Mandatory sentencing: implications for judicial independence

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In various jurisdictions in Australia, following overseas examples, notably American, mandatory sentencing regimes have been introduced. I use the word 'mandatory' to include cases where a court is required to impose a minimum sentence of imprisonment as well as cases where the court is required to impose a specific term of imprisonment.

Section 78A of the *Sentencing Act 1997* (NT) is an instance of the first category. The section, which deals with property offences, deprives the court of a discretion to impose no sentence or a sentence less than that specified. As amended last year by the *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000* (NT), s 78A(1) provides:

> Where a court finds an offender aged 18 years or over guilty of a property offence, the court shall record a conviction and order the offender to serve a term of imprisonment of not less than 14 days.

A person found guilty of a relevant property offence is liable to a mandatory minimum sentence of 28 days' detention for one prior conviction. Subsections (2) and (3), which deal respectively with an offender who has once before been found guilty of a property offence and an offender who has two or more times been found guilty of such an offence, make similar provision for recording a conviction not less than 90 days and 12 months as the case may be.

Sentences for property offences are not to be served concurrently with a term of imprisonment for another offence, whether it be a property offence or not (s 78A(3)(a)).

The court's general discretion under s 7 of the *Sentencing Act*, where a person is found guilty of an offence, to make various orders not involving imprisonment, is excluded. That is because s 5 expressly states that it is 'subject to any specific provision relating to the offence'. Section 5 is therefore subject to s 78A.

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Quite apart from the exclusion of the s 7 discretion, s 78A strips a court of part of the discretion which it ordinarily has in deciding what punishment or penalty is appropriate in the light of the offence and the particular circumstances in which it was committed. Legislatures, in generally leaving the courts with that discretion, have recognised that like offences, by reason of the differing circumstances in which they are or may be committed, may merit differential treatment by the courts simply because the different circumstances may reveal varying degrees of moral responsibility or blameworthiness.

What are the implications for judicial independence? That is the question I am asked to address. Judicial independence has been expressed as,

> Freedom from direction, control or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government. (Butterworths, 1997: 648)

That statement, admirably succinct, presupposes that there may be an unlawful or improper legislative direction or interference in the exercise of judicial power. But the exercise of judicial power by a court is not engaged unless there is a grant of jurisdiction to the court which it is obliged to exercise by applying the relevant law. Generally speaking, the grant of jurisdiction is to be found in statute and very often the law to be applied is also found in statute. The law with respect to the sentence or penalty to be imposed upon conviction for a criminal offence is invariably statute-based.

Section 78A is a law prescribing the sentence or penalty to be imposed. As such it is a valid law unless it can be shown that it amounts to a usurpation of, or interference with, judicial power. That, I think, is the precise legal question to be answered rather than a question relating to the implications for judicial independence, which seems to be consequential upon the outcome of the legal question which I have posed.

The general principle is that legislation may amount to a usurpation of judicial power, particularly in a criminal case, if it prejudges an issue with respect to a particular individual and requires a court to exercise its function accordingly. It is upon this principle that bills of attainder may offend against the separation of judicial power. But a law of general application governing the exercise of a jurisdiction which it confers does not interfere with the judicial function (see *Leeth v The Commonwealth*, per Mason CJ, Dawson and McHugh JJ at 469-70).

Usurpation of the judicial function

In the case of the High Court and the Federal Courts, Parliament cannot, under the Constitution, entrust them with the exercise of non-judicial functions (except when

they are incidental to the exercise of judicial power) or interfere with the exercise of the judicial function. As a result of the decision in *Kable v Director of Public Prosecutions (NSW)*, it seems that a similar restriction applies to State courts, though it is possible that the restriction may be qualified in some way. With Territory courts, the position is more complex (see *Kruger v The Commonwealth*, *Northern Territory v GPAO*, and *Re Governor, Goulburn Correctional Centre*). But, for present purposes, I shall assume that the judicial function cannot be usurped or impaired.

Do the considerations to which I have referred result in a usurpation of the judicial power? The Australian authorities indicate a negative answer to the question. First, there was the decision of the High Court in *Palling v Corfield* in 1970.[1] Under s 49(2) of the *National Service Act 1951* (Cth), a person who was convicted of the offence of failing to respond to a national service notice was liable to a fine ranging from $40 to $200 and, at the request of the prosecutor, an additional mandatory sentence of seven days imprisonment if the defendant continued to refuse to comply with the requirements of national service. The High Court was unanimous in rejecting an argument that the mandatory imposition of the additional penalty was a contravention of the separation of powers. The Court held that the sub-section did not confer part of the judicial power of the Commonwealth on the prosecution or constitute an interference with judicial functions or attempt to delegate legislative power to the prosecution. Legislative power by way of prescribing penalty was likened to the legislative power in determining the elements of the offence.

