes, the County Court of Victoria” (at 186-187).

³⁸ *Re Woolley* (2004) 225 CLR 1 at 23.

³⁹ *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444.

⁴⁰ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27; referring to judicial power, they said its most important aspect was the adjudgement and punishment of criminal guilt: “that function appertains exclusively to, and could not be excluded from, the judicial power of the Commonwealth”; see also *Nicholas v The Queen* (1998) 193 CLR 173 at 186 (Brennan CJ), *Re Tracey; Ex parte Ryan* (1988) 166 CLR 518 at 580 (Brennan J); Mason CJ in *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 537 stated it in negative terms: “a statute which contains no declaration of guilt and does not impose punishment for guilt is not a usurpation of judicial power”; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at [39] (Lord Steyn); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 609-610 (Gummow J) and 650 (Hayne J). Kirby J in *Baker v The Queen* (2004) 223 CLR 513 at 547 (dissenting) found that an “attempt to involve the judiciary in the performance of punitive decisions effectively already determined by parliament itself” was offensive to the *Kable* doctrine.

⁴¹ *International Finance Trust v New South Wales Crime Commission* (2009) 240 CLR 319 at 338: “[the Act] requires the Supreme Court to hear and determine, without notice to the persons affected, applications for restraining orders made ex parte by the Commission. For that reason, the section impermissibly directs the Court as to the manner and exercise of its jurisdiction and restricts the application of procedural fairness in the judicial process and conditions its full application upon a discretion exercised by the Executive branch of the government of New South Wales” (French CJ).

Parliament. The latter constitutes an impermissible intrusion into the judicial power which Chapter III vests exclusively in the courts.⁴²

Surely, a law prescribing a minimum mandatory sentence which a court, regardless of the individual circumstances, must impose, fits within the latter category of a law purporting to direct the courts as to the manner and outcome of the exercise of their jurisdiction, on a matter that the judges have found to be an exclusively judicial function.

PARLIAMENTARY SUPREMACY?

In his last paragraph, Mr Hemming makes reference to Diceyan theory to support his argument: “The net result of the foregoing is to confirm the supremacy of Parliaments and legislatures, not only in Australia but also in countries that share a similar common law legal tradition”.⁴³

The authors would remind Mr Hemming of three references. First, the following observation by a unanimous High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ): “the *Constitution* displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature”. Second, four members of the High Court in *Attorney-General of Western Australia v Marquet* (2003) 217 CLR 545 at 570 (Gleeson CJ, Gummow, Hayne and Heydon JJ) noted that “unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty”. Third, most recently in *Momcilovic v The Queen* (2011) 245 CLR 1 at 84, Gummow J referred to principles of parliamentary sovereignty as “speaking to a non-Australian universe of constitutional discourse”. Does Mr Hemming argue that these judges are incorrect?

The authors are not exactly sure of the countries to which Mr Hemming refers in his reference to countries which share a common law legal tradition, though in his article he refers to Canadian law and United States law, as well as the United Kingdom. Though the notion of parliamentary sovereignty may have been true of the United Kingdom Parliament at one time, this has come to be doubted in that jurisdiction.⁴⁴ With respect to the United States, of course it is not sensible to refer to the doctrine when speaking of that country, in the context of a written Bill of Rights, and 200 years of acceptance of the notion of judicial review and the ability of courts to declare laws to be unconstitutional,⁴⁵ including, of course, State laws, contrary to the Bill of Rights.⁴⁶ Indeed, any defender of the doctrine of Parliamentary sovereignty would do well to explain how it is consistent with the doctrine of judicial review, a doctrine accepted of course in countries with a written *Constitution*, such as Canada, the United States and Australia. Dicey himself acknowledges this point, and a close reading of Dicey’s work bears this out.⁴⁷

In terms of Dicey’s principle of parliamentary sovereignty upon which Hemming relies, Dicey himself gave three characteristics of a sovereign law-making body: (a) there was no law which the body could not change; (b) there was no distinction between fundamental (or constitutional) laws and non-fundamental laws; and (c) no body could pronounce void any enactment passed by the sovereign

⁴² *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37 (Brennan, Deane and Dawson JJ).

