Mandatory sentencing: rights and wrongs

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It is not the function of universities to engage in political partisanship, or to take sides in a public debate in which reasonable people of goodwill are aligned, or might be aligned, on the opposing sides. But it is manifestly the function of a university to expose subjects of public interest or controversy to scholarly examination, to question public assumptions, to pierce the rhetoric which often times covers matters of controversy, to spell out the implications of endorsed policies, and to reveal the true issues for public consideration. The performance of this function will itself often be controversial, perhaps alienating to some. But universities are and should be the exemplars of freedom of thought, and the performance of this function is one of the chief justifications for academic freedom.

I thank, therefore, the University, for arranging this seminar, which is on a subject of great importance to Australia. I thank particularly Dato' Param Cumaraswamy, who has come here under circumstances of some difficulty, as we have heard, to lay out the various grounds of consideration of this difficult topic, and to display for us with the wealth of his international experience, the nature of the problem from the international perspective. Sir Anthony Mason has indicated that there are perhaps no constitutional grounds, or no substantial constitutional grounds, for challenging the validity, even under the federal constitution, of mandatory sentencing regimes. It is of course unusual, and in general undesirable, as Sir Garfield Barwick said, that the court should not have a discretion in the imposing of penalties.

There may be one exception to that general proposition — an exception that is now happily irrelevant in this country. In England, before capital punishment was abolished, the judiciary was said to be comforted by the mandatory character of the dread sentence, which they were required to impose on conviction for murder. Judges could not have borne the responsibility of condemning another person to die if they had had a discretion as to the sentence to be imposed. But the morality and legitimacy of condemning a person to death are in a different area of discourse from the morality and legitimacy of sending a person to jail.

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We have been grateful for the contributions that have been made by Dr Brendan Nelson, and from Mr Foss as Attorney General for Western Australia. It seems that the Commonwealth does not seek to override State or Territory laws enacting mandatory sentencing because of three reasons: States and Territories are best situated to deal with the problem of criminal punishment in repeat offenders; laws enacted by legislatures have been enacted by those legislatures being democratically elected; and in reaching its decisions, the Federal Government should not be influenced in this case by international views.

Mr Foss notes that the United Nations committees in this connection have not called on the Government of Western Australia for comment on the mandatory sentencing regime of that State. However, international bodies are constrained necessarily to deal with States Parties which have international personalities. And it would be a matter of great regret if submissions that have been made by the Federal Government to United Nations agencies have not reflected inputs that have come from the States or Territories concerned.

The Western Australian system has been distinguished from the Territory system, and that is a matter which I need not go into. What is obvious, however, is that both Dr Nelson and Mr Foss agree that, to the extent that mandatory sentencing affects Aboriginal people, the real problems are the underlying socio-economic issues. But, as Dr Zdenowski has pointed out, it is a non sequitur that mandatory sentencing should be maintained when it seems that it may compound the very problems which are said to be the underlying causes of these difficulties.

The justification of a practice which depends on the public will, or the democratic will, must itself receive some examination. Chief Justice Spigelman has pointed out that the nature of sentencing is such as to require the consideration of balancing, overlapping, contradictory, and incommensurable objectives, as it has always been thus. In other words, there will be times when justice can be achieved only by consideration of the circumstances of the individual case. Dato' Param has indicated that many of the mandatory sentencing provisions are in breach, or may be in breach, of international conventions — or at least of international standards. And that is a view which has been agreed with by Dr Pritchard and Dr Ward.

It seems, from the examination that has been made by Professor Brown, that the system of mandatory sentencing simply does not work. And yet there are consequences of a mandatory sentencing system which have to be considered, some of them being displayed in telling form by the speakers in the session presided over by Ms Linda Burney. None of us could help being moved by the description by Mr William Tilmouth of the Aboriginal woman who took a tin of meat, two tomatoes, and fed her children, and as a result went to jail, with her family being split up.

There has been, so it is said, discriminatory targeting of Aboriginal people, and much has been said here this afternoon on that subject. So far as the judiciary is concerned, it is clear that some judges or magistrates must find themselves in a situation of great difficulty when having to impose sentences which they know to be unjust, contrary to the function which they expect to perform. And that, as Sir Anthony Mason has pointed out, destabilises the relationship between the judicial and the political branches of government. The system creates inhumanity. And, as Mr Tilmouth said, prisons create and foster violence. The last speaker has noted that the system has an effect on Aboriginal communities in the Northern Territory. And it erodes public funds which may incur losses not only in the criminal justice system, but in health and education as well. Moreover, even if mandatory sentencing is not a contravention of international obligations, there seems to be at least an inconsistency with the standards traditionally expected of developed nations such as Australia.

Today's papers have revealed the impact of mandatory sentencing, at least in the Northern Territory. It has fallen generally on those who are outside the mainstreams of our society — on those who, by reason of race or want of education or opportunity, do not find fulfilment in the ordinary activities of our society, on those who indulge in petty crime, sometimes under the compulsion of hunger, but are not malicious or hardened criminals. They may be troublesome, and sometimes gravely disturbing to their victims, as Dr Nelson observed. All of the factors of each offence, however, could and ordinarily would be evaluated by a magistrate imposing a discretionary sentence. But a legislative hammer has been used to satisfy political demand for measures which would impose penalties, different from those which might be accorded by an experienced and independent judicial officer in exercising his or her discretion.

The majority of electors, it is said, may want this. How valid is that as a consideration? Democracy can work well where the majority of the electors in self-interest seek to protect what is their own and to maintain their lifestyles in peace. The rule of law operates with the support of the majority, and freedom is denied only to those who, in the opinion of a majority, should be denied their freedom. But the self-interests of the majority, if not restrained, can be destructive of the interests of the minority. And particularly is that so when the minority are those who have been alienated from society, who have been unable to participate in its benefits, who are not in the mainstream. The civilised standards of a society are to be judged by the way in which the society deals with its minorities and its misfits.

There are only two ways in which the self-interests of a majority can be restrained so as to balance the interests of the minorities and the misfits. One way is to satisfy society that the independent judiciary should be the exclusive repository of the power to keep the balance right. Dato' Param has pointed out the utility of the 'guideline on

sentencing' judgments delivered by the Court of Appeal of New South Wales. To secure that exclusive power to the judiciary, beyond the reach of the political branches of government, would require the enactment of a constitutional Bill of Rights as Sir Anthony Mason said. The alternative way is for a display of political leadership imbued with the civilising spirit. Dr Nelson and Mr Foss have manifested that spirit but the spirit is not enough. The political will to lead by manifesting that will is needed. Historically, in this country, we have placed our trust in the political branches of government and we have eschewed the American example of a Bill of Rights that would transfer massive political powers to the judiciary as a check on the legislative and executive branches of government. But if we, as a nation, lose that trust in the charism and calibre of our leaders, they should not be surprised if the people seek a Bill of Rights to protect themselves and their communities against those political excesses which threaten the civilised character of a 'fair go' society. ●