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Topic

Rethinking federal sentencing aims and options for terrorists.

Abstract

This article looks at the constitutionality (not the morality) of incapacitating terrorists by confining them for as long as they represent an assessed risk to national security or public safety.

Introduction

1. As the bomb blasts in New York, Bali, Madrid, London and most recently Mumbai demonstrate international terrorism poses a grave and continuing threat to western style democracies. Despite its geographical isolation and global insignificance Australia is no exception and, whether realistic or not, fears are growing that the first suicide attack on our own soil is not very far away.
2. Only last week Sydney architect Faheen Khalid Lodhi became the first person convicted of planning terrorist strikes. Another man 'Jihad' Jack Thomas was sentenced to five years imprisonment earlier this year for having links with an outlawed militant group.
3. Others suspected of terrorism related activities have been acquitted or convicted on less serious charges in the last 2 or 3 years and 22 men from Sydney and Melbourne are currently waiting to be tried for offences against new national anti-terror laws.
4. Ordinary law enforcement powers and methods are unlikely to adequately protect us from the deadly dangers such people pose. There is no doubt that the nature and scale of the challenge of international terrorism we have today calls for toucher than usual reponses. Desperate times call for drastic measures. Citizens have to feel safe and secure and would-be terrorists, whether driven by religious hatred or political ideology, have to be stopped somehow. More effective and efficient ways of preserving our basic right to live in safety and free of fear must be found – preferably sooner rather than later. The question is what action can or should a

civilised country like Australia take to achieve this legitimate aim without drifting too far from traditional moral and legal moorings?

5. Is there, for instance, a rightful place for pre-emption via preventative or indefinite detention where there is reasonable but unsubstantiated suspicion someone is an immediate or imminent threat to the security of the nation or the lives of Australian citizens whichis unlikely to be averted by conventional methods?

6. There is, of course, no single or simple answer to this.

7. Preemptive action is not totally alien to or irreconcilable with democratic principles but protective thinking raises fundamental civil liberties issues. There are important philosophical and morality questions involved too. What are the limits of the precautionary approach? When, if ever, will the end of public safety justify undemocratic means to achieve it? How clear and credible does the proof of danger have to be and how heavy handed a response is society as a whole prepared to tolerate for the sake of national security and public safety?

8. This paper, however, is not directly concerned with these wider concerns surrounding preventative detention laws but with the relatively narrow issue of whether the power to order it can be validly conferred on and exercised by a federal court consistently with internal constitutional constraints and human rights obligations that exist under international treaties such as the *International Covenant on Civil and Political Rights* (ICCPR).

The constitutional context

9. Australia is a federation of six states and two territories in which legal, political and judicial power is separated and shared under a written constitution and quasi co-operative ad hoc inter parliamentary arrangements.

10. Its criminal justice and court systems are highly integrated to ensure consistency across the nation and helps reduce costs and avoid duplication. This results in the 'autochthonous expedient' [1] of most federal offences

[1] *R v Kirby; Ex parte The Boilermakers Society of Australia* (1956) 94 CLR 254, 268.

being dealt with by state and territory courts invested with federal jurisdiction.

11. The Queensland Parliament has power to make laws for "the peace welfare and good government" of the State under s 2 of its own *Constitution Act* 1867. That power is preserved by s 107 of the *Commonwealth Constitution* which limits the power of the Federal Parliament to make laws affecting national rather than state interest, including, for example, with respect to national security, immigration, taxation corporations, industrial relations, foreign affairs, international trade etc.

12. The administration of criminal justice is mainly a state and territory responsibility. However, by ratifying international protocols under its external affairs power and various other devices such as cross-vesting legislation and power referral, inter se, the federal government has made certain categories of criminal activity, including acts of terrorism, a domestic federal offence.

The separation of powers doctrine

13. The *Constitution* is based on the so called doctrine of the separation of judicial from legislative and executive powers. The fundamental purpose of the doctrine is to safeguard civil rights from abuse of power by the executive and legislature. The overarching requirement is the independence of federal judges from the other arms of government. This is essential to the court's ability to protect individual liberty and maintain public confidence in the integrity and impartiality of the judiciary. [2] Chapter III of the *Constitution* gives practical effect to the doctrine insofar as the vesting of federal judicial power is concerned.

14. Judicial power can be exercised by state or federal court judges but not by any part of the executive.

15. The concept of judicial power is difficult to define satisfactorily and the line between judicial and executive power is 'very blurred'. [3]

16. However, the judicial process involves applying the law as it is to facts found to exist. Some functions can be identified '... as essentially and

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2 Lanes *Commentary on the Australian Constitution*, (1997) at 458.

3 *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Anor.* (1992) 176 CLR 1 at 67 per McHugh J.

exclusively judicial' in character. [4] The most important of these '…is the ajudgment and punishment of criminal guilt under a law of the Commonwealth'. [5]

17. According to Blackstone [6] and Coke: [7]

> The confinement of the person, in any wise, is an imprisonment. So that the keeping [of] a man against his will … is an imprisonment … to make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the courses of the commitment, in order to be examined into (if necessary) upon a habeas corpus.

18. No law, state or federal, can validly require or authorise a court to exercise federal judicial jurisdiction inconsistently with the essential character of a court or the nature of judicial power. [8] This means that in practice judges of courts within the integrated national system cannot exercise non judicial power or perform functions incompatible with judicial office.