⁴³ Hemming, n 3 at 234.

⁴⁴ *R (Jackson) v Attorney-General* [2006] 1 AC 262 at 302 (“The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom” (Lord Steyn); “Parliamentary sovereignty is no longer, if it ever was, absolute” (Lord Hope, 303-304).

⁴⁵ *Marbury v Madison* 1 Cranch 137; 5 US 137 (1803), referred to with approval by Fullagar J in the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 263).

⁴⁶ Most of the United States Bill of Rights has been held applicable to the States: Baugh, “Applying the Bill of Rights to the States” (1998) 49 *Alabama Law Review* 551; Crosskey W, Fairman C, “Legislative History and the Constitutional Limitations on State Authority” (1954) 22 *University of Chicago Law Review* 1; Gray A, “Applying Provisions of the Australian Constitution to Protect Rights From Intrusion by State Parliaments” (2011) 18 *AJ Admin L* 229.

⁴⁷ Dicey AV, *An Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1926).

body on the basis that it was contrary to the *Constitution*.⁴⁸ At the very least, neither (a) nor (c) applies in Australia. The Australian Parliament cannot change the *Constitution*, and in respect of (c), of course the Australian High Court can declare a law to be invalid as being contrary to the *Constitution*. Considering the United States system of governance, Dicey concluded (correctly, in the authors' opinion) that his doctrine of parliamentary sovereignty was not applicable to the United States Congress:

Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence; no legislature throughout the land is more than a subordinate law-making body capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of judges is not only the guardian but also at a given moment the master of the *Constitution*.⁴⁹

Note Dicey's assessment of the United States Congress as a "subordinate law making body", finding that it was the United States Supreme Court ("The Bench") that was sovereign, given it had the final say on the constitutionality of Congress' laws. Obviously, these observations are directly applicable to the Australian system of government. Australia has accepted judicial review, a principle surely implicit in a written *Constitution*. Dicey never turned his attention to the Australian Parliament or that of State Parliaments within Australia, but if he had, he surely would have reached the same view as he had of the United States Congress, in that they were not sovereign law-making bodies in the sense that was at least at one time true with respect to the United Kingdom Parliament. If further authority is needed, Sir Owen Dixon confirmed that notions of parliamentary sovereignty were applicable (only) to the Parliament at Westminster.⁵⁰

In summary, any argument based on parliamentary sovereignty in Australia is inconsistent with High Court authority in *Lange* and *Marquet*, contrary to the stated views of Sir Owen Dixon, and not consistent with the stated criteria for the application of the doctrine by the author usually credited for recognition (creation?)⁵¹ of the principle, Albert Dicey, because the Australian Parliament does not meet at least two of the three conditions that Dicey himself prescribed as being hallmarks of a parliament that was sovereign. No proponent of parliamentary sovereignty as being applicable to the Australian Parliament can or should rely on the work of Dicey, given these three criteria. Further, they should explain how parliamentary sovereignty is consistent with the notion of judicial review and a written constitution under which parliaments make laws. Suffice to say, Mr Hemming's reliance on notions of parliamentary supremacy is also misconceived.

PROPORTIONALITY

The authors also argue that proportionality in sentencing is undermined by mandatory sentencing.⁵² Mr Hemming introduces proportionality in his article and thus accepts in the exercise of judicial discretion, in terms of sentencing, "a balancing process is adopted".⁵³ We agree with this view, and it reflects the authorities on point.

⁴⁸ Dicey, n 50, pp 84-87.

⁴⁹ Dicey, n 50, pp 170-171.

⁵⁰ Dixon O, *Jesting Pilate and Other Papers and Addresses* (Law Book Co., 1965) p 200.

