

# (GROSSLY) DISPROPORTIONATE SENTENCES: CAN CHARTERS OF RIGHTS MAKE A DIFFERENCE?

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*A comparison between United Kingdom (UK) and Australian law concerning grossly disproportionate sentences indicates that human rights charters and/or other strong human rights guarantees in a jurisdiction can produce improved protections for offenders against penal populism. While the relevant Australian case law suggests that there are virtually no restrictions on the state's ability to enact mandatory sentencing laws in those jurisdictions without a charter of rights, the UK and Strasbourg courts have now made it clear that grossly disproportionate sentences cannot be imposed compatibly with art 3 of the European Convention on Human Rights ('ECHR'), and that mandatory sentencing schemes are particularly likely to produce breaches of that article. When further developing the law in this area, the UK courts and the European Court of Human Rights (ECtHR) should learn from the relevant North American jurisprudence, avoiding the excessively deferential approach evident in many of those authorities and embracing the Canadian Supreme Court's more interventionist stance recently in The Queen and Attorney General of Canada v Nur and Charles ('Nur'). In turn, Nur provides further evidence that, when they are armed with a charter of rights, the courts can make a difference if they are courageous enough to do so.*

## I INTRODUCTION

One of the most frequently advanced arguments in favour of enacting charters of rights is that, in the absence of such instruments, governments will tyrannise unpopular minorities. Without a human rights charter, it is urged, what checks exist against populist legislation that provides for the unfair treatment of paedophiles, 'bikies', suspected terrorists and/or other groups that have earned society's ire? Yet there is surprisingly little literature that considers whether, in jurisdictions where they *have been* enacted, charters of rights have been effective to protect such despised groups from the excesses of majoritarian democracy. This article is an attempt to start filling this gap.<sup>1</sup>

My focus is on what various courts have described as 'grossly disproportionate sentences'. My comparison, at least primarily, is between Australia and the United

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1 See also Andrew Dyer, 'Irreducible Life Sentences: What Difference Have the *European Convention on Human Rights* and the United Kingdom *Human Rights Act* Made?' (2016) 16 *Human Rights Law Review* 541.

Kingdom (UK). Of course, the *Human Rights Act 1998* (UK) ('HRA') has been in force in the UK since 2000,<sup>2</sup> and, even before then, reasonably strong human rights protections existed in that jurisdiction by virtue of the UK's being a party to the *European Convention on Human Rights* ('ECHR').<sup>3</sup> Far fewer human rights guarantees exist in Australia. There is no constitutional or statutory charter of rights at the Commonwealth level; most states also lack such a measure;<sup>4</sup> and the Australian government often ignores<sup>5</sup> United Nations Human Rights Committee findings that it has breached the *International Covenant on Civil and Political Rights*.<sup>6</sup> Have the ECHR and HRA led the UK law concerning disproportionate<sup>7</sup> sentences to differ desirably from that in the various Australian jurisdictions? If not, can they do so? This is what I am interested in discovering.

This article is structured as follows. In part two, I consider why exactly disproportionate sentences amount to human rights breaches. I conclude that the

2 *Human Rights Act 1998* (UK) c 42; *Human Rights Act 1998 (Commencement No 2) Order 2000* (UK) SI 2000/1851.

3 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('ECHR'). As the Equality and Human Rights Commission has recorded, the UK government accepted in 1966 its citizens' right of individual petition to Strasbourg and has a 'generally exemplary record ... in implementing judgments of the European Court': Alice Donald, Jane Gordon and Philip Leach, 'The UK and the European Court of Human Rights' (Research Report No 83, Equality and Human Rights Commission, 2012) 152 <[www.equalityhumanrights.com/sites/default/files/documents/research/83.\\_european\\_court\\_of\\_human\\_rights.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/research/83._european_court_of_human_rights.pdf)>.

4 Only one state, Victoria, and one territory, the Australian Capital Territory (ACT), have implemented a human rights charter: see *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT). Neither the Victorian nor the ACT courts have considered the question of whether a grossly disproportionate sentence amounts to a breach of any of the rights protected by the relevant legislation: see, respectively, Law Institute of Victoria, *Charter Case Audit* (1 July 2015) <<http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit/Charter-Case-Audit-Search>>; Australian National University, *Human Rights Cases of the ACT* (17 November 2015) <<https://acthra.anu.edu.au/cases/>>. See also Justice Mark Weinberg, 'Human Rights, Bills of Rights and the Criminal Law' (Paper presented at Bar Association of Queensland 2016 Annual Conference, Brisbane, 27 February 2016) 21. There appears to be no constitutional obstacle to their issuing, respectively, a declaration of inconsistent interpretation or a declaration of incompatibility in a case in which a sentence is claimed to be grossly disproportionate: see *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36(2); *Human Rights Act 2004* (ACT) s 32(2). It is true that, in *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*'), two of the four Justices who found that s 36(2) does not infringe the constraints imposed by Chapter III of the *Commonwealth Constitution* held that '[i]t may be that ... a declaration of inconsistency will rarely be appropriate ... in the sphere of criminal law': at 229 [605]. But the reason that their Honours (Crennan and Kiefel JJ) gave for this — that such a declaration would '[u]ndermin[e] ... a conviction' — would not seem to apply in a case where the provision enabling a particular sentence to be imposed was declared to be incompatible with human rights: in such a scenario, the accused's conviction would not be called into question.

5 See Attorney-General's Department (Cth), *Human Rights Communications* <[www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx](http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx)>.

6 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

7 I refer to 'disproportionate', rather than 'grossly disproportionate', sentences because, contrary to what various courts have held, it should not be necessary for an individual to establish that his/her sentence is grossly disproportionate if it is to be found that he/she has had imposed on him/her an 'inhuman or degrading' or 'cruel and unusual' punishment. Such a person should merely have to show that his/her sentence is disproportionate. That is, for the reasons set out below, all disproportionate sentences are human rights breaches.

objection to such sentences is a human dignity one.<sup>8</sup> By imposing a sentence of this nature, the state treats the offender as both an object and an enemy.<sup>9</sup> Insofar as it imposes a disproportionate sentence on him/her as a means of achieving such sentencing goals as general deterrence and incapacitation, it treats him/her as an object: as van Zyl Smit and Ashworth have noted, ‘the Kantian point that no person should be used solely as a means to an end forms one good reason why disproportionate punishments are objectionable’.<sup>10</sup> But, as foreshadowed above, laws that enable disproportionate sentences to be imposed — and this is particularly true of mandatory sentencing schemes — often do not, or do not only, pursue rational objectives. That is, such laws are not intended (solely) to achieve aims such as general deterrence, but rather are at least primarily to be characterised as acts of law-and-order symbolism; they principally have political, not penological, goals. In such a case, the offender is being treated as an object: he/she is being dealt with unfairly to achieve ends that are considered to be worthwhile, namely, the reassurance of the public and the consequent enhancement of the government’s electoral prospects.<sup>11</sup> But he/she is also being treated as an enemy. By providing for disproportionate sanctions in response to, and as a way of expressing, public indignation about crime, the state treats criminals as having excluded themselves from society, and therefore as not being entitled to respectful treatment.<sup>12</sup> The denial that the offender is capable of responding to anything other than an intimidatory sanction amounts to a claim that he/she is unable to be reasoned with. He/she is a ‘vile embodiment of evil’,<sup>13</sup> a thing to be dominated.

In part three, I consider whether there exist in Australia any protections against disproportionate sentences. I focus, in particular, on mandatory sentencing schemes. Such laws are eminently capable of producing sentencing disproportionality.<sup>14</sup> They also might be thought, at Commonwealth level, to amount to a legislative or executive interference with or usurpation of judicial power, contrary to ch III of the *Constitution*; and, at state and territory level, to confer on the courts functions that are repugnant to or incompatible with

8 As noted by Natasa Mavronicola, ‘Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context’ (2015) 15 *Human Rights Law Review* 721, 733.

9 See Robert S Gerstein, ‘Capital Punishment — “Cruel and Unusual”? A Retributivist Response’ (1974) 85 *Ethics* 75, 77.

10 Dirk van Zyl Smit and Andrew Ashworth, ‘Disproportionate Sentences as Human Rights Violations’ (2004) 67 *Modern Law Review* 541, 547.

11 See, eg, Peter A Sallmann, ‘Mandatory Sentencing: A Bird’s-Eye View’ (2005) 14 *Journal of Judicial Administration* 177, 191.

12 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 86.

13 Jeremy Waldron, ‘Inhuman and Degrading Treatment: The Words Themselves’ (2010) 23 *Canadian Journal of Law and Jurisprudence* 269, 282–3.

14 As noted by, eg, Morris J Fish, ‘An Eye for an Eye: Proportionality as a Moral Principle of Punishment’ (2008) 28 *Oxford Journal of Legal Studies* 57, 69.

their exercise<sup>15</sup> of federal judicial power.<sup>16</sup> The relevant jurisprudence, however, suggests that there are virtually no restrictions on the state's ability to enact mandatory sentencing laws in those Australian jurisdictions without a charter of rights.<sup>17</sup> Sir Anthony Mason has stated that this 'strengthens my view that it is time that we joined the other nations of the Western world in adopting a Bill of Rights'.<sup>18</sup> But is he right to imply that the position would be any different if such an instrument were implemented?

In part four, I analyse the relevant English and Strasbourg case law. At first glance, this jurisprudence might not give much encouragement to those who claim that charters of rights and/or other strong human rights guarantees can produce desirable change in this area. In *Vinter v United Kingdom*,<sup>19</sup> for example, the European Court of Human Rights (ECtHR) cautioned that only on 'rare and unique occasions'<sup>20</sup> will a sentence breach art 3 of the *ECHR*<sup>21</sup> because of its gross disproportionality.<sup>22</sup> But a closer examination of the UK, and Privy Council,<sup>23</sup> cases, reveals that there is *some* cause for optimism concerning the courts' ability to intervene where it is alleged that an offender's sentence is contrary to art 3 for being grossly disproportionate. This is particularly true where the impugned sentence has been mandatorily imposed.

We should not, however, become *too* sanguine about the prospect of the UK and Strasbourg courts taking an appropriately interventionist stance here — or about charters of rights' ability to provide increased protections for offenders against disproportionate sentences. Dirk van Zyl Smit's complaint two decades ago about the 'disappointing ... lack of courage of constitutional courts in tackling the question of the potential disproportionality inherent in mandatory sentences'<sup>24</sup>

15 See *Commonwealth Constitution* s 77(iii).

16 Contrary to the principles in *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*') and the 'cases flowing from it' to use the words of French CJ, Kiefel and Bell JJ in *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593 [39] ('*North Australian Aboriginal Justice Agency Ltd*').

17 See especially *Palling v Corfield* (1970) 123 CLR 52 ('*Palling*'); *Magaming v The Queen* (2013) 252 CLR 381 ('*Magaming*').

18 Sir Anthony Mason, 'Mandatory Sentencing: Implications for Judicial Independence' (2001) 7(2) *Australian Journal of Human Rights* 21, 30. See also Sir Gerard Brennan, 'Mandatory Sentencing: Rights and Wrongs' (2001) 7(2) *Australian Journal of Human Rights* 3, 6.

19 [2013] III Eur Court HR 317 ('*Vinter*').

20 *Vinter* [2013] III Eur Court HR 317, 344 [102]; echoing the Canadian Supreme Court's words in *Warden of Mountain Institution v Steele* [1990] 2 SCR 1385, 1417.

21 *ECHR* art 3 provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

22 As the Administrative Court (Aikens LJ and Globe J) observed, somewhat astringently, in *R (Harkins) v Secretary of State for the Home Department (No 2)* [2015] 1 WLR 2975, 2992 [44], 'how an occasion can be "unique" and "rare" at the same time is not explained'.

23 In particular, *Reyes v The Queen* [2002] 2 AC 235 ('*Reyes*'); *Aubeeluck v Mauritius* [2010] UKPC 13 (21 July 2010) ('*Aubeeluck*').

24 Dirk van Zyl Smit, 'Constitutional Jurisprudence and Proportionality in Sentencing' (1995) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 369, 379.

remains somewhat true today.<sup>25</sup> Indeed, some of the North American jurisprudence — especially that of the United States Supreme Court (USSC) — provides a striking example of excessive judicial deference to the legislative judgment about these emotive questions concerning the proper measure of punishment for criminal offences.<sup>26</sup> This North American case law,<sup>27</sup> particularly the Canadian Supreme Court's (CSC) jurisprudence concerning disproportionately severe sentences, demonstrates both what the UK and European judges should and should not do in future cases where it is alleged that an offender's sentence is grossly disproportionate. The CSC's assertive recent decision in *R v Nur*<sup>28</sup> shows the potential that exists for courts in jurisdictions with a charter of rights to strike down<sup>29</sup> legislation that allows for the imposition of such sentences. But the same Court's more deferential earlier decisions<sup>30</sup> provide some indication of the timidity that can grip the judges when they are asked to interfere with legislative sentencing policy, however misconceived and/or irrationally harsh that policy is.

Nevertheless, in part five, I conclude that the comparison between the UK and those Australian jurisdictions without a charter of rights does reveal that such charters can provide offenders with improved protections against disproportionate sentences. Despite the caution that the judges have exercised, the UK and Strasbourg courts can subject allegedly grossly disproportionate sentences to some scrutiny. In particular, the legislature's ability to provide for the imposition of mandatory sentences seems more limited in the UK than it is in Australia, and we can be cautiously optimistic about the further development of the law in this area *if* the UK and Strasbourg judges are willing to learn from the North American, and particularly the Canadian, jurisprudence. Mistakes have been made in those Canadian cases, but *Nur* shows that courts can make a difference if they are courageous enough to do so.

- 25 For views consistent with this, see Mary Rogan, 'Out of Balance: Disproportionality in Sentencing' on Penal Reform International, *Penal Reform International Blog* (25 August 2014) <<http://www.penalreform.org/blog/balance-disproportionality-sentencing/>>.
- 26 For an analysis of much of this case law, see van Zyl Smit and Ashworth, above n 10, 552–7. See also Alice Ristroph, 'Proportionality as a Principle of Limited Government' (2005) 55 *Duke Law Journal* 263, 300–14.
- 27 For a comparison between the US and Canadian approaches, see Jamie Cameron, 'The Death Penalty, Mandatory Prison Sentences, and the Eighth Amendment's Rule Against Cruel and Unusual Punishments' (2001) 39 *Osgoode Hall Law Journal* 427. See also Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 *Yale Law Journal* 3094, 3184–8.
- 28 [2015] 1 SCR 773 ('*Nur*').
- 29 Of course, the UK courts lack such a power; nevertheless, the powers that they do have — to read and give effect to primary legislation in a way that is compatible with *Convention* rights and, if that cannot be done, to declare primary legislation to be incompatible with human rights — might not be markedly different from those possessed by courts that have been empowered to strike down legislation: see *HRA* ss 3(1), 4(2); Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press, 2009) chs 11, 14. Cf Conor Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford University Press, 2016) chs 5 and 6.
- 30 See, eg, cases such as *R v Goltz* [1991] 3 SCR 485 ('*Goltz*'); *Morrisey v The Queen* [2000] 2 SCR 90 ('*Morrisey*'); *Latimer v The Queen* [2001] 1 SCR 3 ('*Latimer*').

## II DISPROPORTIONATE SENTENCES AS HUMAN RIGHTS BREACHES

Why exactly do disproportionate sentences amount to human rights breaches? Only by answering this question can we determine both whether the UK law concerning such sentences differs desirably from that in Australia and, even if it does, whether the UK and Strasbourg courts have nevertheless been too deferential when an offender has claimed that his/her sentence breaches art 3 of the *ECHR* because of its gross disproportionality.