Barwick CJ (at 58) stated:

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the

1 See also *Sillery v The Queen*.

> punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament.

The Chief Justice concluded his remarks on this point by stating, 'It is not ... a breach of the Constitution not to confide any discretion to the court as to the penalty imposed.' The Chief Justice also rejected an argument that it was the prosecutor who effectively imposed the sentence.

The other members of the Court expressed similar views. It would seem that *Palling v Corfield* denies that s 78A constitutes a usurpation of judicial power.

Before I deal with the next case, *Wynbyne v Marshall*, I should refer to a strand of thinking which surfaced in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (the *Hindmarsh Island* case) and has played a prominent part in recent High Court cases, including, of course, *Kable*. In the *Hindmarsh Island* case the Minister appointed a federal judge, under s 10 of the relevant statute, to deliver a report to him concerning the impact on Aboriginal people of the proposal to construct the Hindmarsh Island Bridge. By majority, the High Court held that the section did not authorise the appointment. That was because, although the function, that of reporting, was given not to a court but to the judge as a *persona designata*, the function was incompatible with the holding of judicial office under Ch III of the Constitution. This was because the judge was undertaking an executive function and giving legal advice to the executive in making a report on a political matter. In reaching this conclusion, the Court had regard to the perception that judicial participation in that activity would endanger public confidence in the integrity of the judicial system.

Judicial preoccupation with maintaining public confidence in the administration of justice in face of apprehended dangers has become a recurrent theme in recent times. Seemingly, it is a by-product of the decline in public respect for, and acceptance of, the decisions of institutions of authority, such as the courts, and the emergence of a climate of scrutiny of court decisions and a willingness to criticise them. In the new climate, it is considered legitimate to take account of the impact on public perceptions in determining whether a function is compatible with the judicial function.

It was this proposition that lay at the root of the argument presented on the special leave application in *Wynbyne*. The applicant, a 23 year old Aboriginal female from a remote Northern Territory community, who had committed no previous offences, pleaded guilty to two offences, one of stealing a can of beer, the other of unlawful entry. She was sentenced to 14 days imprisonment pursuant to the mandatory sentencing requirements of the *Sentencing Act 1995* (NT). The magistrate observed

that, but for the mandatory requirement, a non-custodial order would have been made. The High Court refused the special leave application on the ground that the appeal did not enjoy sufficient prospects of success.[2]

Decisions on special leave applications are not regarded as having precedential value. In any event, it would be a mistake to place much reliance on a decision refusing a special leave application made by two Justices. On the other hand, it would be a mistake of at least equal magnitude to regard maintaining public confidence in the administration of justice as if it were a free-standing criterion of constitutional validity. The judgment of Brennan CJ in *Nicholas v The Queen* effectively debunks that view.

In any event, in view of the publicity surrounding mandatory sentencing, including statements made by magistrates and judges, as well as politicians, it can scarcely be suggested that the public believes that the imposition of a sentence under s 78A proceeds from the exercise of a judicial discretion.

The last decision in the line of authority is the very recent decision of the Privy Council in *Browne v The Queen*. In that case, it was held that it was inconsistent with the basic principle of the separation of powers which was implicit in a West Indian constitution based on the Westminster model, that the Governor General, who was a part of the executive, should have the task of deciding on the duration of the sentence of a juvenile who was ordered to be detained at the Governor General's pleasure.

It was held that Parliament could prescribe a fixed punishment to be inflicted on all those found guilty of a defined offence, such as capital punishment for the crime of murder. But Parliament could not, consistently with the separation of powers, transfer from the judiciary to any executive body a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. So detention during the Governor General's pleasure was unacceptable because it amounted to detention at the discretion of the executive, thereby breaching the doctrine of the separation of powers.

Considered in the light of the authorities just discussed, s 78A would not be objectionable on the ground that it violates the separation of powers. To deprive the courts of their entire sentencing discretion or part of it and compel them to apply a fixed rule is not, according to authorities discussed so far, a departure from the general doctrine of the separation of powers.

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2 See transcript *Wynbyne v Marshall* D174/1997, HCA, 21 May 1998 (Gaudron and Hayne JJ).

There are other authorities which take a rather different approach. However, they deal with constitutions which contain entrenched guarantees of fundamental rights. For that reason they should be viewed with caution. What emerges from them is that even in a context where there are entrenched rights, there is a place for mandatory sentencing, at least in non-capital cases and, in some instances, in capital cases.