⁵¹ de Walker G, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion" (1985) 59 ALJ 276; Allott P, "The Courts and Parliament: Who Whom?" (1979) 38 *Cambridge Law Journal* 79 at 114; Marshall G, *Parliamentary Sovereignty and the Commonwealth* (Clarendon Press, Oxford, 1957); Allan T, "Parliamentary Sovereignty, Law, Politics and Revolution" (1997) 113 *Law Quarterly Review* 443 at 445; Goldsworthy J, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999); Fitzgerald B, "Proportionality and Australian Constitutionalism" (1993) 12 *University of Tasmania Law Review* 263 at 265; Gray A, "The Common Law and the Constitution as Protectors of Rights in Australia" (2010) 39 *Common Law World Review* 119 at 145-149.

⁵² "[T]he main perceived problem with the people smuggling laws is that they violate the proportionality principle": Bagaric M, "The Rift Between the Judiciary and Parliament Over Mandatory Prison Terms for People Smugglers" (2012) 36 *Crim LJ* 3.

⁵³ Hemming, n 3 at 243.

In *Veen (No 2) v The Queen* (1988) 164 CLR 465 the High Court affirmed Australia's position with respect to the doctrine of proportionality in ruling:

The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen (No 1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.⁵⁴

Mr Hemming's view of proportionality, however, is misconceived. For instance, he asserts a "floor under the judge's sentencing discretion"⁵⁵ ensures proportionality is maintained. The authors understand this to be his argument with respect to proportionality, as he claims in the absence of any such floor "sentencing outcomes are inconsistent".⁵⁶ Mr Hemming refers to *Bahar v The Queen* (2011) 214 A Crim R 417 and *R v Karabi* [2012] QCA 47 in support of his argument.⁵⁷ In citing a passage from *Bahar*, Mr Hemming claims that as the court in that case accepted that the mandatory minimums "are the floor and ceiling respectively within which the sentencing judge has a sentencing discretion", there is a general acceptance that the practice of mandatory sentencing ensures consistency (proportionality) in sentence outcomes.⁵⁸ Mr Hemming adopts a narrow view of the proportionality principle; in essence, he is arguing it is a simple matter of arithmetic. If judges are given a floor, he claims, there is less probability of discrepancy in sentencing; hence, he argues, mandatory sentencing leads to consistency with regards to the "sentence outcome".⁵⁹ This view presupposes proportionality is a mathematical question of consistency, a view the authors reject.

Proportionality is achieved where the "punishment... fit[s] the crime".⁶⁰ As far as mandatory sentences are concerned, there is a presumption in favour of universality in criminality – "the crime". This presumption undermines judicial function insofar as it erodes its capability to adjust sentences where there are significant factors of mitigation. On this point, Kelly J of the Supreme Court of the Northern Territory, in sentencing an offender under the *Migration Act 1958* (Cth), s 233C (the same provision referred to in *Bahar*), commented:

Taking into account all of those matters which are set out in s 16A(2), I would not consider it appropriate to hand down a sentence anywhere near as severe as the mandatory minimum sentence of eight years imprisonment nor would I consider it appropriate to fix a non-parole period as long as five years. Such a sentence is completely out of kilter with sentences handed down in the Court for offences of the same or higher maximum sentences involving far greater moral culpability, including violence causing serious harm to victims.⁶¹

For this reason, Slicer J of the Tasmanian Court of Criminal Appeal expressed the view that "[i]t is impossible to allocate to each relevant factor a mathematical value and from that, extrapolate a sum which determines the appropriate penalty".⁶² Proportionality is upheld where there is a consistent consideration of relevant factors: age, criminal history, circumstances of offending, mental capacity etc. If, after consideration of relevant factors, a sentence is reached, that sentence, is, the authors contend, likely to be "consistent". Indeed, Mr Hemming admits that a "court's custom and practice builds up a sentencing range for a particular offence which will withstand a Crown appeal that the sentence is manifestly inadequate and a defence appeal that the sentence is manifestly excessive".⁶³ For that reason consistency should not, as is argued by Mr Hemming, be understood as an exercise of

⁵⁴ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson, Toohey JJ).