It is well-established that two types of punishment breach guarantees against what s 12 of the *Canadian Charter of Rights and Freedoms* and the Eighth Amendment to the *United States Constitution* refer to as ‘cruel and unusual’ punishments, and what art 3 of the *ECHR* describes as ‘torture or ... inhuman or degrading ... punishment’. First, there are punishments that are ‘barbaric in themselves’;<sup>31</sup> examples are torture and, under art 3 at least, the death penalty<sup>32</sup> and irreducible life sentences.<sup>33</sup> Secondly, there are punishments that ‘by their excessive length or severity are greatly disproportioned to the offences charged’.<sup>34</sup>

Punishments in the first category are impermissible because they treat the offender not as someone to be reasoned with, but as something to be dominated. Torture’s point is not to encourage the prisoner to ‘enter into discourse’ about his/her conduct, but rather to ‘reduce him/[her] to a ... screaming animal’.<sup>35</sup> Likewise, the death penalty and irreducible life sentences, by treating the offender as being unable to atone for his/her crime(s), deny that he/she is a rational agent capable of ‘moral deliberation’;<sup>36</sup> and hold instead that he/she is a ‘wild [animal]’<sup>37</sup> that is incapable of exercising self-control.<sup>38</sup> If we consider the matter more closely, there seem to be two main reasons why such punishments are inconsistent with the prisoner’s human dignity, and therefore contrary to human rights. The first, which might be emphasised by those who favour an autonomy-based conception of dignity,<sup>39</sup> is that the offender is treated as being unable to take control of his/her life; he/she is instead seen as being controlled by his/her wicked impulses. The second, which might be given greater emphasis by those who favour a social democratic conception of dignity, is that such punishments exclude the relevant offenders from membership of the community; they treat them as being a ‘species

31 See Dirk van Zyl Smit, ‘Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective’ (1999) 9 *Criminal Law Forum* 5, 31.

32 *Al-Saadoon v United Kingdom* [2010] II Eur Court HR 61.

33 *Vinter* [2013] III Eur Court HR 317.

34 *O’Neil v Vermont*, 144 US 323, 340 (Field J) (1892).

35 As noted by Jeffrie G Murphy, ‘Cruel and Unusual Punishments’ in Jeffrie G Murphy, *Retribution, Justice, and Therapy: Essays in the Philosophy of Law* (D Reidel Publishing, 1979) 223, 233.

36 von Hirsch and Ashworth, above n 12, 77.

37 Jeremy Waldron, ‘How Law Protects Dignity’ (2012) 71 *Cambridge Law Journal* 200, 203.

38 As I have argued elsewhere: Dyer, above n 1.

39 For a discussion of ‘Individualistic Versus Communitarian Conceptions of Dignity’, see Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655, 699–701.

apart from law-abiding citizens'.<sup>40</sup> But ultimately these concerns overlap. By treating the offender as being unable to respond to moral appeals, the state is saying that he/she has no ability to control his/her actions; in turn, *because* the offender is treated as having no ability to control his/her actions, he/she is seen as not being a rights-bearing member of society.

Punishments in the second category are impermissible for similar reasons. Certainly, unlike with punishments that are 'barbaric in themselves', we object to disproportionate sentences not because of the *type* of punishment that is imposed. Whereas torture, for example, is always objectionable, imprisonment is often a legitimate punishment; and will only cease to be so if 'the suffering and humiliation involved ... go[es] beyond that inevitable element of suffering or humiliation connected with' that type of punishment.<sup>41</sup> But when the suffering or humiliation *does* reach this level — as the ECtHR has said it will when the sentence is grossly disproportionate to the seriousness of the offender's crime(s)<sup>42</sup> — the sentence becomes barbaric, and the prisoner's human dignity is attacked in much the same way as it is by punishments within the first category. By imposing a disproportionate sentence, the state exercises its coercive powers in a way that is not tailored to the offender's wrongdoing.<sup>43</sup> It thus fails to reason with him/her. In other words, as with punishments that are barbaric in themselves, the offender is treated not as a moral agent, but rather as a thing to be dominated.

The state's reasons for imposing disproportionate sentences on individuals help to elucidate this point about such sentences' inconsistency with offenders' human dignity. When the government introduces mandatory sentencing schemes, or other 'tough' sentencing measures, it commonly claims that its aim is to achieve goals such as general deterrence and incapacitation.<sup>44</sup> Certainly, there will be no breach of an offender's human rights just because his/her sentence reflects such considerations. But a problem *does* arise if these sentencing goals are permitted to produce a sentence that is disproportionate to the seriousness of the offender's crime(s). In such a case, that is, there will be treatment inconsistent with that offender's human dignity, essentially for the reasons noted above. Instead of reasoning with the offender — instead of addressing the offender as a moral agent

40 Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press, 1993) 5.

41 To use the ECtHR's words: see, eg, *Kafkaris v Cyprus* [2008] I Eur Court HR 223, 269 [96].

42 *Vinter* [2013] III Eur Court HR 317, 344 [102].

43 Mavronicola, 'Crime, Punishment and Article 3 ECHR', above n 8, 735. See also Natasa Mavronicola, 'Güler and Öngel v Turkey: Article 3 of the European Convention on Human Rights and Strasbourg's Discourse on the Justified Use of Force' (2013) 76 *Modern Law Review* 370, especially 378–80; Natasa Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 723, especially 733–5.

44 See, eg, Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164, 169–70. See also Anthony N Doob and Carla Cesaroni, 'The Political Attractiveness of Mandatory Minimum Sentences' (2001) 39 *Osgoode Hall Law Journal* 287, 289.



— the state has tyrannised him/her so as to achieve a goal that it considers to be worthwhile.<sup>45</sup>

Accordingly, it is impossible to accept some utilitarian theorists' claims that sentencing proportionality should be maintained only for as long as it maximises happiness.<sup>46</sup> The suggestion is that it would be desirable to allow for the imposition of disproportionate sentences if it were ever to be shown that the positive consequences of doing so (for example, a reduction in crime rates due to such sentences' deterrent effect) outweighed the negative consequences (for example, a possible public loss of respect for a criminal justice system in which such sentences were imposed).<sup>47</sup> What such arguments ignore is that penological goals can only be pursued within the limitations imposed by liberalism and human rights. When the state stops reasoning with offenders, then, whatever favourable consequences might ensue, it treats those offenders without regard for their human dignity and prejudices its own status as a liberal state.<sup>48</sup>

We should not assume, however, that the state has only, or any, rational aims when it enacts harsh sentencing laws. That is, these laws are often implemented not to achieve objectives such as general deterrence and incapacitation, but instead for political reasons.<sup>49</sup> Frequently passed in response to community concern about a particular incident or an apparently (increasingly) prevalent offence,<sup>50</sup> such legislation's main purposes are to express public anger about crime, and to reassure the public that the government is prepared to protect it against those convicted of such enormities. Accordingly, although parliamentarians commonly claim that laws of this kind can protect the public and achieve a deterrent effect, such claims are often made in the knowledge that no such results will follow. In the South African case of *Dodo*, Ackermann J stated that, even where a disproportionate sentence is not imposed to achieve a penological goal such as general deterrence, it 'would ... tend to treat the offender as a means to an end, thereby denying the offender's humanity'.<sup>51</sup> This is clearly true where the relevant sentence is imposed pursuant to a politically-motivated provision. In such a case, the offender is not being reasoned with, but instead is being bludgeoned — this, in an attempt to

45 See in this regard *Dodo v The State* [2001] 3 SA 382 (Constitutional Court), 404 [38] (Ackermann J) ('*Dodo*').

46 For an example of such a claim, see Mirko Bagaric, 'What Sort of Mandatory Penalties Should We Have?' (2002) 23 *Adelaide Law Review* 113, 124.

47 Ibid. See also H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 25.

48 See Ristroph, above n 26, 331.

49 See, eg, Doob and Cesaroni, above n 44, 298; Russell Hogg, 'Mandatory Sentencing Laws and the Symbolic Politics of Law and Order' (1999) 22 *UNSW Law Journal* 262, 264; Gerry Ferguson and Benjamin L Berger, 'Recent Developments in Canadian Criminal Law' (2013) 37 *Criminal Law Journal* 315, 315.

50 For example, in response to community concern about the arrival by boat of, mainly Afghan, asylum seekers, the Australian Commonwealth government in 2001, just before a federal election, enacted legislation that provided for mandatory minimum sentences for various Commonwealth people smuggling offences: see Neil Morgan, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 296. See also Kate Warner, 'Mandatory Sentencing and the Role of the Academic' (2007) 18 *Criminal Law Forum* 321, 337.

51 [2001] 3 SA 382 (Constitutional Court), 404 [38].



produce a result that is considered desirable, namely, the enhancement of the government's electoral standing. But when this governmental purpose exists, the problem with the disproportionate sentences that follow is not *only* that, by failing to engage in 'moral communication'<sup>52</sup> with the relevant offenders, the state prevents them from taking control of their lives. Rather, because the failure to reason with such offenders is founded upon the idea that they are 'animals' that are *incapable* of self-control and therefore 'need to be intimidated or restrained into compliance with the law',<sup>53</sup> we can surely object to such sentences on the additional basis that they treat those upon whom they are imposed as having excluded themselves from membership of the community.

### III THE AUSTRALIAN POSITION

#### A *Introductory Remarks*

What protections exist against disproportionate sentences in those Australian jurisdictions without a charter of rights? The answer is that virtually no such protections exist currently, and it appears unlikely that the *Commonwealth Constitution* will in the future be found to place any meaningful limits on the state's ability to impose such sentences.<sup>54</sup> For while it might appear that mandatory and mandatory minimum,<sup>55</sup> and even presumptive,<sup>56</sup> sentencing provisions are constitutionally suspect, the Australian courts have denied that these provisions *do* contravene either the Commonwealth separation of powers<sup>57</sup> or, when they are

52 See von Hirsch and Ashworth, above n 12, 17.

53 von Hirsch, *Censure and Sanctions*, above n 40, 5.

54 See Arie Freiberg and Sarah Murray, 'Constitutional Perspectives on Sentencing: Some Challenging Issues' (Paper presented at Federal Crime and Sentencing Conference, Canberra, 11–12 February 2012) 31 <njca.com.au/wp-content/uploads/2013/07/Freiberg-Murray-Constitutions.pdf>. Cf Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (Federation Press, 2016) ch 7.

55 When I use the term 'mandatory sentencing provision', I refer to the statutory provision that states that one sentence must be imposed on all individuals convicted of a particular offence. When I use the term 'mandatory minimum sentencing provision', I refer to the statutory provision that states that no lesser sentence than a particular minimum sentence must be imposed on anyone convicted of a particular offence, but leaves it open to the sentencer to impose a more severe sentence on a particular offender, up to the statutory maximum, if he/she considers this to be warranted: see Warner, above n 50, 322–3. In this article, I will refer both to laws that provide for the imposition of one sentence alone and those that provide for the imposition of a particular minimum sentence, as 'mandatory sentencing laws'.

56 When I use the term 'presumptive sentencing provision', I refer to provisions that require the imposition of a particular sentence, or a particular minimum sentence, apart from where 'substantial and compelling circumstances' exist (to use the South African formulation): see Dirk van Zyl Smit, 'Mandatory Minimum Sentences and Departures from Them in Substantial and Compelling Circumstances' (1999) 15 *South African Journal on Human Rights* 270. For an Australian case in which there was an unsuccessful challenge to a presumptive sentencing provision, see *R v Ironside* (2009) 104 SASR 54.

57 See *Commonwealth Constitution* ch III.

imposed at state or territory level, what has been said to be the limited,<sup>58</sup> or de facto,<sup>59</sup> separation of state and territory judicial power established by *Kable*<sup>60</sup> and subsequent cases.

## B Commonwealth Law

### 1 The Separation of Powers Doctrine

Chapter III of the *Commonwealth Constitution* requires<sup>61</sup> the judicial power of the Commonwealth to be exercised only by the High Court and other federal courts created by the Commonwealth Parliament,<sup>62</sup> and by state courts that have been invested with federal jurisdiction.<sup>63</sup> One major rationale for this insulation of judicial power is that such an arrangement safeguards liberty. That is, by ensuring that disputes between individuals, and between individuals and governments, ‘are judged by that independent judiciary which is the bulwark of freedom’,<sup>64</sup> the separation of judicial power, indirectly, has a rights-protective effect.<sup>65</sup>

Indeed, the separation of powers doctrine seems at first glance to have an obvious capacity to protect the rights of those who have had a disproportionate sentence imposed on them because of a mandatory or mandatory minimum sentencing provision. It is well-established that the adjudgment and punishment of criminal guilt are ‘essentially and exclusively judicial’<sup>66</sup> functions. Accordingly, if the federal legislature passes a Law of Attainder — that is, enacts legislation ‘adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence’<sup>67</sup> without the safeguards of a judicial trial<sup>68</sup> — it has impermissibly usurped the judicial power of the Commonwealth.<sup>69</sup> Surely the same is true if the legislature, though it refrains from making any determination of guilt, stipulates that, once a court has adjudged guilt, it must impose a particular penalty/minimum penalty on an

58 Fiona Wheeler, ‘The *Kable* Doctrine and State Legislative Power Over State Courts’ (2005) 20(2) *Australasian Parliamentary Review* 15, 15.

59 Freiberg and Murray, above n 54, 7.

60 (1996) 189 CLR 51.

61 *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275–6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *A-G (Cth) v The Queen* [1957] AC 288, 311–4 (Lord Simonds for the Privy Council).

62 See *Commonwealth Constitution* s 71.

63 See *Commonwealth Constitution* s 77(iii).

64 *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (Jacobs J).

65 See George Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 185, 188.

66 See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (*‘Lim’*).

67 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 535 (Mason CJ) (*‘Polyukhovich’*).

68 See *ibid* 685–6 (Toohey J), citing Michael P Lehmann, ‘The Bill of Attainder Doctrine: A Survey of the Decisional Law’ (1978) 5 *Hastings Constitutional Law Quarterly* 767, 790–1.

69 *Polyukhovich* (1991) 172 CLR 501, 535–6 (Mason CJ), 612 (Deane J), 686 (Toohey J), 704–5 (Gaudron J), 721 (McHugh J); see also at 647–8 (Dawson J).

offender? Surely in such a case, the legislature, though it has made no finding of guilt, *has* performed the exclusively judicial task of imposing punishment?

## 2 A Legislative Usurpation of or Interference with Judicial Power?

The answer to these questions is more complicated than one might expect. Indeed, the courts have drawn a distinction between laws that apply generally and those that speak *ad hominem*. If a law provides that a court must impose a particular sentence, or a particular minimum sentence, *on a specific individual or individuals* after conviction, it seems that the legislature has usurped judicial power — or, at least, has interfered impermissibly with its exercise.<sup>70</sup> The Privy Council appears to have held as much in *Liyanage v The Queen*.<sup>71</sup> Certainly, in that case, the Ceylon legislature did not *merely* purport to alter the sentence to which the leaders of the failed *coup d'état* would be exposed upon conviction. As well as providing that the appellants were to be sentenced to at least ten years' imprisonment if convicted, the Parliament: modified an offence with which some of the accused were charged 'to meet the circumstances of the abortive coup'; enabled the Minister of Justice to order that the appellants' trial be heard by three judges of his choosing, sitting without a jury; altered the laws of evidence that would apply at the trial so as to make admissible statements made by the accused while in custody that would otherwise have been inadmissible; and legalised the appellants' pre-trial custody.<sup>72</sup> Nevertheless, in finding that the relevant Act amounted to both a 'legislative [judgment]; and an exercise of judicial power',<sup>73</sup> Lord Pearce particularly emphasised Parliament's direction to the judges to impose a minimum sentence on those who were ultimately convicted. The legislation's aim, his Lordship thought, was, '[q]uite bluntly':

to ensure that the judges in dealing with these particular persons on these particular charges 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.<sup>74</sup>

Accordingly, the Privy Council in *Hinds v The Queen* seems justifiably to have read *Liyanage* as holding that, in jurisdictions with a Constitution that provides for a separation of judicial power, 'the legislature ... *can* not ... prescribe the penalty to be imposed in an individual citizen's case'.<sup>75</sup>

70 Concerning the difference between usurpation and interference, see *Nicholas v The Queen* (1998) 193 CLR 173, 220 [112] (McHugh J) ('*Nicholas*'). See also Desmond Manderson and Naomi Sharp, 'Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process' (2000) 22 *Sydney Law Review* 585, 595–7.

71 [1967] 1 AC 259 ('*Liyanage*'). As a former Australian High Court Justice has noted, it seems clear that this decision would be followed in Australia: Michael McHugh, 'Does Chapter III of the *Constitution* Protect Substantive as Well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235, 243.

72 *Liyanage* [1967] 1 AC 259, 278–81, 290.