The first authority is another Privy Council decision, *Ong Ah Chuan v Public Prosecutor.* Section 15 of a Singapore statute provided for penalties for trafficking, importing and exporting drugs that were graduated according to the quantity of the drug involved. Heroin attracted the death penalty where the quantity involved was 15 grams or more. The defendant argued that the mandatory death sentence was unconstitutional because it deprived him of his life otherwise than 'in accordance with law' contrary to art 9(1) of the Singapore Constitution and because it was contrary to the 'equal protection of the law' requirement of art 12(1) of the Singapore Constitution. One argument was that to exclude from the judicial function all considerations peculiar to the defendant was wrong. In other words, standardisation of the sentencing process which left little room for judicial discretion to take account of variations in culpability within single offence categories results in a function which ceases to be judicial.

Another argument was that the provision offended against the equality principle because it compelled the court to condemn to the highest penalty of death any addict who gratuitously supplied an addict friend with 15 grams of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99 grams.

The Privy Council rejected these arguments. Lord Diplock pointed out (at 672) that there is nothing unusual in a capital sentence being mandatory, noting that at common law 'all capital sentences were mandatory'. His Lordship went on to say (at 673) that, if the argument were valid, it would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital — a consequence which his Lordship was plainly not prepared to accept.

His Lordship then rejected the argument which relied on inequality of treatment by saying that the 'equal protection' provision did not forbid discrimination in punitive treatment based on some difference in the circumstances of the offence which had been committed, the relevant difference being in the quantity of the drug involved, that difference being not a purely arbitrary one.

His Lordship said (at 673-4):

> The questions whether this dissimilarity in circumstances justifies any differentiation in the

> punishments imposed upon individuals who fall within one class and those who fall within the other, and if so, what are the appropriate punishments for each class are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no consistency with art 12(1).

Fifteen grams was not a quantity so low as to be completely arbitrary.

In an earlier decision, *Hinds v The Queen*, the Privy Council had said (at 225-6):

> What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the [Jamaican] Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders.

The Privy Council adopted a statement made by the Supreme Court of Ireland that 'the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive' (*Deaton v Attorney-General* at 183).

Our Constitution contains no equal protection clause. It would be necessary to find one by implication. The decision in *Leeth v Commonwealth* is against the making of such an implication. And the equal protection point does not appear to arise in relation to s 78A.

There are also decisions of the US Supreme Court in which death penalty statutes have been invalidated. For the most part the decisions turn on the Eighth and Fourteenth Amendments, some being applications of the requirement of proportionality of punishment to offence. Death sentences which have been imposed arbitrarily, as well as those which were mandatory have been held unconstitutional.

In *Ong Ah Chuan* the Privy Council did not refer to *Lockett v Ohio* on which the defendant based its first argument attacking the sentencing provision. In *Lockett*, an Ohio statute mandating the death sentence was struck down because it did not permit the sentencing court a full opportunity to consider the mitigating circumstances and thus violated the Eighth Amendment. Burger CJ, speaking for the Court, said (at 603-4):

> *Although legislatures remain free to decide how much discretion in sentencing cases should be reposed in the judge or jury in non-capital cases,* the plurality opinion in *Woodson v North Carolina*, after

> reviewing the historical repudiation of mandatory sentencing in capital cases[3] concluded that: 'In capital cases the fundamental respect for humanity underlying the 8th Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offence as a constitutionally indispensable part of the process of inflicting the penalty of death' [emphasis added].

Burger CJ pointed out that the *Woodson* statement rested 'on the predicate that the penalty of death is qualitatively different' from any other sentence' (at 604).

It was in the light of this reasoning that the Supreme Court in *Lockett* reached its conclusion, namely that the sentences, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offence that the defendant proffers as a basis of a sentence of less than death.

So much for the authorities. They speak for themselves.

Some may be surprised that the authorities do not provide support for the proposition that the judicial function in sentencing *necessarily* entails a sufficient element of discretion which enables a court to differentiate between different degrees of blameworthiness. Mandatory capital punishment in earlier times was inconsistent with that broad proposition as indeed were the mandatory penalties prescribed in the 18th and 19th centuries for a broad range of offences, not all being capital offences. It is possible that capital punishment might now be seen in Australia as an outmoded exception to what is a more desirable rule, namely that punishment for a criminal offence necessarily entails discretionary considerations and, as such, is an integral part of the exercise of judicial power. That proposition has been asserted in order to repel invasion of sentencing by the executive. But the proposition has not been asserted to repel legislative invasion in the form of mandatory sentencing. Unfortunately, the cases do not lend support to that proposition. Moreover, to establish the proposition as a constitutional rule it would be necessary to extract from the separation of the judicial power in Ch III not only the implication of a right to a fair trial, but also the proposition that the right to a fair trial includes judicial consideration of whether the sentence mandated by the legislature should be imposed.