⁵⁵ Hemming, n 3 at 234.

⁵⁶ Hemming, n 3 at 234.

⁵⁷ Hemming, n 3 at 230.

⁵⁸ Hemming, n 3 at 229.

⁵⁹ Hemming, n 3 at 234.

⁶⁰ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 486 (Wilson J) affirmed in *R v Aston (No 2)* [1991] 1 Qd R 375 at 380-381.

⁶¹ *R v Nafi* (Unreported judgment, 19 May 2011) at [6]; *Nafi v The Queen* (2012) 269 FLR 1 upheld the appeal against sentence.

⁶² *Pavlic v The Queen* (1995) 5 Tas R 186 at 202 (Slicer J).

⁶³ Hemming, n 3 at 234.

comparison of sentence outcomes from which artificial conclusions are inferred regarding such consistency; rather, consistency is a product of comparison of sentencing methodology. In the former case, consider an occasion where six offenders are each sentenced to 12 months' imprisonment pursuant to *Criminal Code 1913* (WA), s 401(4) – to use Mr Hemming's legislative reference.

Section 401(4)(a) requires the court to sentence the offender to at least 12 months' imprisonment, despite any other law.⁶⁴ Mr Hemming would argue that the section will ensure consistency in sentencing as each person convicted a "third time of entering a home without permission" with circumstances of aggravation, and will receive equal punishment. The authors disagree. Surely, factors such as the offender's age are relevant. It makes a difference, or it should, whether the offender is 18 or 35. Further, other matters deserve consideration, including the time that has elapsed between the commission of each crime, whether the victim was at home at the time, what was taken, if anything, whether violence was used or threatened, circumstances of the offender/s etc. This obviously raises issues of parity. Parity is a duty of judicial discretion. In *Lowe v The Queen* (1984) 154 CLR 606 Mason J (as he was then) referred to the policy of parity:

Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.⁶⁵

Lowe does not favour Mr Hemming's view of proportionality. *Lowe* affirms the authors' view that proportionality is a judicial exercise, an exercise which is compromised by mandatory sentencing regimes. The authors argue that mandatory sentencing provisions, like s 401(4), result in "unjustifiable discrepancy in sentencing ... [which is] a matter of abiding importance to the administration of justice and to the community".⁶⁶ Five judges in *Chester v The Queen* (1988) 165 CLR 611 reaffirmed the importance of proportionality in sentencing.⁶⁷

Recently, the New South Wales Court of Criminal Appeal in *Karim v The Queen* [2013] NSWCCA 23 noted the disproportionality aspect of minimum mandatory sentencing provisions, concluding that those subject to it might legitimately conclude they had been treated in a grossly disproportionate, arbitrary and/or cruel manner.⁶⁸ Allsop P for the court indicated that this could be the basis for an argument about the constitutionality of such legislation, but declined to decide this way in light of a 1945 High Court decision.⁶⁹ Recently, the High Court granted special leave to appeal the *Karim* decision.

Mandatory sentencing regimes are a gross violation of the fundamental principles of proportionality and parity in sentencing. Proportionality in sentencing is fundamental in terms of achieving parity between offenders.⁷⁰ Mandatory sentencing regimes, while perhaps establishing numerical consistency in sentencing, nevertheless undermine the judicial discretion ordinarily enjoyed by a sentencing judge to decrease a sentence where there is evidence of mitigation. Sentencing is a matter of judicial discretion, a discretion which the authors argue is exclusively judicial. To this end a

⁶⁴ *Criminal Code 1913* (WA), s 401(4)(a).

⁶⁵ *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 (Mason J).

⁶⁶ *Lowe v The Queen* (1984) 154 CLR 606 at 610-611 (Mason J).

⁶⁷ "[T]he fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender": *Chester v The Queen* (1988) 165 CLR 611 at 618 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ); *Hoare v The Queen* (1989) 167 CLR 348 at 354.