73 *Ibid* 291, quoting *Calder v Bull*, 3 US (3 Dallas) 386, 389 (Chase J) (1798).

74 *Liyanage* [1967] 1 AC 259, 290–1.

75 [1977] AC 195, 227 (Lord Diplock for the Privy Council) ('*Hinds*') (emphasis in original).

The position is different, however, if a law provides that a court must impose a particular sentence, or a particular minimum sentence, on *anyone* whose future conduct causes him/her to be convicted of a particular offence. As Barwick CJ observed in *Palling*:

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 ... it may lay an unqualified duty on the court to impose that penalty. ... If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded.<sup>76</sup>

But the question arises: what difference exists between the constitutionally valid, generally applicable mandatory sentencing law that Barwick CJ contemplates here and the ad hominem mandatory sentencing law that the Privy Council in *Hinds* and, apparently, *Liyanage*, stigmatised as a usurpation, or an impermissible interference with the exercise, of judicial power? In *Palling*, Barwick CJ considered that the former type of law is valid because '[t]he exercise of the judicial function is the act of imposing the penalty consequent upon conviction ... which is essentially a judicial act'.<sup>77</sup> In other words, for his Honour, because the judge or magistrate *actually* imposes the sentence, the legislature has not performed, or interfered impermissibly with, the exclusively judicial function of punishing criminal guilt. This reasoning is excessively formalistic.<sup>78</sup> But, more importantly for present purposes, it fails satisfactorily to answer the question that I have posed above. This is because, in the case of ad hominem mandatory sentencing laws, too, the judge actually imposes the sentence. In *Liyanage*, for instance, the trial judges, despite protesting that they 'would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it',<sup>79</sup> imposed sentences of at least ten years' imprisonment on those whom they convicted. Yet in that type of case, as we have seen, the relevant legislation will be struck down.

In short, there is no obvious reason why ad hominem mandatory sentencing laws should, but generally applicable mandatory sentencing laws should not, be invalidated on separation of powers grounds. Indeed, there is much to be said for the view that both types of law should be equally vulnerable to attack on this basis. A law that 'purports to direct' the courts as to the 'manner and outcome of the exercise of their jurisdiction' is constitutionally infirm.<sup>80</sup> Surely a law that requires a court to impose a particular sentence or minimum sentence *either*

76 (1970) 123 CLR 52, 58; see also 64–5 (Menziez J), 67 (Owen J), 68 (Walsh J). These remarks have been accepted in subsequent cases as being authoritative: see, eg, *Wynbyne v Marshall* (1997) 7 NTLR 97, 108 (Mildren J, with whom Bailey J agreed) ('*Wynbyne*').

77 (1970) 123 CLR 52, 58.

78 See below nn 94–7 and accompanying text.

79 [1967] 1 AC 259, 291, quoting *R v Liyanage* (1965) 67 NLR 193, 424.

80 *Lim* (1992) 176 CLR 1, 36–7 (Brennan, Deane and Dawson JJ).

on a particular individual or individuals, or on anyone convicted of a particular offence, has purported to direct it in this way?<sup>81</sup>

### 3 An Executive Usurpation of or Interference with Judicial Power?

Similar inconsistencies are present in the law concerning the *executive government's* ability to impose a mandatory sentence on a person. Just as the legislature apparently may not require a court to impose a particular sentence, or a particular minimum sentence, on a specific individual or individuals, it is well-established that the executive may not sentence identified persons.<sup>82</sup> So, in *Hinds* the Privy Council held that it was impermissible for a non-judicial Review Board to determine the length of the sentences for those convicted of a certain firearms offence.<sup>83</sup> To hold differently, Lord Diplock thought, would be to 'open the door to the exercise of arbitrary power by the executive in the whole field of criminal law'.<sup>84</sup>

Nevertheless, in some cases, the executive has seemingly been permitted effectively to impose a mandatory sentence on particular offenders. A possible example of this is *Palling*.<sup>85</sup> The relevant sub-section provided that, where a person was convicted of failing to attend for a medical examination, in defiance of a notice served under pt III of the *National Service Act 1951–1968* (Cth), the prosecutor was entitled to request the court to ask the offender whether he was prepared to comply with the requirements of a further such notice. If the offender replied in the negative, the court was required to sentence him to seven days' imprisonment. The High Court unanimously rejected<sup>86</sup> the applicant's argument that, because the imposition of this penalty was the 'inevitable result'<sup>87</sup> of the prosecutor's decision to make the aforementioned request, the Crown had determined the punishment to be imposed — and so had exercised judicial power. For Barwick CJ, it was crucial that Parliament may allow the Crown to choose whether to prosecute a particular offence summarily or on indictment, even where

81 Such a proposition certainly has received significant academic — and even some judicial — support: see, eg, Gray, *Criminal Due Process and Chapter III of the Australian Constitution*, above n 54, 286–8; Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22 *Journal of Judicial Administration* 37, 39–41; Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes — Part II' (2013) 23 *Journal of Judicial Administration* 58, 65; Anthony Gray, 'The Constitutionality of Queensland's Recent (Legal) War on "Bikies"' (2014) 19 *Deakin Law Review* 51, 83–4; Manderson and Sharp, above n 70, 604–5; Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36 *Melbourne University Law Review* 553, 594–5; G F K Santow, 'Mandatory Sentencing: A Matter for the High Court?' (2000) 74 *Australian Law Journal* 298, 301.

82 *Hinds* [1977] AC 195, 226–228 (Lord Diplock for the Privy Council); see also *Browne v The Queen* [2000] 1 AC 45, 46–9 (Lord Hobhouse for the Privy Council).

83 *Hinds* [1977] AC 195, 226 (Lord Diplock for the Privy Council).

84 *Ibid.*

85 (1970) 123 CLR 52.

86 *Ibid* 59–61 (Barwick CJ), 62–3 (McTiernan J), 64–5 (Menzies J), 65 (Windeyer J), 66–67 (Owen J), 69–70 (Walsh J), 70 (Gibbs J).

87 *Ibid* 56 (Barwick CJ).

the accused will be exposed to a higher penalty if the latter procedure is used.<sup>88</sup> It followed by analogy, his Honour thought, that when the Crown in the present case chose to make the relevant request, thus exposing the offender to the mandatory minimum penalty, it was not exercising judicial power.<sup>89</sup>

Certainly, the result in *Palling* has been plausibly defended. The prosecutor there, it has been said, did not effectively sentence the offender, because, contrary to the applicant's submission, it was *not* the inevitable result of the Crown's request that the Court would impose at least a seven day prison sentence. Instead, the argument proceeds, the sentence was imposed only after the offender volunteered a negative response to the Court's inquiry.<sup>90</sup> But such a rationalisation, however persuasive it is, cannot explain two other High Court decisions, *Fraser Henleins Pty Ltd v Cody*<sup>91</sup> and *Magaming v The Queen*.<sup>92</sup>

In those cases, it was alleged that the legislature had created two identical criminal offences, one of which was, and the other of which was not, punishable by a mandatory minimum prison sentence. Accordingly, on the assumption that the offences *were* identical,<sup>93</sup> the executive, when prosecuting the relevant conduct, could choose whether to expose the accused to the mandatory minimum sentence. Where it opted to proceed against her/him for the offence carrying the mandatory penalty, might it not have usurped, or interfered impermissibly with the exercise of, judicial power?

In both cases, the High Court held that the answer to this question is 'no'. In so holding, their Honours deployed similar reasoning to Barwick CJ's in *Palling*. The prosecutorial choice whether to charge a person with an offence carrying a mandatory sentence, or an identical offence that did not carry such a penalty, was, they thought, no different from the undoubtedly constitutionally valid choice whether to proceed summarily or on indictment for particular offences.<sup>94</sup> This reasoning is dubious. Where the Crown makes a choice to proceed on indictment, this will usually expose the accused to a higher maximum penalty than that to which he/she would be subject if he/she were to be dealt with summarily. But, even so, it is clear that there has not been any substantial interference with the

88 Ibid 59.

89 Ibid 61.

90 Martin Flynn, 'Fixing a Sentence: Are There Any Constitutional Limits?' (1999) 22 *UNSW Law Journal* 280, 284. See also *Magaming v The Queen* (2013) 252 CLR 381, 407 [80] (Gageler J) ('*Magaming*').

91 (1945) 70 CLR 100 ('*Fraser Henleins*').

92 (2013) 252 CLR 381.

93 In *Magaming*, the majority in fact denied the truth of this assumption concerning the offences that they had been asked to consider: see *ibid* 388–9 [16]–[17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, with whom Keane J agreed). The simple people smuggling offence created by *Migration Act 1958* (Cth) s 233A(1), they held, differed in the following way from the aggravated people smuggling offence created by s 233C(1) of that Act (for which there was a mandatory minimum non-parole of three years). Whereas a person's guilt of the latter offence depended upon proof that he/she had organised or facilitated the coming to Australia of at least *five* unlawful non-citizens, an accused could be convicted of the s 233A(1) offence if it was proved that only *one* unlawful non-citizen was to be brought to Australia.

94 *Fraser Henleins* (1945) 70 CLR 100, 120 (Latham CJ), 121 (Starke J), 139 (Williams J); *Magaming* (2013) 252 CLR 381, 394 [39] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

exercise of judicial power. This is because the sentencing court's discretion to impose what it considers to be a fit sentence is preserved; it may still impose *any* sentence it thinks suitable, below the statutory maximum. Where, however, the Crown makes a choice to charge a person with an offence carrying a mandatory sentence, the Court's discretion is at least significantly limited (if a mandatory minimum sentence applies) — and might even be removed entirely (if there is but one sentence that can be imposed). For this reason, it seems that, in cases where the Crown could have proceeded against the accused for an identical offence that does not carry a mandatory penalty, there is a strong argument that there has been at least an impermissible interference with the exercise of judicial power.

Can the results in *Fraser Henleins* and *Magaming* nevertheless be supported on other grounds? Might it be that, properly viewed, the executive in those cases was not effectively imposing the mandatory minimum sentence on those whom it chose to charge with the more serious offence? In *Ex parte Coorey*,<sup>95</sup> which was decided the year before *Fraser Henleins*, the NSW Supreme Court considered the validity of the same legislation that was at issue in that slightly later case. As did the High Court, the majority found that the legislature had acted validly when it created two identical offences, one with and the other without a mandatory sentence, and allowed the Commonwealth Attorney-General, after receiving a ministerial report and advice from a committee, to choose whether to expose a particular offender to the mandatory penalty. In so holding, Davidson J employed similar reasoning to that used by Barwick CJ in *Palling* — and which I described above as being excessively formalistic.<sup>96</sup> His Honour said:

the Legislature ... has vested in the Attorney-General a power which is not judicial, and although it has the effect of limiting in some degree the discretion of the Court in imposing penalties, *that limitation only operates in the future upon a contingency of a conviction by the Court*. The position would perhaps be different had the Parliament enacted that the judicial tribunal before which the charge was heard might only record a conviction in order that the penalty might be assessed and imposed by the Attorney-General or the Executive. *In such circumstances there would be a decision upon transactions had as involving the creation of an instant liability at that stage on the person convicted*. Then there would be a judicial as distinct from either a legislative or executive act.<sup>97</sup>

One suggestion here is that it is enough that the court has *in fact* imposed the mandatory minimum sentence; only if the executive made an instantly binding decision to impose a particular penalty on a specific offender would there be a breach of the separation of powers. The other is the related proposition that, because the court has been left to adjudge guilt, the executive has neither usurped nor interfered impermissibly with the exercise of judicial power. As Jordan CJ

95 (1944) 45 SR (NSW) 287 ('Coorey').

96 See above nn 77–8 and accompanying text.

97 *Coorey* (1944) 45 SR (NSW) 287, 314–15 (emphasis added). The High Court Justices who heard *Fraser Henleins* either expressly adopted this reasoning or deployed very similar reasoning of their own: see *Fraser Henleins* (1945) 70 CLR 100, 120 (Latham CJ), 121 (Starke J), 124–5 (Dixon J), 132 (McTiernan J), 139 (Williams J).



argued in dissent,<sup>98</sup> none of this is persuasive. To regard as critical the fact that a judge has actually imposed the sentence is to overlook the true effect of the executive's decision to proceed against the offender for the more serious offence. By so doing, it has surely 'dictate[d] to a Court ... that at least a certain penalty shall be imposed in the event of conviction'.<sup>99</sup> Moreover, it is irrelevant that the legislature has refrained from interfering with the judicial function of *adjudging* guilt. What *is* relevant is that, when imposing sentence — when exercising this further exclusively judicial function of *punishing* guilt — the Court is, to use Allsop P's language, 'in a significant respect' implementing a decision made 'in advance, by ... the Australian executive government'.<sup>100</sup>

But, however unpersuasive is some of the reasoning upon which the judges have relied, it is clear that the Commonwealth Parliament has an almost unrestricted power to: (i) create mandatory sentencing provisions; and (ii) allow the executive to choose to expose particular accused to mandatory sentences. The same is true of state and territory legislatures.

### C The Position in the States and Territories

While there is no formal separation of powers in the states and territories,<sup>101</sup> neither state<sup>102</sup> nor territory<sup>103</sup> legislatures may confer on a court a function that is repugnant to or incompatible with its exercise<sup>104</sup> of the judicial power of the Commonwealth.<sup>105</sup> In *Kable*, it was suggested that, when deciding whether such a function has been purportedly conferred on a court, the crucial question is whether, if the court were to perform that function, public confidence in its independence and impartiality would be damaged.<sup>106</sup> But public confidence is now not the touchstone of validity; rather, the crucial question is whether the court's institutional integrity would be substantially impaired.<sup>107</sup>

Because the 'critical notions'<sup>108</sup> of repugnancy, incompatibility and institutional integrity are apparently 'not readily susceptible of definition in terms which will dictate future outcomes',<sup>109</sup> the precise parameters of the principles just stated are

98 *Coorey* (1944) 45 SR (NSW) 287, 300.

99 *Ibid.*

100 *Karim v The Queen* (2013) 83 NSWLR 268, 299 [117] ('*Karim*').

101 *Kable* (1996) 189 CLR 51, 65 (Brennan CJ), 77–80 (Dawson J), 92–4 (Toohey J), 109 (McHugh J).

102 *Ibid.*

103 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [28]–[29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Bradley*').

104 *Commonwealth Constitution* s 77(iii).

105 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 88–9 [123]–[124] (Hayne, Crennan, Kiefel and Bell JJ) ('*Pompano*'). See also *Kable* (1996) 189 CLR 51, 104 (Gaudron J).

106 *Kable* (1996) 189 CLR 51, 98 (Toohey J), 107 (Gaudron J), 116–9 (McHugh J), 133 (Gummow J).

107 *Fardon v A-G (Qld)* (2004) 223 CLR 575, 617–618 [102] (Gummow J) ('*Fardon*'); *North Australian Aboriginal Justice Agency Ltd* (2015) 256 CLR 569, 595 [40] (French CJ, Kiefel and Bell JJ).

108 *Pompano* (2013) 252 CLR 38, 89 [124] (Hayne, Crennan, Kiefel and Bell JJ), quoting *Fardon* (2004) 223 CLR 575, 618 [104] (Gummow J).

109 *Pompano* (2013) 252 CLR 38, 89 [124] (Hayne, Crennan, Kiefel and Bell JJ).

unclear.<sup>110</sup> Nevertheless, it is clear that, under these principles, state and territory courts must be and appear to be impartial and independent.<sup>111</sup> Accordingly, as at Commonwealth level, these courts ‘cannot be required to act at the dictation of the Executive’,<sup>112</sup> and ‘legislation which purport[s] to direct the [state or territory] courts as to the manner and outcome of the exercise of their jurisdiction [is] apt impermissibly to impair the character of the courts as independent and impartial tribunals’.<sup>113</sup>

So, while the separation of judicial power ‘does not apply in terms to the States’ and that therefore ‘there can be no direct application to the State courts of all aspects of the doctrines that have been developed in relation to Ch III’,<sup>114</sup> the principles overlap substantially and often produce the same outcomes.<sup>115</sup> And this also means that challenges to state and territory mandatory sentencing laws have failed for much the same reason as have challenges to Commonwealth laws of this nature. While, as argued above, there is a powerful argument that these laws do purport to dictate to the courts that at least a minimum sentence be imposed, the relevant authorities effectively deny this.<sup>116</sup>

#### **D Why the Dubious Reasoning and Inconsistencies?**

As I have noted, the Australian law concerning the validity of mandatory sentencing provisions is not altogether consistent; and the reasoning used in cases where mandatory sentencing legislation has been challenged on constitutional grounds has not always been persuasive. The question arises: why have the courts been so willing to embrace reasoning that, as Gageler J pointed out in dissent in *Magaming*, ‘elevates form over substance’<sup>117</sup> and has created such inconsistencies?