The considerations already mentioned do, however, provide powerful arguments against the adoption of the mandatory penalty regime prescribed by s 78A. As Barwick CJ pointed out in *Palling v Corfield*, it is unusual and undesirable to deprive the court of its discretion as circumstances alter cases and it has been the traditional

3 At 289-298.

function of the courts to make the punishment appropriate to the circumstances as well as the nature of the crime.

A law which insists on the incarceration of a first offender, more especially a young offender, for theft, no matter how trivial the amount involved, regardless of alleviating circumstances, is inhuman in this day and age. Some might describe it as a cruel and unusual punishment, to adopt the language of a Bill of Rights. A moment's reflection on the conditions which prevail in our prisons and on the character of some of their inmates is enough to lead inevitably to the conclusion that to send a youthful first offender to prison for a trivial offence may well be a greater threat to humanity than the commission of the actual offence itself. There is no shortage of opinions from those experienced in the field of criminology who say that gaols are a fertile breeding ground of crime and that young offenders are at risk of becoming professional criminals as a result of imprisonment.

I am not alone in thinking that effort put into rehabilitation, rather than retribution and deterrence, is more likely to be cost effective and lead to a better world. With indigenous and younger people generally, restorative justice programs have much to offer. The restorative justice approach, particularly in relation to indigenous people, has been sanctioned by courts in Canada and New Zealand.

In expressing this view, I should make it clear that I do not assert that heavy or harsh penalties have no effect at all on the crime rate. That proposition has been asserted from time to time but its correctness has not, in my view, been demonstrated. Crime rates appear to have been reduced in California ('three strikes and you're 'out' or is it 'in') and New York (where infractions of the law have been vigorously enforced). Some have argued that, in these jurisdictions, other factors are responsible for the reduction in crime. For my part, I find it difficult to accept that a regime of heavy penalties will never have any effect. Just how much effect is a critical question and that may depend upon a range of circumstances, including the nature of the offence and the conduct, the significance of the deterrent and the motivations of those who comprise the offending class. If the deterrent effect be non-existent or minimal, as will generally be the case, the detriments outweigh the advantage.

A regime of harsh penalties brings other unwanted consequences in its train. The massive increase in the prison population comes at a high cost to the budget. The increase must be funded by increased taxation or, more likely, at the expense of expenditure on other matters such as education, health and welfare. Other consequences which I do not have time to mention are instructively discussed in the Forum on Mandatory Sentencing Legislation in Volume 22 of the *University of New South Wales Law Journal*. It should be prescribed as compulsory reading for all politicians.

Finally, on this topic, Draconian legislation of this kind strengthens my view that it is time that we joined the other nations of the Western world in adopting a Bill of Rights. Otherwise disadvantaged minority groups have no protection against the majority will when it sanctions legislation causing grave injustice. ●

Domestic cases

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51
Kruger v The Commonwealth (1997) 190 CLR 1
Leeth v The Commonwealth (1992) 174 CLR 455
Nicholas v The Queen (1998) 193 CLR 173
Northern Territory v GPAO (1999) 161 ALR 318
Palling v Corfield (1970) 123 CLR 52
Re Governor, Goulburn Correctional Centre (1999) 165 CLR 171
Sillery v The Queen (1981) 180 CLR 353
Wilson v The Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1
Wynbyne v Marshall (1997) NTR 11

Domestic legislation

National Service Act 1951 (Cth)
Sentencing Act 1995 (NT)
Sentencing Act 1997 (NT)
Sentencing of Juveniles (Miscellaneous Provisions) Act 2000 (NT)

International legal material

Browne v The Queen (St Christopher and Nevis) [1999] UKPC 21 (6 May 1999)
Deaton v Attorney-General [1963] IR 170
Hinds v The Queen [1977] AC 198
Lockett v Ohio 438 US 586 (1977)
Ong Ah Chuan v Public Prosecutor [1981] AC 648
Woodson v North Carolina 428 US 280 (1976)

References

Butterworths *Australian Legal Dictionary* Butterworths, Sydney (1997).
'Forum on Mandatory Sentencing Legislation' Vol 22 *University of NSW Law Journal* 256 et seq.