⁶⁸ *Karim v R* [2013] NSWCCA 23 at [120]-[121], Allsop P, with whom all members of the court agreed.

⁶⁹ He did not decide this issue, believing he was constrained by the earlier High Court decision in *Fraser Henlems Pty Ltd v Cody* (1945) 70 CLR 100. However, *Fraser Henlems* was decided more than 50 years prior to the *Kable* decision, where real significance was given to the implications of Ch III of the *Constitution*. As a result, its continuing correctness is a matter of some contention, as the High Court appeal in *Karim* will surely consider.

⁷⁰ *R v Goodall* [2013] QCA 72 at [17]; *R v Smith* [1999] QCA 250; *R v Berton* [2009] QCA 68.

legislative provision which mandates proportionality is effectively mandating the scope of the judicial discretion which is unconstitutional insofar as it offends Ch III of the *Constitution*.

The authors derive further support for these arguments from recent American jurisprudence. United States Supreme Court justices have clarified that fundamental to a just sentencing process is individualised sentencing,⁷¹ not possible with mandatory minimum sentencing. The Supreme Court has recently reconfirmed these fundamental principles. In *Miller v Alabama* 132 S Ct 2455 at 2463 (2012), a majority of the court held that punishment needed to be graduated and proportional to the offender and the offence, such that sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty were not acceptable.⁷² This reflected similar sentiment expressed in *Graham v Florida* 130 S Ct 2011 (2010).⁷³

CONCLUSION

The growing use of minimum mandatory sentencing regimes triggers important philosophical, legal and constitutional issues. Quite apart from their highly questionable utility in actually deterring crime, their constitutionality is open to serious question. The mere fact that they were used prior to federation is not a reason to constitutionally justify them today, given that the principle of separation of powers was formally enshrined in the Australian *Constitution* in a way that was never a feature of colonial constitutions. In addition, authorities since *Kable* have confirmed the integrated nature of the court structure in Australia, and the fact that courts cannot be asked to exercise power in such a way as to undermine their independence or perception of their independence. Recent case law demonstrates the *Kable* principle to be growing in importance, not in retreat, as its opponents might hope. Attempts to deny that Australian law recognises the right to a fair hearing or fair process are unconvincing, and clearly contrary to *Dietrich* and subsequent case law. There is weighty authority in support of the proposition that sentencing is an exclusively judicial function, and authority that courts do not generally like being told how to exercise their discretion, for good reason. Mandatory sentencing is likely to lead to judges imposing disproportionate sentencing, undermining fundamental sentencing principles which it is the courts' responsibility to uphold. Any reference to parliamentary supremacy in the Australian context is misconceived, as two High Court decisions in the past 16 years, and any close reading of Dicey's actual words, will attest.

⁷¹ *Lockett v Ohio* 438 US 586 (1978); *Woodson v North Carolina* 428 US 280 at 303 (1976); *United States v Booker, United States v Fanfan* 543 US 220 (2005). In *Booker* the court held that sentencing guidelines issued by the Sentencing Commission could only be treated as guidelines, rather than be mandatory. In so doing, it insisted that courts must be able to punish based on the "real conduct" of the offender and reaffirmed Congress' policy of creating consistency in sentencing similar types of offender.

⁷² *Miller v Alabama* 132 S Ct 2455 at 2463 (2012) (Kagan J, with whom Kennedy, Ginsburg, Breyer and Sotomayor JJ joined); *Pepper v United States* 131 S Ct 1229 (2011); Easton S and Piper C, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, 2012); Spohn C, *How Do Judges Decide* (Sage Publications, 2009) Ch 6, "The Sentencing Reform Movement".

⁷³ *Graham v Florida* 130 S Ct 2011 (2010), "the concept of proportionality is central to the Eighth Amendment ... [it is a] precept of justice that punishment for a crime should be graduated and proportioned to the offence" (Kennedy J, with whom Stevens, Ginsburg, Breyer and Sotomayor JJ joined); *Weems v United States* 217 US 249 (1910).