The courts’ willingness to allow Parliament to provide for mandatory sentences is, seemingly, partly based on an acknowledgement that mandatory sentences

110 This has led more than one commentator to observe that the principles from *Kable* and subsequent cases give rise to no little indeterminacy: see, eg, Peter Johnston, ‘The High Court, *Kable* and the Constitutional Validity of Criminal Property Confiscation Laws: *Attorney General (Northern Territory) v Emmerson*’ (2014) 26(2) *Bond Law Review* 3, 9–10, 14.

111 *Bradley* (2004) 218 CLR 146, especially 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

112 *Pompano* (2013) 252 CLR 38, 89–90 [125] (Hayne, Crennan, Kiefel and Bell JJ), citing *South Australia v Totani* (2010) 242 CLR 1, 52 [82], 67 [149], 92–3 [236], 160 [436], 173 [481].

113 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 531, 560 [39] (Gummow, Hayne, Heydon and Kiefel JJ).

114 *Pompano* (2013) 252 CLR 38, 90 [125] (Hayne, Crennan, Kiefel and Bell JJ).

115 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [53] (French CJ), quoting *Kable* (1996) 189 CLR 51, 118 (McHugh J); see also James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 278.

116 See, eg, *Palling* (1970) 123 CLR 52, 58 (Barwick CJ). See also 64–5 (Menziez J), 67 (Owen J), 68 (Walsh J); *Wynbyne* (1997) 7 NTLR 97, 99–101 (Martin CJ) and 111–12 (Mildren J); *Magaming* (2013) 252 CLR 381, 396 [49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

117 *Magaming* (2013) 252 CLR 381, 407 [81].

were commonplace in previous centuries,<sup>118</sup> and continued to be ‘known forms of legislative prescription of penalty for crime’<sup>119</sup> from Federation to the present. Consistently with Latham CJ’s observations in *Fraser Henleins*, no one ever suggested during that time that ‘the sphere of judicial power’ was thus ‘invaded’.<sup>120</sup> Their failure to do so makes it more difficult for a litigant to claim that it has now become clear that mandatory sentences are inconsistent with Chapter III after all<sup>121</sup> — even if, in fact, the legislation that provides for them to be imposed bears all of the vices of the more unorthodox laws considered in *Liyanage*.

It is doubtful, however, whether these historical considerations provide a full explanation for the inconsistencies and questionable reasoning in the cases. An even more important reason for the anomalies that exist, and the unpersuasive justifications that have been advanced, seems to be the courts’ desire not to be seen to be substituting their views about the wisdom of mandatory sentencing laws for those of the democratically elected legislature. Chapter III has recently been found to contain a number of protections that few previously considered it to hold.<sup>122</sup> In other words, the novelty of an argument that a particular law contravenes Chapter III seems not to be a sufficient reason for the High Court to reject it. For example, in *Kirk v Industrial Court of New South Wales*<sup>123</sup> the Court accepted that, contrary to what had hitherto been supposed, a privative clause in a state law cannot prevent that state’s Supreme Court from granting relief in the nature of certiorari for ‘jurisdictional error’.<sup>124</sup> Academics have not unanimously accepted the plausibility of their Honours’ reasoning.<sup>125</sup> Nevertheless, as Sackville has noted, the decision was not merely publicly uncontroversial, but popular:

Commentators, including in organs vehemently opposed to a national charter of rights, greeted the decision ... None of the commentaries remarked upon the novelty of the reasoning ... Nor did they comment on the willingness of the court to use creative reasoning to frustrate the will of democratically-elected State legislatures.<sup>126</sup>

However prepared the press and public might be to accept novel interpretations of Chapter III in cases such as *Kirk* — where an employer was seeking judicial review

118 Just how commonplace they in fact were, is the subject of debate: compare Manderson and Sharp, above n 70, 617–21 with Mason, above n 18, 28. See also Andrew Hemming, ‘The Constitutionality of Minimum Mandatory Sentencing Regimes: A Rejoinder’ (2013) 22 *Journal of Judicial Administration* 224, 225–6.

119 *Magaming* (2013) 252 CLR 381, 396 [49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

120 *Fraser Henleins* (1945) 70 CLR 100, 119 (Latham CJ).

121 A point made by George Zdenkowski, ‘Mandatory Imprisonment of Property Offenders in the Northern Territory’ (1999) 22 *UNSW Law Journal* 302, 309.

122 See, eg, Ronald Sackville, ‘Bills of Rights: Chapter III of the Constitution and State Charters’ (2011) 18 *Australian Journal of Administrative Law* 67, 70, 72, 75; Fiona Wheeler, ‘The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview’ (2000) 20 *Australian Bar Review* 282, 283, 284, 290; Leslie Zines, ‘A Judicially Created Bill of Rights’ (1994) 16 *Sydney Law Review* 166, 167–75.

123 (2010) 239 CLR 531 (*Kirk*).

124 *Ibid* 580–1 [96]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

125 See, eg, Jeffrey Goldsworthy, ‘*Kable*, *Kirk* and Judicial Statesmanship’ (2014) 40 *Monash University Law Review* 75, 93–104.

126 Sackville, above n 122, 77.

of his conviction for an industrial safety offence, on the basis that the Industrial Court had, among other things,<sup>127</sup> erroneously not considered it to be necessary for the prosecution to identify any particular act or omission that founded his liability<sup>128</sup> — it must be patently obvious to the judiciary that they would not be so indulgent of such interpretations in cases concerning the controversial topic of mandatory sentencing. Accordingly, it appears that courts, when deciding such cases, have been influenced by a desire to avoid any suggestion that they are undemocratically overriding Parliament's will.

This is perhaps demonstrated by the High Court's attitude in *Magaming* to an argument that the impugned provision was constitutionally invalid because, essentially, it mandated the imposition on a less blameworthy offender of a sentence that was, 'manifestly disproportionate to the circumstances of the offence committed by him and his personal moral culpability'.<sup>129</sup> To require the courts to impose such a sentence, it was contended, was to require them to act in an 'arbitrary and non-judicial' way.<sup>130</sup> Although agreeing with the majority's reasons for dismissing Mr Magaming's appeal, Keane J wrote a brief separate judgment containing some 'observations' about this submission. In turn, these observations are eloquent of an eagerness to avoid any suggestion that his Honour was willing to claim for the courts powers that are commonly seen as properly being exercised only by Parliament:

The enactment of sentences by the legislature, whether as maxima or minima, involves the resolution of broad issues of policy by the exercise of legislative power. ... It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of a view that condign punishment is called for to suppress that activity, and to determine whether a level of punishment should be enacted as a ceiling or a floor. ...

It is ironic that the appellant should invoke the separation of powers ... because, in truth, the institutional integrity of the judiciary would be compromised by accepting the argument that the validity of [the relevant subsection] is conditional upon acceptance by a sentencing judge that the sentence enacted by the legislature is no more than is appropriate to that judge's opinion of the culpability of the [offender] ...<sup>131</sup>

The other majority Justices, while perhaps not placing quite as much emphasis on the point, similarly held that any harshness produced by the relevant provision failed to establish its invalidity.<sup>132</sup>

127 The primary judge also erred by allowing the defendant to give evidence as a witness for the prosecution, contrary to *Evidence Act 1995* (NSW) s 17(2): (2010) 239 CLR 531, 565 [50]–[53] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

128 (2010) 239 CLR 531, 557 [26] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

129 (2013) 252 CLR 381, 413 [101] (Keane J).

130 *Ibid* 390 [23] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

131 *Ibid* 414 [105], [107] (Keane J).

132 *Ibid* 397–8 [52] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *A-G (NT) v Emmerson* (2014) 253 CLR 393, 439 [85], where six Justices approved Keane J's observations in *Magaming*, holding that 'complaints about the justice, wisdom, fairness or proportionality of ... measures ... are complaints of a political, rather than a legal, nature'.

The first point here is that the argument that it is contrary to Chapter III to require a court to depart from the proportionality principle when sentencing offenders is probably not as obviously fallacious as Keane J thought. The separation of judicial power requires not merely that the judiciary exercise certain powers, but also that they do so in accordance with the judicial process.<sup>133</sup> Accordingly, a court cannot be required or authorised to act ‘in a manner which is inconsistent with the essential character of a court or with the nature of judicial power’.<sup>134</sup> If it is inconsistent with a court’s essential character for it to be required or authorised, for example, not to apply procedural fairness,<sup>135</sup> not give reasons for its decisions<sup>136</sup> or, possibly, to proceed in a manner that does not ensure equality before the law,<sup>137</sup> might not the same be true where it is required to impose a (radically) disproportionate sentence? After all, as noted above, sentencing is an exclusively judicial function, and it is well established that proportionality is sentencing’s primary aim.<sup>138</sup> Perhaps somewhat consistently with this analysis, even one reasonably cautious (and very distinguished) commentator considered that ‘Commonwealth legislation imposing barbarous sentences would probably contravene s 71 of the *Constitution*, because the courts would be required to exercise a power which was incompatible with the role of the judiciary in a civilised society’.<sup>139</sup>

In the first paragraph set out above, Keane J does not really explain why sentencing proportionality is not among the ‘defining or essential characteristics’<sup>140</sup> of a court. His Honour simply asserts that setting penalties is a legislative function, and, seemingly, that Parliament is better placed<sup>141</sup> than the courts to determine how severely to punish particular misconduct.

The material in the second paragraph set out above might reveal, at least partly, *why* Keane J does not consider particularly carefully whether Parliament’s general freedom to legislate in this area might be ‘subject to ... the constraints of

133 See, eg, *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J). See also Winterton, above n 65, 199.

134 *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

135 *North Australian Aboriginal Justice Agency Ltd* (2015) 256 CLR 569, 594 (French CJ, Kiefel and Bell JJ), citing *Leeth v Commonwealth* (1992) 174 CLR 455, 469–70 (Mason CJ, Dawson and McHugh JJ) (*‘Leeth’*).

136 *Wainohu v New South Wales* (2011) 243 CLR 181, 228–30 [104]–[109] (Gummow, Hayne, Crennan and Bell JJ).

137 *Nicholas* (1998) 193 CLR 173, 208 [74] (Gaudron J); *Kruger v Commonwealth* (1997) 190 CLR 1, 112 (Gaudron J) (*‘Kruger’*), citing *Leeth* (1992) 174 CLR 455, 502–3 (Gaudron J).

138 See *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

139 Winterton, above n 65, 207; see also Gray, ‘The Constitutionality of Queensland’s Recent (Legal) War on “Bikies”’, above n 81, 86; Gray and Elmore, ‘The Constitutionality of Minimum Mandatory Sentencing Regimes’, above n 81, 42.

140 *North Australian Aboriginal Justice Agency Ltd* (2015) 256 CLR 569, 594 (French CJ, Kiefel and Bell JJ).

141 This tends to ignore the possibility that Parliament enacted the relevant laws not for rational reasons, but rather in a cynical attempt to placate the public (indeed, concerning the specific law that was challenged in *Magaming*, see above n 50). It also ignores the fact that it is widely acknowledged that sentencing policy is one of those areas in which judges have sufficient expertise to entitle them not to be as deferential to the legislative judgment as they often must in other areas of policy: see, eg, Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2005) 122.

any relevant Constitutional limitation'.<sup>142</sup> Particularly noteworthy is his Honour's statement that the courts' 'institutional integrity' would be 'compromised' if the High Court were to strike down a law because it required the imposition of disproportionate sentences.<sup>143</sup> The concern here appears to be for the courts' reputation; indeed, these remarks, and Keane J's claim that the sentencing judge's opinion as to the proportionality of the sentence is irrelevant to the law's constitutionality, are reminiscent of Brennan CJ's contention in *Nicholas v The Queen* that:

It is the faithful adherence of the courts to the laws enacted by the Parliament, however undesirable the courts may think them to be, which is the guarantee of public confidence in the integrity of the judicial process and the protection of the courts' repute as the administrator of criminal justice.<sup>144</sup>

In other words, the Australian courts are usually unwilling to risk creating a perception that they have substituted their views about certain laws' desirability for those of the democratically elected legislature. Novel arguments might be accepted in cases such as *Kirk*, where, because popular results are produced, the courts are unlikely to face any substantial criticism. But they will often be flatly rejected in cases such as *Magaming*, where, if a different approach were taken, accusations of 'judicial activism' might well follow.

This concern with legitimacy seems at least partly to explain the inconsistencies, and the dubious and formalistic reasoning, discussed above. It was not as though the High Court in *Magaming*, for example, was *required* to decide the case as it did. That *the law* did not compel such an outcome is demonstrated by the ease with which Gageler J justified reopening *Fraser Henleins*.<sup>145</sup> And, as I have argued, and as his Honour showed, there were persuasive arguments in favour of departing from that old authority.

This same concern also means that any further arguments open to those who wish to challenge a mandatory sentencing law on Chapter III grounds seem unlikely to succeed. In *Kuczborski v Queensland*,<sup>146</sup> the plaintiff challenged the *Vicious Lawless Association Disestablishment Act 2013* (Qld) ('VLAD Act'). This legislation, the primary aim of which is to destroy various motorcycle clubs,<sup>147</sup> relevantly provides that a court must impose a further sentence of 15 years' imprisonment on a person who commits any of a wide range of offences<sup>148</sup> while a participant in the affairs of an association, if the offence was committed for that association's purposes or while participating in its affairs.<sup>149</sup> If the defendant

142 As Allsop P put it in *Karim* (2013) 83 NSWLR 268, 298 [110].

143 *Magaming* (2013) 252 CLR 381, 414 [107] (Keane J).

144 (1998) 193 CLR 173, 197 [37].

145 *Magaming* (2013) 252 CLR 381, 407–8 [79]–[83] (Gageler J).

146 (2014) 254 CLR 51 ('*Kuczborski*').

147 See Queensland, *Parliamentary Debates*, Legislative Assembly, 15 October 2013, 3114 (Campbell Newman, Premier).

148 For the offences that are included, see *VLAD Act* s 3 and sch 1.

149 See *VLAD Act* ss 7(1)(b) and 5(1). 'Association' is defined in s 3 to include 'any ... group of 3 or more persons by whatever name called, whether associated formally or informally and whether the group is legal or illegal'.

was an office-bearer of the association, the further sentence that the court must impose rises to 25 years' imprisonment.<sup>150</sup> In support of his contention that the Act was invalid on *Kable* grounds, the plaintiff argued that it 'confers a function on courts offensive to the principle of equality before the law and [is] thereby repugnant to the judicial process'.<sup>151</sup> A person who has committed the offence of affray, he submitted,<sup>152</sup> will usually be liable to a maximum penalty of one year's imprisonment.<sup>153</sup> But if he/she was an office-bearer of an 'association' and committed the offence for the purposes of the 'association' or while participating in its affairs, he/she had to be sentenced to a minimum non-parole period of at least<sup>154</sup> 25 years. Surely, he argued, this shows that the *VLAD Act* requires the courts to treat differently 'like persons in like circumstances'?<sup>155</sup> The difference between the two offenders referred to above — one did, and the other did not, commit the crime in the course of participating in an association's affairs — is not, it was said, a relevant difference<sup>156</sup> such as to justify the vastly different punishments.

Because the plaintiff was found to lack standing to challenge the Act's validity,<sup>157</sup> the High Court did not have to decide this point. But assuming<sup>158</sup> that 'equal justice ... is fundamental to the judicial process'<sup>159</sup> such as to mean that a law requiring a court to exercise powers in an irrationally discriminatory manner is contrary to Chapter III,<sup>160</sup> might such an argument succeed in the future? The answer is that it would probably fail for largely the same reasons as the argument in *Magaming* about harshness did. The only Justice in *Kuczborski* to deal squarely with the equality argument, Hayne J, was dismissive of it.<sup>161</sup> Such an approach is only to be expected. If, as Keane J held in *Magaming*, it is inappropriate for the courts to strike down mandatory sentencing legislation simply because they consider that it requires the imposition of disproportionate/grossly disproportionate sentences, how could it be appropriate for them to strike it down because, in their opinion, it requires either the different treatment of like offenders or the like treatment

150 *VLAD Act* s 7(1)(c).

151 *Kuczborski* (2014) 254 CLR 51, 65 [15] (French CJ).

152 See Stefan Kuczborski, 'Plaintiff's Written Submissions', Submission in *Kuczborski v Queensland*, B14/2014, 16 July 2014, [58]–[59].

153 See *Criminal Code Act 1899* (Qld) s 72(1).

154 I say 'at least' because, at the time that *Kuczborski* was being argued, if the association was also a 'criminal organisation' within the meaning of the *Criminal Code Act 1899* (Qld) s 1, the court was required to impose a minimum sentence of 25 ½ years on the offender. The provision that mandated this, *Criminal Code Act 1899* (Qld) s 72(2), has since been altered: *Serious and Organised Crime Amendment Act 2016* (Qld) s 66.

155 *Leeth* (1992) 174 CLR 455, 502 (Gaudron J).

156 See generally *Wong v The Queen* (2001) 207 CLR 584, 608 [65] (Gaudron, Gummow and Hayne JJ).

157 *Kuczborski* (2014) 254 CLR 51, 66 [19] (French CJ), 87–8 [99]–[100] (Hayne J), 107–8 [178]–[182], 110 [188] (Crennan, Kiefel, Gageler and Keane JJ), 131 [280] (Bell J).

158 For a discussion of the law concerning equality and Chapter III, see Stellios, *Zines's The High Court and the Constitution*, above n 115, 307–9; James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 295–305.

159 *Leeth* (1992) 174 CLR 455, 502 (Gaudron J).

160 *Ibid* 502–3 (Gaudron J); *Kruger* (1997) 190 CLR 1, 112 (Gaudron J); *Cameron v The Queen* (2002) 209 CLR 339, 352 [44] (McHugh J).

161 *Kuczborski* (2014) 254 CLR 51, 90–91 [108]–[109].



of different offenders? Whether there has been unequal treatment depends on a judicial assessment that the offenders are in fact relevantly alike or different. And that will usually<sup>162</sup> require the courts to express a view about whether the Parliament correctly assessed the relevant offences' seriousness. The *Kuczborski* affray example again illustrates the point. In such a case, the question would essentially be: was the Parliament entitled to consider that an individual convicted of an affray committed while he/she was an office-bearer of an association, and for its purposes is so much more culpable than a person convicted of an affray that was not aggravated in these ways, as to justify the imposition on him/her of a radically different sentence? Judging by Keane J's approach in *Magaming*, the courts will be slow to answer this question in the negative. To do so would be to enter what his Honour regarded as that distinctly legislative province of 'gaug[ing] the seriousness of what is seen as an undesirable activity' and determining what is a suitable punishment for it.<sup>163</sup> In other words, even if the law in those Australian jurisdictions without a charter of rights does still leave open the possibility that the courts in the future will place some meaningful limits on Parliament's ability to provide for the imposition of mandatory sentences, it seems unlikely that they will do so.<sup>164</sup> It is more likely that they will continue to refuse to intervene in such cases, partly at least due to a concern to avoid any suggestion that they are unwarrantably striking down legislation on human rights grounds.

But what happens when there *is* a charter of rights and/or other strong human rights guarantees in a jurisdiction? When the courts have been given a specific mandate to consider whether certain sentences amount to 'inhuman or degrading punishment',<sup>165</sup> have they shown a greater willingness than have the Australian courts to intervene where it has been alleged that a grossly disproportionate sentence has been imposed?

162 I say 'usually' because, as *R v Nitu* [2013] 1 Qd R 459 ('*Nitu*') shows, the argument that offenders convicted of *different* offences (or *effectively* different offences, to continue with the *Kuczborski* affray example), have been treated unequally, is not the only equal justice argument that might be made. In *Nitu*, the claim was rather that the mandatory sentencing provision at issue required the courts to impose the same mandatory minimum sentence of three years' imprisonment on offenders convicted of the *same* offence, though they had displayed different levels of culpability. If such an argument were ever to be raised in the High Court, it might be dismissed on the basis suggested by the Queensland Court of Appeal in *Nitu*, namely, that when a mandatory minimum sentencing provision applies, there is in fact no compression of sentences at the bottom of the range that results in discrimination between 'low level' and 'higher level offenders': *Nitu* [2013] 1 Qd R 459, 473 [38], 475 [42]. Of course, such reasoning would be unavailable in the case of a provision that required the imposition of the one sentence on all those convicted of an offence. In such a case, however, the Crown would presumably argue, as did the defendant in *Kuczborski*, that what was said in *Palling* about the permissibility of such provisions makes it clear that in fact equal justice is not fundamental to the judicial process: see State of Queensland, 'Defendant's Written Submissions', Submission in *Kuczborski v Queensland*, B14/2014, 11 August 2014, [50]; see also *Nitu* (2013) 1 Qd R 459, 475 [42].

163 *Ibid* 414 [105] (Keane J).

164 For views that are consistent with this, see Rebecca Ananian-Welsh, 'Kuczborski v Queensland and the Scope of the Kable Doctrine' (2015) 34 *University of Queensland Law Journal* 47, 62–3. For a more optimistic assessment, however, see Gray, *Criminal Due Process and Chapter III of the Australian Constitution*, above n 54.

165 *ECHR* art 3.

## IV THE UK POSITION

### A 'The Domestic Context'

There are now many UK, Privy Council and ECtHR decisions that establish<sup>166</sup> that an *ECHR*-contracting party, such as the UK, may not, compatibly with art 3 of the *ECHR*, impose a grossly disproportionate sentence on an individual.

The first relevant case is *Weeks v United Kingdom*,<sup>167</sup> where the sentencing judge had imposed a discretionary life sentence on the applicant, for an almost farcical armed robbery offence that he had committed when he was 17. The ECtHR held that the only reason why this sentence amounted to no breach of art 3 was that, properly analysed, it was a part-punitive and part-preventive one that had been imposed on the applicant because he was, when sentenced, a 'very dangerous young man'.<sup>168</sup> Upon the expiry of the punitive part of such a sentence, the offender is entitled to challenge before a court the lawfulness of his/her detention, and to be released if that court determines that he/she is no longer dangerous.<sup>169</sup> But if the judge had imposed a wholly punitive life sentence on Mr Weeks '[h]aving regard to ... [his] age at the time [of offending] and to the particular facts of the offence he committed, ... one could have serious doubts as to its compatibility with Article 3'.<sup>170</sup>

The suggestion, of course, is that a punitive sentence that is grossly disproportionate to the seriousness of the applicant's offence will, on that account, breach art 3.

Further support for such a proposition was then provided by two cases, *Hussain v United Kingdom*<sup>171</sup> and *V v United Kingdom*,<sup>172</sup> where juveniles had been convicted of murder and imprisoned 'during [Her] Majesty's pleasure'.<sup>173</sup> The ECtHR in *Hussain* held that such a sentence is structured in the same — part-punitive, part-preventive — way as is the discretionary life sentence.<sup>174</sup> If the sentence were instead a purely punitive one, the Court continued, young persons upon whom such a sentence had been imposed 'would be treated as having forfeited their liberty for the rest of their lives', which 'might give rise to questions under Article 3'.<sup>175</sup> Certainly, it is unclear exactly *why* the ECtHR considered that art 3 might be breached in such a case. The Court's reference to art 37 of the *Convention*

166 Or, in the case of the Privy Council authorities, *implicitly* establish: see below nn 184–95 and accompanying text.

167 (1987) 114 Eur Court HR (ser A) ('*Weeks*').

168 To use the words of the trial judge, Thesiger J: see *ibid* 10 [14].

169 See *ECHR* art 5(4); *Weeks* (1987) 114 Eur Court HR (ser A) 28–9 [58].

170 *Weeks* (1987) 114 Eur Court HR (ser A) 25 [47].

171 [1996] 1 Eur Court HR 252, 269 [53] ('*Hussain*').

172 [1999] IX Eur Court HR 111 ('*V*').

173 In accordance with *Children and Young Persons Act 1933*, 23 Geo 5, c 12, s 53(1). The relevant provision is now *Powers of Criminal Courts (Sentencing) Act 2000* (UK) c 6, s 90.

174 [1996] 1 Eur Court HR 252, 269–70 [54].

175 *Ibid* 269 [53].

on the Rights of the Child,<sup>176</sup> when expressing a similar view in *V*,<sup>177</sup> indicates that it thought that one art 3 problem that would arise is that an *irreducible life sentence* would have been imposed on a juvenile. Nevertheless, it does seem to have believed that a further problem with such a sentence is that it would be ‘severely disproportionate’.<sup>178</sup>

Shortly after the decision in *V*, the English courts, too, began to accept that grossly disproportionate sentences might amount to art 3 breaches. In both *R v Offen*<sup>179</sup> and *R v Lichniak*,<sup>180</sup> there are important statements to this effect.<sup>181</sup> For instance, in *Lichniak*, Lord Bingham noted that, if the effect of the appellants’ life sentences had been that they ‘forfeited [their] liberty to the state for the rest of [their] days’, he would have had ‘little doubt’ that these sentences would have breached art 3 due to their disproportionality.<sup>182</sup> And his Lordship added that, ‘[i]ndeed, any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate manner in some cases’.<sup>183</sup>

By apparently holding both that the art 3 guarantee protects offenders against grossly disproportionate sentences, and that mandatory sentences / mandatory sentencing provisions are particularly likely to breach this article, Lord Bingham was merely repeating views that he had expressed in the Privy Council in *Reyes v The Queen*.<sup>184</sup> Delivering the Court’s judgment, Lord Bingham found that the Belize mandatory death penalty for murder by shooting breached s 7 of that country’s *Constitution*, which is phrased almost identically to art 3.<sup>185</sup> After stating that s 7 protects individuals against grossly disproportionate sentences,<sup>186</sup> his Lordship held that death penalty for murder by shooting was, sometimes at least, ‘plainly excessive and disproportionate’.<sup>187</sup>

A number of points must be made about *Reyes*. First, because s 7’s language is so similar to art 3’s, this case is further authority for the proposition that grossly disproportionate sentences amount to breaches of that article. Secondly, as with *Lichniak*, *Reyes* establishes that mandatory sentences / mandatory

176 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UTS 3 (entered into force 2 September 1990) art 37.

177 *V* [1999] IX Eur Court HR 111, 150 [97]. As the Court noted, art 37 prohibits life imprisonment without the possibility of release for those who were under the age of 18 at the time of offending.

178 See *ibid* 149 [93]. See also *Sawoniuk v United Kingdom* [2001] VI Eur Court HR 375, 394, where the Court cited *V* as authority for the proposition that a ‘disproportionately lengthy sentence might in some circumstances raise issues under the Convention’.

179 [2001] 1 WLR 253 (*‘Offen’*).

180 [2003] 1 AC 903 (*‘Lichniak’*).

181 See *Offen* [2001] 1 WLR 253, 276 [95]; *Lichniak* [2003] 1 AC 903, 909 [8], 911 [13].

182 [2003] 1 AC 903, 909 [8] (Lord Bingham, with whom Lord Nicholls, Lord Steyn, Lord Hutton, Lord Hobhouse, Lord Scott and Lord Rodger agreed).

183 *Ibid* 911 [13].

184 [2002] 2 AC 235 (*‘Reyes’*).

185 Section 7 provides that: ‘[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment’. Indeed, the *ECHR* applied to Belize in the period between its coming into force in 1953 and the enactment of the *Belize Constitution* in 1981: see *Reyes* [2002] 2 AC 235, 245 [24].

186 *Reyes* [2002] 2 AC 235, 248 [30].

187 *Ibid* 256 [43].

sentencing provisions are particularly constitutionally suspect. Certainly, Lord Bingham expressly refrained from stating a view about the constitutionality of any mandatory penalty other than the one at issue.<sup>188</sup> Nevertheless, the emphasis that he placed on the need, in all cases of murder by shooting, for judicial consideration of whether the death penalty is warranted,<sup>189</sup> suggests that he considered that mandatory sentencing schemes are particularly likely to produce sentencing disproportionality (consistently of course with the view that he later explicitly stated in *Lichniak*). Thirdly, while Lord Bingham correctly stated that the person upon whom a grossly disproportionate sentence has been imposed has been treated ‘as no human being should be treated’,<sup>190</sup> his reasoning seems questionable<sup>191</sup> insofar as it suggests that a person *has* been treated incompatibly with his/her human dignity simply because a sentence has been imposed upon him/her arbitrarily (that is, without individual consideration).<sup>192</sup> His Lordship, like the Privy Council in the later case of *Aubeeluck v Mauritius*,<sup>193</sup> might have been closer to the mark when he cited with approval<sup>194</sup> Lamer J’s contention in *R v Smith* that the Canadian guarantee against ‘cruel and unusual’ punishments ‘does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate’.<sup>195</sup> That is, while a lack of individual consideration might lead to sentencing disproportionality, the ultimate question is whether such (gross) disproportionality has in fact resulted. In such a case, as argued above<sup>196</sup> (and consistently with Lamer J’s analysis), one of the problems with the sentence is that the state — perhaps by overemphasising sentencing purposes such as general deterrence — has used the offender as a ‘means to an end’.

The fourth and most important point to make about *Reyes* concerns the reasoning that Lord Bingham used to justify judicial intervention where a grossly disproportionate sentence has been imposed. Particularly noteworthy here is the contrast that exists between this reasoning and that which Keane J deployed to justify *non-intervention* in *Magaming*.<sup>197</sup> Certainly, like Keane J, his Lordship did emphasise Parliament’s role in setting penalties for its criminal offences, and the need for the courts not too readily to invalidate sentencing laws:

188 Ibid.

189 Ibid.

190 Ibid.

191 But see the discussion in van Zyl Smit and Ashworth, above n 10, 543–4.

192 See *Reyes* [2002] 2 AC 235, 256 [43].

193 [2010] UKPC 13 (21 July 2010) [32]–[33]. This is another case in which the Privy Council accepted that a constitutional guarantee expressed very similarly to art 3 ‘outlaw[s] wholly disproportionate penalties’: at [22]. It also held that the sentencing provision at issue, which provided for a mandatory minimum sentence of three years’ imprisonment for trafficking in certain drugs, had produced such a sentence in the instant case, as mandatory sentencing provisions are apt to do: at [22]–[35], [39].

194 See *Reyes* [2002] 2 AC 235, 253 [37].

195 [1987] 1 SCR 1045, 1073 (*Smith*).

196 See above nn 44–53 and accompanying text.

197 (2013) 252 CLR 381. See above nn 131–45 and accompanying text.

In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal ... and to decide what kind and measure of punishment such conduct should attract or be liable to attract. ... The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted.<sup>198</sup>

But Lord Bingham then argued that where, in a jurisdiction with a charter of rights, a sentencing law is said to breach a protected right, the courts need not, and should not, be as passive as Keane J considered they must in jurisdictions without such an instrument. It is true that judges still must exercise *some* restraint lest they be perceived to be unjustifiably substituting their own values for those of the democratically-elected legislature: '[t]he court', Lord Bingham said, 'has no licence to read its own predilections and moral values into [a] Constitution'.<sup>199</sup> Nonetheless, a 'generous and purposive interpretation' must be given to the relevant guarantee.<sup>200</sup> And the courts must not give undue weight to any historical tolerance of the impugned measure or ones like it; the goal is instead to 'ensure contemporary protection of [the] right in the light of evolving standards of decency that mark the progress of a maturing society'.<sup>201</sup>

The clear implication is that, because the UK and the Strasbourg courts have a clear mandate to protect human rights, they enjoy greater powers than do Australian courts without such a mandate, to intervene where a disproportionate sentence has allegedly been imposed. Historical considerations certainly will not constrain them. As noted above,<sup>202</sup> apparently one reason why the Australian courts have been unwilling to strike down mandatory sentencing legislation is that such laws were historically regarded as being compatible with the separation of judicial power. According to *Reyes*, however, what is relevant is not that a particular penalty might once have been considered to be acceptable, but rather whether it is *now* compatible with human rights. Of course, it is technically open to the Australian judiciary to adopt a similar approach.<sup>203</sup> But, as argued above, it is surely easier for courts to deploy such reasoning to achieve human rights-protective outcomes when they have been granted explicit authority to resolve rights controversies.

In any case, the ECtHR has now expressly stated that a grossly disproportionate sentence will violate art 3.<sup>204</sup> Certainly, consistently with *Reyes*, the Court has made it clear that it will not be quick to find that art 3 has been breached in such a case. '[M]atters of appropriate sentencing', it assures us, 'largely fall outside

198 *Reyes* [2002] 2 AC 235, 245–6 [25].

199 *Ibid* 246 [26].

200 *Ibid*.

201 *Ibid*, citing *Trop v Dulles*, 356 US 86, 101 (1958).

202 See above nn 118–21 and accompanying text.

203 *Magaming* (2013) 252 CLR 381, 407–8 [79]–[83] (Gageler J). See also accompanying text to n 145 above.

204 *Vinter* [2013] III Eur Court HR 317, 344 [102]; see also *Vinter v United Kingdom* (2012) 55 EHRR 34, [88]–[89]; *Harkins v United Kingdom* (2012) 55 EHRR 19, [133] ('*Harkins*'); and *Ahmad v United Kingdom* (2013) 56 EHRR 1, [237] ('*Ahmad*').

the ... *Convention*',<sup>205</sup> further, as noted above, it will only be on 'rare and unique occasions'<sup>206</sup> that the gross disproportionality test will be met.<sup>207</sup> Nevertheless, also consistently with *Reyes*, it has observed that mandatory sentencing provisions are particularly likely to produce grossly disproportionate sentences.<sup>208</sup> This provides further evidence that the UK and Strasbourg courts have greater ability than do courts in Australian jurisdictions without a charter of rights to protect convicted persons from disproportionate sentences.<sup>209</sup>

## **B 'The Extradition Context' and the 'Prisoner Transfer Context'**

*R (Wellington) v Secretary of State for the Home Department*<sup>210</sup> appears to make three relatively simple points about grossly disproportionate sentences. We have already dealt sufficiently with the first two of these: there will be an art 3 breach if a grossly disproportionate sentence is imposed domestically;<sup>211</sup> and the courts are especially likely to declare mandatory sentencing provisions to be incompatible with that article.<sup>212</sup> The third principle is that a contracting state will breach art 3 if, *by extraditing a person to a non-contracting state*, it exposes him/her to a real risk<sup>213</sup> of having a grossly disproportionate sentence imposed on him/her.<sup>214</sup>

But, while the ECtHR has ostensibly<sup>215</sup> rejected the *Wellington* majority's contention that the 'desirability of extradition' is relevant when determining whether there is a real risk of an inhuman or degrading punishment being imposed in the receiving state,<sup>216</sup> it has also held that:

205 *Vinter v United Kingdom* (2012) 55 EHRR 34, [89]. See also *Vinter* [2013] III Eur Court HR 317, 344 [102].

206 *Vinter* [2013] III Eur Court HR 317, 344 [102].

207 Szydło is undoubtedly right to observe that this reluctance to intervene stems from a desire to avoid any perception that the Court is prepared unwarrantably to substitute its own views for those of the contracting states' legislatures in the 'politically sensitive' area of sentencing: Marek Szydło, 'Vinter v United Kingdom' (2012) 106 *American Journal of International Law* 624, 628. See also Rogan, 'Out of Balance: Disproportionality in Sentencing', above n 25.

208 *Vinter v United Kingdom* (2012) 55 EHRR 34, [93].

209 For views consistent with this, see Mary Rogan, 'The European Court of Human Rights, Gross Disproportionality and Long Prison Sentences after *Vinter v United Kingdom*' [2015] *Public Law* 22, 36.

210 [2009] 1 AC 335 ('*Wellington*').

211 This is implicit in the remarks of at least Lord Hoffmann (Baroness Hale agreeing) and Lord Scott: *ibid* 348 [36], 351 [45].

212 *Ibid* 348 [36] (Lord Hoffmann, with whom Baroness Hale agreed).

213 See *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A); *Chahal v United Kingdom* [1996] V Eur Court HR 1831; *Saadi v Italy* [2008] II Eur Court HR 207.

214 *Wellington* [2009] 1 AC 335, 347–8 [35]–[36] (Lord Hoffmann, with whom Baroness Hale agreed), 351 [45] (Lord Scott).

215 For an argument that the ECtHR's approach involves no less relativism than does the majority's in *Wellington*, see Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*' (2013) 76 *Modern Law Review* 589, especially 600–3.

216 *Wellington* [2009] 1 AC 335, 345 [24]–[27] (Lord Hoffmann). See also 352 [48] (Baroness Hale), 355 [57] (Lord Carswell).

*the Convention does not purport to be a means of requiring the contracting states to impose Convention standards on other states. ... The Court therefore considers that it will only be in very exceptional cases that an applicant will be able to demonstrate that the sentence he or she would face in a non-contracting state would be grossly disproportionate and thus contrary to art 3.*<sup>217</sup>

Seemingly, then, it will be even rarer for an art 3 breach to be established on the basis that an extradition would expose an alleged offender to the real risk of a grossly disproportionate sentence, than it will be for the courts to find that a *domestic* sentence contravenes the article.<sup>218</sup>

In the prisoner transfer context, too, the UK and Strasbourg courts have shown that they will defer even more readily than they will in domestic cases to legislatures' judgments concerning how severely to punish criminal conduct. Moreover, and worryingly, they have employed reasoning in these prisoner transfer cases that is incompatible with that in *Reyes* and *Aubeeluck*<sup>219</sup> and, if used more widely, has the potential completely to undermine the guarantee against grossly disproportionate sentences.

In *R (Willcox) v Secretary of State for Justice*, the claimant, a British citizen, had been sentenced in Thailand to 33 years and 6 months' imprisonment, almost all of which was for an offence of possessing for distribution 24 grams of heroin and 14 ecstasy pills.<sup>220</sup> While Mr Willcox claimed that he possessed the drugs for personal use, the relevant Thai law created an irrebuttable presumption that possession of heroin and ecstasy in these amounts was for the purpose of distribution.<sup>221</sup> Pursuant to a bilateral agreement for the transfer of prisoners, the Thai and UK governments agreed to Mr Willcox's transfer to a British gaol.<sup>222</sup> A Thai royal decree then reduced his sentence by four years.<sup>223</sup> Furthermore, once he was imprisoned in the UK, Mr Willcox was subject to that State's release provisions.<sup>224</sup> Even so, he will become eligible for parole only once he has served 14 years and 6 months of the sentence.<sup>225</sup> Before the Divisional Court, Mr Willcox argued that his sentence was grossly disproportionate and that, by requiring him to serve it, the UK had breached art 3.<sup>226</sup>

The Court accepted that, if the claimant had performed the relevant conduct in the UK, then — even if he had been convicted of possessing the relevant drugs *with intent to supply* — he would have been imprisoned for no longer than six years,<sup>227</sup>

217 *Ahmad* (2013) 56 EHRR 1, 70 [238]; *Harkins* (2012) 55 EHRR 19, 602–3 [134] (emphasis added).

218 Certainly that was the view of the Administrative Court in *Pham v United States* [2014] EWHC 4167 (Admin) (12 December 2014) [66] (Aikens LJ and Simon J).

219 See above nn 193–5 and accompanying text.

220 [2009] EWHC 1483 (Admin) (1 July 2009) [2].

221 *Ibid* [3].

222 *Ibid* [2].

223 *Ibid*.

224 *Ibid* [14]–[15].

225 *Ibid* [2].

226 *Ibid* [3], [56]–[57].

227 *Ibid* [56] (Ouseley J).



and possibly only four or five.<sup>228</sup> Nevertheless, the UK had not breached art 3. Their Lordships noted that, if they held differently, the prisoner transfer system would be undermined.<sup>229</sup> Thailand would be displeased if the UK were to release a transferred prisoner because the Thai sentence was grossly disproportionate, even though, before the transfer, the UK had provided an assurance that there would be no interference with the maximum term.<sup>230</sup> This might affect other prisoners, ‘languishing’ in foreign prisons, whose transfer might ‘thereby be inhibited or prevented’.<sup>231</sup>

Accordingly, the Court found that *the UK* had not imposed a grossly disproportionate sentence on the claimant. It was *Thailand* that imposed the impugned punishment. The UK’s treatment of Mr Willcox comprised its agreement, at his request, to transfer him into its prison system.<sup>232</sup> This treatment, pursuant to a ‘humane provision’,<sup>233</sup> the purpose of which was to ‘enabl[e] ... persons sentenced for crimes committed abroad to serve out their sentences within their own society’,<sup>234</sup> could never be characterised as inhuman or degrading.

This reasoning seems unobjectionable. It is difficult to argue that art 3 should operate so as to prevent prisoners from being transferred to their own country to serve their sentences. And it is perhaps plausible enough to contend that *the UK* was not punishing Mr Willcox. But Ouseley J added this:

Even if the continued enforcement of sentence ... were capable of breaching Article 3 because of the length of sentence or the circumstances in which it was imposed, I do not regard the sentence here as so grossly disproportionate to the offence ... that its continued enforcement by the UK would breach Article 3. ... By UK sentencing standards, the sentence is harsh but he did not commit the offences in the UK; he committed them in Thailand where there is a serious drugs problem, and where the government and legislature are entitled to take the view that harsh sentences are legitimate and necessary.<sup>235</sup>

Certainly, whether a sentence is disproportionate sometimes depends upon local circumstances. To use Scalia J’s example, one jurisdiction might punish the killing of a particular wild animal, because it is endangered within its borders, whereas another might offer a bounty for those who kill the same animal, because there is a plague of that creature there.<sup>236</sup> But we must be clear about *why* the sentence is proportionate in the first jurisdiction, whereas it would not be so in the second. What justifies the sentence in the first state is that, unlike in the second, the killing *has caused harm*; accordingly, the conduct has a gravity that it lacks in the second State. Ouseley J, however, does not state that the person who possesses drugs, with or without intent to supply, either causes or risks any more harm in Thailand than he/she does in the UK. (Such an offender is clearly also equally

228 Ibid [95] (Davis J).

229 Ibid [66] (Ouseley J), [91] (Davis J).

230 Ibid [63] (Ouseley J), [84] (Davis J).

231 Ibid [64], [70] (Ouseley J); see also [87] (Davis J).

232 Ibid [70] (Ouseley J), [95] (Davis J).

233 Ibid [70] (Ouseley J).

234 Ibid [62] (Ouseley J).

235 Ibid [75].

236 *Harmelin v Michigan*, 501 US 957, 989 (1991) (‘*Harmelin*’).

culpable wherever he/she commits such an offence.)<sup>237</sup> Instead, while his Lordship does not expressly refer to general deterrence, the suggestion seems to be that the same sentence might be grossly disproportionate in one place (the UK) but not in another (Thailand) because of the prevalence of that offence in that second place and the consequent need for harsh sentences to deter such activity.

The problem with this is that, as foreshadowed above,<sup>238</sup> it is inconsistent with the approach correctly taken in *Reyes* that, while general deterrence and other penological purposes can be taken into account at sentencing, they cannot be allowed to produce a grossly disproportionate sentence. To say, as Ouseley J apparently did, that a sentence will not be grossly disproportionate if the court can regard it as doing only what is necessary to achieve general deterrence, is to attempt impermissibly to circumvent this principle.

Unfortunately, however, when the matter reached it, the ECtHR endorsed Ouseley J's reasoning.<sup>239</sup> The Court considered that the UK's relevant treatment of Mr Willcox was its enforcement of his sentence, observing that, as such: 'the focus must be on whether any suffering or humiliation involved go[es] beyond that inevitable element of suffering and humiliation connected with the enforcement of the sentence of imprisonment imposed by the foreign court'.<sup>240</sup>

It will be recalled<sup>241</sup> that, previously, the ECtHR accepted that, where a sentence is grossly disproportionate, the applicant's suffering or humiliation *will* go beyond that which inevitably flows from imprisonment.<sup>242</sup> But, as its approval of Ouseley J's reasoning would imply, the Court's approach in *Willcox v United Kingdom* is not easily reconciled with this principle. It did indicate that the length of the applicants' sentences was of some *small* relevance to whether the UK, by enforcing them, had contravened art 3: such a contravention would be established, apparently, if the sentences were not 'within the range of approaches considered to be acceptable by democratic States'.<sup>243</sup> But it also made it clear that it would be most unusual for the enforced sentence's length to place the enforcing state in breach. After observing that drugs offences are 'severely punished' in Thailand because of the 'serious drugs problem' there, the Court stated, in common with Ouseley J, that 'the Thai government and legislature were entitled to take the view that harsher sentences than those applicable in the United Kingdom were legitimate and necessary'.<sup>244</sup> It also observed that States are entitled to '[construct] ... their criminal-justice systems around principles and approaches' that differ vastly from each other.<sup>245</sup> As argued above, this reasoning

237 If we are to determine whether a sentence is disproportionate to the seriousness of an offender's crime, we of course have to establish how serious the relevant offence was; and, as is noted by Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1, 2–3, '[s]eriousness of crime has two dimensions: harm and culpability'.

238 See above nn 193–5 and accompanying text.

239 *Willcox v United Kingdom* [2013] 1 Eur Court HR 1, 27–8 [78] ('*Willcox*').

240 *Ibid* 27 [76].

241 *Kafkaris v Cyprus* [2008] 1 Eur Court HR 223, 269 [96]. See also accompanying text to n 41 above.

242 *Vinter* [2013] III Eur Court HR 317, 344 [102]. See also the discussion in Mavronicola, 'Crime, Punishment and Article 3 ECHR', above n 8, 733–4.

243 *Willcox* [2013] 1 Eur Court HR 1, 28 [78].

244 *Ibid*.

245 *Ibid*.

is erroneous. The apparent suggestion is, again, that a sentence will not be grossly disproportionate if it can be regarded as doing only what is necessary to achieve general deterrence. But the true position is that general deterrence cannot justify a sentence that is significantly greater than that warranted by the gravity of the offending conduct.

## **C Can the HRA and ECHR Make a Difference?**

### **1 Some Conclusions about the UK and Strasbourg Jurisprudence**

In sum, while the UK and Strasbourg courts have adopted a cautious approach where it has been alleged that sentences breach art 3 because of their gross disproportionality, it is now well-established that such sentences cannot be imposed consistently with that article. This principle has yet not been acted upon.<sup>246</sup> But it *is* important<sup>247</sup> — mainly because it is quite conceivable that it will be applied in the future, especially in cases concerning mandatory sentencing. Consequently, the UK position seems preferable to that in Australia, where, as we have seen, the courts have discovered no real constitutional limits on Parliament's power to provide for mandatory sentencing schemes. It is important, however, that the UK and Strasbourg courts continue to maintain, as the Privy Council did in *Reyes* and *Aubeeluck*, that penological justifications such as general deterrence cannot justify a grossly disproportionate sentence. Certainly, different views *have* only been expressed in prisoner transfer cases, where pragmatic concerns understandably influenced the courts' decisions. Nevertheless, such reasoning is dangerous and wrong. It is to be hoped that this approach does not take root in domestic cases, because, as the North American jurisprudence shows, when this happens, guarantees against disproportionate sentences become very weak indeed.

### **2 Lessons for the Future: the US Supreme Court's Jurisprudence**

This is most graphically demonstrated by the USSC's decisions in most of the non-capital cases<sup>248</sup> in which it has been alleged that a sentence is grossly

246 The Privy Council in such cases as *Reyes* and *Aubeeluck* did not find that *art 3* had been breached — although, as noted above, the relevant guarantees in those cases were worded almost identically to that *ECHR* article.

247 As observed by Ben Emmerson et al, *Human Rights and Criminal Justice* (Sweet & Maxwell, 3<sup>rd</sup> ed, 2012) 836–7 [20.06].

248 Compare with the capital cases of *Coker v Georgia*, 433 US 584 (1977); *Enmund v Florida*, 458 US 782 (1982); *Atkins v Virginia*, 536 US 304 (2002); *Roper v Simmons*, 543 US 551 (2005); *Kennedy v Louisiana*, 554 US 407 (2008). Compare also with the recent cases in which the Court has accepted that, 'if "death is different", children are different too' (see *Miller v Alabama*, 567 US 460, 481 (2012) ('*Miller*')); and has held that a sentence of life without parole may not be imposed on juvenile non-homicide offenders (*Graham v Florida*, 560 US 48 (2010)); mandatorily on juvenile homicide offenders (see *Miller*, 567 US 460, 479 (2012)); or indeed on 'all but the rarest of juvenile [homicide] offenders, those whose crimes reflect permanent incorrigibility' (see *Montgomery v Louisiana*, 136 S Ct 718, 734 (2016); see also *Miller*, 567 US 460, 479–80 (2012)).

disproportionate and, consequently, violates the Eighth Amendment. In the 1980s, bitter differences emerged between conservative and liberal Justices concerning the proper scope of the 'proportionality principle'.<sup>249</sup> The former contended that, in non-death penalty cases, the principle should apply only very narrowly. According to the *Rummel v Estelle*<sup>250</sup> majority, legislatures should have an almost complete freedom to pursue penological purposes such as general deterrence and incapacitation; only in extreme cases (the example provided was of a legislature making 'overtime parking a felony punishable by life imprisonment')<sup>251</sup> was a court justified in finding a sentence to be grossly disproportionate. Accordingly, the petitioner's life sentence for a third petty fraud offence was upheld. While, as the dissent urged, the three crimes together 'involved slightly less than \$230',<sup>252</sup> the majority held that the legislature was entitled to give priority to the penological goals of 'deter[ring] repeat offenders' and 'segregat[ing] recidivists 'from the rest of society for an extended period of time'.<sup>253</sup>

The liberal Justices' views, on the other hand, were largely consistent with those expressed by the Privy Council in *Reyes* and *Aubeeluck*. According to a liberal majority in *Solem v Helm*,<sup>254</sup> while the courts owe legislatures 'substantial deference' in this area, 'criminal sentence[s] must [nevertheless] be proportionate to the [defendant's] crime'.<sup>255</sup> In determining whether a sentence *is* grossly disproportionate, the majority continued, courts must be guided by: (i) their own assessment of the offence's gravity and the appropriateness of the sentence that was imposed; (ii) a consideration of sentences imposed for similar offences in the relevant jurisdiction; and (iii) a consideration of sentences imposed for the same offence in other US jurisdictions.<sup>256</sup> This analysis led their Honours to conclude that the petitioner's sentence of life imprisonment without the possibility of parole for a seventh nonviolent felony violated the Eighth Amendment. The sentence's capacity to deter and incapacitate recidivists was not to the point; what *was* important was that 'Helm has received the penultimate sentence for relatively minor criminal conduct'.<sup>257</sup>

But it was the conservatives' position that, largely, prevailed. In *Harmelin*,<sup>258</sup> Kennedy J wrote the crucial judgment. After accepting the *Rummel* view that only 'extreme sentences' contravene the proportionality principle,<sup>259</sup> his Honour upheld the petitioner's sentence of life imprisonment without the possibility of parole for possessing more than 650 grams of cocaine.<sup>260</sup> Kennedy J did make

249 *Harmelin*, 501 US 957, 997 (Kennedy J) (1991).

250 445 US 263 (1980) ('*Rummel*').

251 *Ibid* 274.

252 *Ibid* 295.

253 *Ibid* 284.

254 463 US 277 (1983) ('*Solem*').

255 *Ibid* 290.

256 *Ibid* 292.

257 *Ibid* 303.

258 501 US 957 (1991).

259 *Ibid* 1001.

260 *Ibid* 1009.

some concessions to the *Solem* majority's views; but these concessions were limited, even tokenistic. After purportedly<sup>261</sup> considering the first *Solem* factor, his Honour found that it was unnecessary to conduct the comparative analysis mandated by factors (ii) and (iii): the seriousness of the petitioner's crime was such, he thought, that no such analysis was necessary.<sup>262</sup> Most importantly for present purposes, however, Kennedy J contended that, when a court assesses for itself whether the sentence imposed was grossly disproportionate to the seriousness of the offender's crime, one relevant principle is that 'the Eighth Amendment does not mandate adoption of any one penological theory'.<sup>263</sup> That being so, his Honour accepted that Michigan was entitled to provide for this 'severe and unforgiving' sentence, with the aim of achieving general deterrence.<sup>264</sup>

Together with those subsequent cases in which Kennedy J's analysis has been applied,<sup>265</sup> *Harmelin* demonstrates that US legislatures enjoy an almost complete freedom to provide for the imposition of sentences that treat offenders 'as merely a means to an end'.<sup>266</sup> And it follows that the US case law only contains negative lessons<sup>267</sup> for the UK and Strasbourg courts. Specifically, this jurisprudence shows the dangers of both the Divisional Court and the ECtHR's reasoning in *Willcox* to the effect that the legislature has a very broad power to pursue sentencing aims such as general deterrence and incapacitation — and that only truly extreme sentences (or, to use the ECtHR's formulation, only sentences that go beyond what democratic states consider to be acceptable) are impermissible.

### **3 Lessons for the Future: the Canadian Supreme Court's Jurisprudence**

The Canadian jurisprudence, however, contains both positive *and* negative lessons for the UK and Strasbourg courts. The Canadian judges have sometimes shown excessive deference to Parliament. This jurisprudence therefore, in common with the USSC cases discussed above, demonstrates the potential that exists for unwarranted judicial timidity significantly to weaken guarantees against grossly disproportionate sentences. But the Court's recent more assertive approach also shows what the UK courts and the ECtHR can achieve if they have the integrity to

261 When assessing the seriousness of the petitioner's offence, Kennedy J focused merely on the harm that it risked, and left completely out of account the petitioner's culpability: see *ibid* 1002–4. By so doing, his Honour failed to consider a factor that must be considered if there is to be any sensible evaluation of an offence's gravity: see above n 237.

262 *Harmelin*, 501 US 957, 1004 (1991).

263 *Ibid* 999.

264 *Ibid* 1008.

265 See, eg, *Lockyer v Andrade*, 538 US 63 (2003), where a majority held that the Californian Court of Appeal had not erred when it affirmed a fifty-year minimum sentence that had been imposed on a drug-addicted petty criminal for two offences of stealing videotapes.

266 See van Zyl Smit and Ashworth, above n 10, 557.

267 As noted by Elizabeth Sheehy, 'Introduction: Mandatory Minimum Sentences: Law and Policy' (2001) 39 *Osgoode Hall Law Journal* 261, 267, citing Cameron, 'The Death Penalty, Mandatory Prison Sentences, and the Eighth Amendment's Rule Against Cruel and Unusual Punishments', above n 27.

give a 'generous and purposive interpretation' to art 3.<sup>268</sup> Moreover, in so doing, it provides further evidence that charters of rights can improve the law in this area — provided that the judges are brave enough to identify grossly disproportionate sentences, rather than remaining passive as the legislature gives<sup>269</sup> undue weight to sentencing aims that are apt to produce such excess.

In *Smith*,<sup>270</sup> the majority struck down a provision that required a minimum penalty of seven years' imprisonment to be imposed on any person convicted of importing narcotics into Canada. It did so, not because this provision had caused *the appellant* to be 'subjected to any cruel and unusual treatment or punishment',<sup>271</sup> but instead because it was capable of applying to 'a young person who, while driving back into Canada from a winter break in the U.S.A., is caught with ... his or her first "joint of grass"'.<sup>272</sup> While, according to Lamer J, the Parliament was owed some deference,<sup>273</sup> his Honour also thought<sup>274</sup> that it was not entitled, by privileging sentencing aims such as general deterrence, to require the imposition of sentences that are 'grossly disproportionate to what the offender deserves'.<sup>275</sup> In finding that a seven-year sentence *would* be grossly disproportionate to the seriousness of the hypothesised young person's offence, Lamer J primarily, and rightly, considered the harm caused or risked by this offence, and the young person's level of culpability. Because only a small quantity of a not especially dangerous drug would have been imported, by a first offender, the offence was not such as could warrant anything approaching seven years' imprisonment.<sup>276</sup> This was an assertive<sup>277</sup> — even an 'extraordinary'<sup>278</sup> — decision: given that the appellant had been caught not with one 'joint', but with between \$126 000 and \$168 000 worth of cocaine,<sup>279</sup> the Court could easily have avoided making the confrontational finding that the relevant provision breached the *Charter*.<sup>280</sup> Unfortunately, in the cases that followed, the Court did not maintain this stance; instead, it used a number of techniques to avoid finding that various mandatory minimum sentencing provisions breached s 12.

268 *Reyes* [2002] 2 AC 235, 246 [26] (Lord Bingham).

269 Or *purports to* give such weight to these aims, in the case of the legislature that enacts harsh sentencing laws for political reasons, in the knowledge that they will not achieve any of the penological goals ostensibly pursued: see above nn 49–53 and accompanying text.

270 [1987] 1 SCR 1045.

271 See *Canada Act 1982* (UK) c 11, sch B pt I, s 12 ('*Canadian Charter of Rights and Freedoms*').

272 *Smith* [1987] 1 SCR 1045, 1053 (Lamer J, writing for himself and Dickson CJ; Wilson and La Forest JJ relevantly agreed with Lamer J at 1109, 1113).

273 *Ibid* 1070.

274 As we have seen: [1987] 1 SCR 1045, 1073 ('*Smith*'). See also accompanying text to n 195 above.

275 *Ibid* 1073.

276 *Ibid* 1078.

277 As noted by, for instance, Kent Roach, 'Searching for *Smith*: The Constitutionality of Mandatory Sentences' (2001) 39 *Osgoode Hall Law Journal* 367, 381–2.

278 Jamie Cameron, 'Fault and Punishment under Sections 7 and 12 of the *Charter*' (2008) 40 *Supreme Court Law Review* 553, 583.

279 *Smith* [1987] 1 SCR 1045, 1083 (McIntyre J).

280 See Roach, 'Searching for *Smith*: The Constitutionality of Mandatory Sentences', above n 277, 381–2.

The first such technique is already familiar to us: like the USSC, the Court gave Parliament an increased freedom to pursue sentencing aims that have a tendency to produce disproportionate sentences. In *Latimer*,<sup>281</sup> the appellant had killed his 12-year-old daughter, who suffered from a severe form of cerebral palsy, in circumstances such as to arouse some feelings of sympathy for him. After being convicted of second-degree murder, Mr Latimer claimed that he was entitled to a constitutional exemption<sup>282</sup> from the mandatory minimum penalty of 10 years' imprisonment for that offence. In denying that the sentence imposed on him was grossly disproportionate, the Court stated that:

this sentence is consistent with a number of valid penological goals and sentencing principles. ... Furthermore, denunciation becomes much more important in the consideration of sentencing in cases where there is a 'high degree of planning and premeditation, and where the offence and its consequences are highly publicized, [so that] like-minded individuals may well be deterred by severe sentences'.<sup>283</sup>

Although the Court here certainly undermined more subtly than has the USSC the rule that the various penological goals cannot justify a grossly disproportionate sentence, it is nevertheless difficult to resist the conclusion that it *did* fail to apply this rule in a suitably demanding way.<sup>284</sup> In particular, its insistence that 'the sentence is not out of step with valid penological goals or sentencing principles'<sup>285</sup> suggests that, if it is open to regard a sentence as doing only what is necessary to achieve, say, general deterrence, this is a strong indication of compatibility with s 12.<sup>286</sup>

A second technique that the Court used to avoid interfering with mandatory minimum sentencing provisions was this: when assessing the seriousness of the relevant — hypothetical or real — offence, it excluded from consideration factors that are of obvious relevance to an offender's culpability.<sup>287</sup> In *Latimer*, the Court said that, when assessing the appellant's blameworthiness for the purpose of determining the gravity of his offence, what was relevant was the offence's

281 [2001] 1 SCR 3.

282 It has since been established that a constitutional exemption from the application of a mandatory minimum sentencing provision is never the proper remedy for an offender who establishes that the sentence required by such a provision would amount to cruel and unusual punishment in his/her case. Rather, in such a case, the Court must strike down the relevant provision: *R v Ferguson* [2008] 1 SCR 96, 105 [13] (*Ferguson*). For commentary on *Ferguson*, see Lisa Dufrainmont, 'R. v. Ferguson and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12' (2008) 42 *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 459; Benjamin L Berger, 'A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and R. v. Ferguson' (2009) 47 *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 101. See also Kent Roach, 'The Future of Mandatory Sentences after the Death of Constitutional Exemptions' (2008) 54 *Criminal Law Quarterly* 1; Debra Parkes, 'From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences' (2012) 57 *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 149, 161–3.

283 *Latimer* [2001] 1 SCR 3, 41 [86].

284 See Roach, 'Searching for *Smith*: The Constitutionality of Mandatory Sentences', above n 277, 380–1.

285 *Latimer* [2001] 1 SCR 3, 42 [87].

286 See David M Paciocco, 'The Law of Minimum Sentences: Judicial Responses and Responsibility' (2015) 19 *Canadian Criminal Law Review* 173, 196.

287 Cameron, 'Fault and Punishment under Sections 7 and 12 of the *Charter*', above n 278, 584–9.



‘mens rea element ... rather than the offender’s motive or general state of mind’.<sup>288</sup> The problem with this is that an offender’s motive is of crucial importance when assessing how culpable he/she is.<sup>289</sup> In *Morrissey*, too, the Court’s culpability assessment was narrowly focussed on the offence’s mens rea: ‘[o]ne cannot emphasize ... enough’, according to Gonthier J, that a person could only be convicted of this offence (criminal negligence with a firearm causing death, for which there was a mandatory minimum penalty of four years’ imprisonment) if the Crown proved that he/she departed markedly from the reasonable person’s standards.<sup>290</sup> His Honour placed little emphasis, however, on the accused’s intoxication at the time of offending, the ‘extreme psychological distress’<sup>291</sup> that he was then experiencing, or his subsequent feelings of remorse.<sup>292</sup>

Thirdly, in some cases, the Court attached importance to the possibility that the executive would release the prisoner before the expiry of his/her sentence.<sup>293</sup> *Latimer* once more illustrates the point. Immediately after observing that doubt surrounded the wisdom of mandatory minimum sentences,<sup>294</sup> the Court considered that it was ‘worth referring ... to the royal prerogative of mercy’,<sup>295</sup> which allows the executive to release an offender whom it considers to be enduring unjust imprisonment. It continued: ‘[t]he executive will undoubtedly, if it chooses to consider the matter, examine all of the underlying circumstances surrounding the tragedy of Tracy Latimer that took place ... some seven years ago’.<sup>296</sup> The suggestion is that some doubt existed concerning whether Mr Latimer was serving a grossly disproportionate sentence (indeed, in the immediately prior paragraph, the Court had explicitly expressed such doubt),<sup>297</sup> but that this matter was for the executive to resolve.<sup>298</sup>

The fourth and final deference technique to which I will refer is the Court’s insistence that the courts use hypothetical examples only narrowly. We have seen that, in *Smith*, the majority struck down the relevant provision not because it had been used to impose a grossly disproportionate sentence on Mr Smith, but because the mandatory minimum sentence for which it provided would be grossly

288 *Latimer* [2001] 1 SCR 3, 39 [82], citing *Morrissey* [2000] 2 SCR 90, 112 [36].

289 See, eg, Andrew von Hirsch, ‘Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale’ (1983) 74 *Journal of Criminal Law & Criminology* 209, 214.

290 [2000] 2 SCR 90, 112 [36] (Gonthier J, writing for himself, Iacobucci, Major, Bastarache and Binnie JJ).

291 *Ibid* 113 [38]. Indeed, Gonthier J perhaps considered these two factors to be *aggravating* circumstances.

292 As noted by Kent Roach, ‘The Charter Versus the Government’s Crime Agenda’ (2012) 58 *Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 211, 221.

293 For criticisms of this approach, see Roach, ‘Searching for *Smith*: The Constitutionality of Mandatory Sentences’, above n 277, 398.

294 *Latimer* [2001] 1 SCR 3, 42 [88].

295 *Ibid* [89].

296 *Ibid* 43 [90].

297 *Ibid* 42 [87].

298 See also in this regard *R v Luxton* [1990] 2 SCR 711, 725 (Lamer J, writing for himself, Dickson CJ, Wilson, Gonthier and Cory JJ); *Morrissey* [2000] 2 SCR 90, 115 [42] (Gonthier J, writing for himself, Iacobucci, Major, Bastarache and Binnie JJ).

disproportionate if imposed on the youthful importer of one marijuana cigarette. As Doherty JA has noted, '[u]nmodified, the ... analysis described in *Smith* would have left very few, if any, mandatory minimum jail terms standing'.<sup>299</sup> The offender just described was hardly a typical drug importer.<sup>300</sup> Surely in *any* case where a mandatory minimum sentencing provision was challenged on s 12 grounds, the judges would be able to summon from their imaginations such an improbably innocent offender so as to invalidate the section?

But as Doherty JA has also observed, the *Smith* analysis was modified.<sup>301</sup> In *Goltz*, the appellant unsuccessfully challenged a provision that created a minimum penalty of seven days' imprisonment for anyone who drove while prohibited from doing so under certain sections of the *Motor Vehicle Act*.<sup>302</sup> Gonthier J did concede that, where, as here, the sentence was not grossly disproportionate as applied to the appellant, the Court might still be required to strike down the relevant provision — *but only if* it was capable of producing a grossly disproportionate sentence in 'reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases'.<sup>303</sup> While the Court would inevitably have to consider hypothetical offenders, his Honour continued: 'this is not a licence to invalidate statutes on the basis of remote or extreme examples. ... The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life'.<sup>304</sup>

In *Morrisey*, Gonthier J returned to this theme. In that case, the courts below had relied on the facts of reported cases when determining whether the impugned provision might require the imposition of grossly disproportionate sentences in 'reasonable hypothetical' cases.<sup>305</sup> But Gonthier J counselled that, 'a reported case could be one of those "marginal" cases, not contemplated by the approach set out in *Goltz*'.<sup>306</sup> It might not, that is, concern a 'common [example] of the crime'.<sup>307</sup>

Two things must be noted about *Goltz* and *Morrisey*. First, the effect of these decisions was largely to limit the courts to considering the facts of the case actually before them, when deciding whether to strike down a mandatory minimum sentencing provision.<sup>308</sup> Whatever Gonthier J *said* about the legitimacy of using 'reasonable hypotheticals', his above comments make it clear that he envisaged a

299 *R v Nur* (2013) 117 OR (3d) 401, 432 [116].

300 In fact, Lamer J conceded that 'no such case has actually occurred to my knowledge': *Smith* [1987] 1 SCR 1045, 1054.

301 *R v Nur* (2013) 117 OR (3d) 401, 432 [116].

302 *Motor Vehicle Act*, RSBC 1979, c C-288.

303 [1991] 3 SCR 485, 506 (Gonthier J, writing for himself, La Forest, L'Heureux-Dubé, Sopinka, Cory and Iacobucci JJ) (emphasis in original).

304 *Ibid* 515–16.

305 See *Morrisey* [2000] 2 SCR 90, 100–3 [9], [13]–[14].

306 *Ibid* 110 [32].

307 *Ibid* 111 [33]; see also 119 [50]. For criticisms of this approach, see *ibid* 127 [65] (Arbour J, writing for herself and McLachlin J); see also, eg, Allan Manson, 'Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences' (2012) 57 *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 173, 180.

308 A point made by Peter Sankoff, 'The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case' (2013) 22(1) *Constitutional Forum* 3, 5.

very limited role for them indeed. Secondly, as Sankoff has observed, the Court, by insisting that ‘unusual’ cases ‘should only be addressed in the event they actually made it to court’, relied upon the Crown not to prefer charges against those less blameworthy offenders who, like the youthful importer in *Smith*, technically fell within the scope of the relevant enactment.<sup>309</sup> By so doing, it once more delegated to the executive its responsibility of preventing contraventions of s 12.

But if the CSC’s jurisprudence in the decades following *Smith* provides a negative model for the UK and Strasbourg courts, demonstrating as it does that the courts have the ability to deprive guarantees against grossly disproportionate sentences of any meaningful content, the same Court’s recent decisions in *Nur* and *R v Lloyd*<sup>310</sup> show that this excessively deferential approach is far from inevitable.

At issue in *Nur* was an offence of possessing a loaded prohibited or restricted firearm, or unloaded prohibited or restricted firearm together with readily accessible ammunition that could be discharged in the firearm, without being authorised or licensed to possess the firearm in the relevant place or holding a registration certificate for it.<sup>311</sup> If the Crown proceeded summarily, the maximum penalty for the offence was one year’s imprisonment.<sup>312</sup> But if the Crown proceeded on indictment, a first offender was exposed to a mandatory minimum penalty of three years’ imprisonment; and, in the case of a second or subsequent offender, the court was required to impose a sentence of at least five years’ imprisonment.<sup>313</sup> The respondents, who had been proceeded against on indictment for and convicted of the offence, challenged these mandatory sentencing provisions on the basis that they allowed grossly disproportionate sentences to be imposed in ‘reasonable hypothetical’ cases.<sup>314</sup>

In accepting the respondents’ argument, the majority distanced itself from each of the deference techniques noted above. Writing for the six Justices in the majority, McLachlin CJ did state — as of course had Lamer J in *Smith* — that it was necessary for the Courts to show *some* deference to Parliament. Only *grossly* disproportionate sentences will amount to ‘cruel and unusual ... punishment’, her Honour thought; it is not enough that a sentence is merely disproportionate or excessive.<sup>315</sup> Nevertheless, she then made this strong statement about the impermissibility of allowing penological goals such as general deterrence to produce grossly disproportionate sentences: ‘[g]eneral deterrence ... is relevant.

309 Ibid.

310 [2016] 1 SCR 130 (*Lloyd*).

311 *Criminal Code*, RSC 1985, c C-46, s 95(1).

312 See *Nur* [2015] 1 SCR 773, 789 [11]–[12].

313 Ibid.

314 Ibid 786 [3]–[4].

315 *Nur* [2015] 1 SCR 773, 798 [39], citing *Smith* [1987] 1 SCR 1045, 1072–3. As I have argued above, the courts have been wrong to insist that a sentence must be *grossly* disproportionate before it will amount to a ‘cruel and unusual’ or an ‘inhuman or degrading’ punishment: see above n 7. But, whatever it *says* it is doing, the majority of the CSC might not, in reality, be adhering in any very rigorous way to the rule that the only mandatory minimum sentencing provisions that will be struck down are those that foreseeably will produce such *gross* sentencing disproportionality. In this regard, see the remarks of the three dissenting Justices in *Lloyd* [2016] 1 SCR 130, 170 [87]–[88], 174 [99], 177 [107].

*But it cannot, without more, sanitize a sentence against gross disproportionality ... Put simply, a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending*.<sup>316</sup> The UK and Strasbourg courts should pay particular attention to the words that I have italicised here. Again, contrary to the approach taken in *Willcox* but consistently with that in *Reyes*, a sentence may be grossly disproportionate, and therefore contrary to human rights, even if it is open to the legislature to regard that sentence as being necessary to achieve general deterrence.

McLachlin CJ proceeded to support the courts' liberal use of hypotheticals. After observing that '[a] single theme underlies *Goltz* and *Morrisey* ... reasonable foreseeability',<sup>317</sup> her Honour favoured an approach that is in fact far more consonant with *Smith* than it is with either *Goltz* or *Morrisey*. 'The reasonable foreseeability test', she said:<sup>318</sup>

is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it ... targets circumstances that are foreseeably captured by the minimum conduct caught by the offence. Only situations that are 'remote' or 'far-fetched' are excluded ... [T]here is a difference between what is foreseeable although 'unlikely to arise' and what is 'remote [and] far-fetched' ...

There is obvious difficulty in reconciling this with Gonthier J's insistence in *Morrisey* that, to be reasonable, a hypothetical had to be a 'common [example] of the crime'.<sup>319</sup> Moreover, McLachlin CJ proceeded expressly to disapprove the *Morrisey* majority's contention that reported decisions could not be used as 'reasonable hypotheticals' if they were 'marginal' cases. Preferring Arbour J's and her own dissenting view in *Morrisey*,<sup>320</sup> her Honour stated:

Reported cases illustrate the range of real-life conduct captured by the offence. I see no principled reason to exclude them on the basis that they represent an uncommon application of the offence, provided that the relevant facts are sufficiently reported. Not only is the situation in a reported case reasonably foreseeable, it has happened.<sup>321</sup>

That this approach *is* far more consistent with *Smith* than it is with *Goltz* and *Morrisey*, was confirmed in *Lloyd*, where the majority struck down a provision that created a mandatory minimum sentence of one year's imprisonment for a person convicted of possessing certain prohibited drugs for the purpose of trafficking, who had been convicted in the previous ten years of an offence against pt I of the *Controlled Drugs and Substances Act*<sup>322</sup> other than of simple possession.<sup>323</sup> I noted above that, if the *Smith* approach to hypotheticals had been maintained, very few, if any, mandatory minimum sentencing provisions would

316 *Nur* [2015] 1 SCR 773, 800–1 [45] (emphasis added).

317 *Ibid* 804 [56].

318 *Ibid* 809 [68].

319 *Morrisey* [2000] 2 SCR 90, 111 [33]; see also 119 [50].

320 *Ibid* 127 [65].

321 *Nur* [2015] 1 SCR 773, 811 [72].

322 *Controlled Drugs and Substances Act* SC 1996, c 19.

323 *Lloyd* [2016] 1 SCR 130, 141–2 [5]–[6].

have been constitutionally valid. In *Lloyd*, McLachlin CJ — again writing for the majority — observed that, under the *Nur* approach to reasonable hypotheticals, many mandatory sentencing provisions *are* constitutionally suspect:

[I]n light of *Nur*, the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional.<sup>324</sup>

The *Nur* majority also made it clear that, when the courts assess the seriousness of the real or hypothetical offence for the purposes of resolving the gross disproportionality question, more than just the offence’s mens rea is relevant. The offender’s personal characteristics may also generally be considered. Accordingly, in determining whether a three-year sentence would be grossly disproportionate for a hypothetical ‘licensed and responsible gun owner who stores his unloaded firearm safely with ammunition nearby, but makes a mistake as to where it can be stored’,<sup>325</sup> McLachlin CJ emphasised not the mental element that must be proved against *any* offender for him/her to be convicted of the relevant offence, but instead the ‘minimal blameworthiness’ of *this particular* offender and the fact that his conduct neither caused harm nor created a real risk of it.<sup>326</sup>

Further, her Honour held that the courts may not delegate to the executive *their* responsibility to determine whether, if applied to particular offenders, a mandatory minimum sentencing provision would produce grossly disproportionate sentences. Responding to an argument that parole might be granted to any first offender upon whom the three-year mandatory minimum sentence had been imposed, McLachlin CJ stated that ‘[t]he discretionary decision of the parole board is no substitute for a constitutional law’.<sup>327</sup> Her Honour was similarly dismissive of the further argument that the Crown’s ability to elect to proceed summarily meant that it was not in fact reasonably foreseeable that the impugned provision would produce grossly disproportionate sentences.<sup>328</sup> Observing that ‘it is the duty of the courts to scrutinise the constitutionality of the provision’, McLachlin CJ declined the invitation to ‘delegate the courts’ constitutional obligation to ... prosecutors’.<sup>329</sup>

The final noteworthy thing about *Nur* is this emphasis on the courts’ obligation to strike down laws that infringe the *Charter*.<sup>330</sup> It is reminiscent of Lord Bingham’s insistence in *Reyes* that the courts must interpret rights generously. If the courts fail to do this, they abdicate their responsibility, given to them by Parliament, to make it known when legislation is incompatible with human rights. It is this

324 Ibid 152 [35].

325 *Nur* [2015] 1 SCR 773, 814 [82].

326 Ibid 815 [83].

327 Ibid 821, [98].

328 See *ibid* 816 [85]–[87].

329 Ibid 816 [87].

330 See also *ibid* 807 [63].

*Nur / Reyes* approach that the UK and Strasbourg courts should adopt in future cases concerning grossly disproportionate sentences. Moreover, *Nur* and *Reyes* demonstrate that charters of rights can make a difference in this area, if the courts are brave enough to identify grossly disproportionate sentences — and do not avoid making such a finding: (i) because the sentence can be regarded as being consistent with a sentencing purpose such as general deterrence; (ii) by focussing unduly on the relevant offence’s mental element, when assessing the seriousness of that offence; (iii) by citing the executive’s ability to prevent any disproportionality from arising; and/or (iv) by ensuring that there is very limited, or no, consideration of hypothetical offenders in cases where a mandatory sentencing provision is impugned.<sup>331</sup>

## V CONCLUSION

A comparison between Australian law on one hand, and UK and ECtHR decisions on the other, demonstrates that there exists greater potential in jurisdictions with a human rights charter and/or other strong human rights guarantees, than in jurisdictions without such instruments, to intervene where it is claimed that a grossly disproportionate sentence has been imposed. The UK and Strasbourg courts have not yet fully realised this potential. Nevertheless, they have stated that grossly disproportionate sentences cannot be imposed compatibly with art 3; and, importantly, that mandatory sentencing provisions are particularly likely to produce such excess. By contrast, the Australian courts in jurisdictions that lack a charter of rights have, seemingly inevitably, felt unable to impose any limitations on Parliament’s ability to provide for, or the executive’s ability to expose offenders to, mandatory sentences. Without explicit authority to decide human rights controversies, these courts have used formalistic and unpersuasive reasoning to reject arguments that the constraints imposed by ch III of the *Commonwealth Constitution* prevent the legislature or the executive from requiring judges to impose a particular sentence, or a particular minimum sentence, once they have adjudged guilt.

It is important, however, that the UK and Strasbourg courts adopt an appropriately interventionist stance in future cases. Most particularly, contrary to both the Divisional Court and the ECtHR’s suggestion in *Willcox*, the courts must not tolerate grossly disproportionate sentences simply because they can be seen as

331 Note, in this regard, that, in a domestic case where a prisoner challenged his or her mandatorily imposed sentence on art 3 grounds, the UK courts would issue a declaration that *the section* that provided for the imposition of his/her sentence was incompatible with human rights. The *sentence itself* would not be interfered with, because, although s 6(1) of the *HRA* states that it is unlawful for a public authority (such as a court: s 6(3)(a)) ‘to act in a way which is incompatible with a *Convention right*’, this subsection does not apply to an act if, ‘as the result of one or more provisions of primary legislation, the authority could not have acted differently’ (see s 6(2)(a)); and, of course, a mandatory sentencing provision is a classic case of a provision that requires a court to act in a particular way. It follows that, in such a case, it would be open to the UK courts to consider not only the prisoner’s sentence, but also hypothetical offences, when determining whether to issue a declaration; this indeed appears to be implicit in Lord Hoffmann’s remarks in *Wellington* [2009] 1 AC 335, 347–8 [35].

being necessary to achieve sentencing aims such as general deterrence and/or incapacitation. The question is one of disproportionality and human dignity. This is a question that the courts are well placed to answer.<sup>332</sup> The question is *not* whether the sentence is arguably necessary to deter, incapacitate or rehabilitate — even where the legislature has conscientiously considered these concerns.

Relatedly, the UK and Strasbourg courts should learn from the CSC's jurisprudence concerning grossly disproportionate sentences. Specifically, consistently with the majority's approach in *Nur*, they should eschew the deference techniques employed in cases such as *Goltz*, *Morrisey* and *Latimer*. Courts' anxiety about how they might be perceived should not lead them to act, where it is alleged that a grossly disproportionate sentence has been or will reasonably foreseeably be imposed, as though they have not expressly been given the responsibility of protecting human rights. While they must exercise some caution, they should not be craven; to adapt the words of Powell J in dissent in *Rummel*,<sup>333</sup> they must resist the temptation to choose the easiest path rather than the best. If they *do* resist this temptation, then, as *Nur* shows, they will help to realise charters of rights' potential substantially to improve protections for offenders against penal populism.

332 See above n 141.

333 445 US 263, 307 (1980).