19. The state parliaments have plenary legislative power over state courts because the doctrine of the separation of powers does not strictly apply as such in any of the states, including Queensland. Nevertheless Chapter III invalidates state legislation that attempts to alter or interfere with the working of the federal justice system or purports to confer jurisdiction on state courts which compromises their institutional integrity to the extent that it affects their capacity to exercise federal jurisdiction conferred under Chapter III impartially and incompetently. [9]

20. This prevents the political branches from borrowing the reputation of judges for impartiality and non partisanship 'to cloak their work in the neutral colours of judicial action'. [10]

21. However, there is nothing precluding a Chapter III judge from, in his or her personal capacity, being appointed to an office performing the performance of administrative or executive functions the persona designata

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4 *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Anor* (1992) 176 CLR 1 at 55 per Gaudron J.

5 *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Anor* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

6 *Commentaries*, 17th ed. (1830), Bk 1 pars. 136-137.

7 *Institutes of the Laws of England* (1809), Pt 2, P.589.

8 *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs and Anor* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

9 *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1528.

10 *Mistreeta v United States* (1989) 488 US 361 at 404.

exception [11] provided that it does not compromise their independence or conflict with the proper performance of their judicial role (the so-called imcompatibility principle). [12]

22. The use of federal judges to authorise and supervise police telephone taps for investigative purposes has been upheld by the High Court via the persona designata exception. [13]

23. Non-judicial functions vested in a federal judge or state court exercising federal jurisdiction will fall foul of the incompatibility doctrine and outside the persona designata exception where the function in question forms an integral part of, is closely connected with legislative or executive activity which (a) involves a discretion to be exercised on political grounds or (b) is not transparently free of government interference or influence or (c) is exercised non-judicially; that is, strictly in line with the requirements of due process. [14]

24. Individual judges have a right, and maybe even a duty, to act in their private capacities for the benefit of the community provided what they do and how they do it is not incompatible with their judicial role and functions. Whether an individual judge accepts a persona designata position is a matter entirely for their own conscience and decision except, perhaps, to the extent that their private action impairs community confidence in the court as a whole or somehow brings the judiciary into disrepute. The risk of being criticised for the manner in which they exercise their persona designata power, ie by issuing an invalid order, is an occupational hazard and not likely to cause public disquiet. However, if a judge was thought to be 'chosen' for his or her personal leanings, prejudices or predispositions, then there would be a real danger of a crisis of confidence in his or her capacity to act judiciously (as distinct from judicially) and even-handedly. This would reduce the public standing of the court and corrode its institutional integrity.

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11 *Drake v Minister for Immigration and Ethnic Affiairs* (1979) 24 ALR 577 at 583-4.

12 *Hilton v Wells* (1985) 157 CLR 77 at 83.

13 *Grollo v Palmer* (1995) 184 CLR 348.

14 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17-20.

25. Unlike other great democracies of the world such as the US, Canada and New Zealand, there is no general statement , bill or charter of rights and freedoms in Australia. However the High Court has interpreted Chapter III of the *Constitution* as guaranteeing the right to procedural due process. The application of this principle and the separation of powers doctrine constrain the exercise of federal judicial power in relation to criminal offenders [15] generally, and in particular, whether, and to what extent, terrorists (or anyone else for that matter) can be confined for the purposes of incapacitation.

Preventative detention powers

26. There are four relevant forms of preventative detention: (a) arbitrary (b) before arrest or trial (c) on conviction (d) post sentence.

27. Arbitrary punishment including confinement without conviction in ordinary judicial proceedings is unavailable as a social control mechanism in Australia not least of all because it is contrary to Art. 9 ICCPR.

28. It infringes the separation of judicial and legislative power by substituting a legislative judgment of guilt for the judgment of the courts exercising federal judicial power and would also be:

> … beyond the legislative power of the parliament to invest the executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from punishment and criminal guilt. [16]

29. The reason why this is so was explained by Brennan, Deane and Dawson JJ in *Chu Kheng Lim and Others v Minister for Immigration, Local Government and Ethnic Affairs & Anor* [17] :

> … putting to one side … exceptional cases … , the involuntary detention of a citizen in custody by the state is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

30. In *Lim* the High Court unanimously decided that immigration laws allowing refugees to be detained in custody pending processing of entry permit applications for at least 9 months could be validly conferred on the

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15 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 [2005] [1.32].

16 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 536, 617, 646-648, 706, 721.

17 (1992) 176 CLR 1 at 28.

executive without infringement of Chapter III exclusive vesting of the judicial power in designated courts because the detention was incidental to proper executive powers and functions and not in the nature of judicial power. The laws were held invalid (by a 4-3 majority) to the extent that they purported to prevent a court from ordering the release of a detainee from custody.

31. The Court freed the refugees in *Lim* on the ground that the statute authorised custody only until the departure of the vessel carrying them to Australia the continued detention in custody after the destruction of the boat on which they arrived in Australia was unlawful.

32. The judges recognised some qualifications to the general proposition that the power to order a citizen to be involuntarily contained in custody is part of the judicial power of the Commonwealth entrusted exclusively to Ch. III courts. The most important is that which Blackstone himself identified in the passage quoted above, namely, the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he is available to be dealt with by the courts. Such committal to custody awaiting trial is not seen by the law as punitive or appertaining exclusively to judicial power. Even there, however, the power of the executive to detain a person in custody pending trial is subject to the supervisory jurisdiction of the courts to order that person be released on bail. [18]

33. Deportation is not regarded as punishment even if it is consequent upon criminal conviction.[19]

34. Neither is involuntary detention in cases of mental illness or infectious diseases which are also seen as non-punitive in character and not necessarily involving the exercise of judicial power. Otherwise, apart from the traditional powers of the parliament to punish for contempt and of military tribunals to penalise breaches of military discipline, the High Court made it clear in *Lim* that citizens of this country (at least in peace time) enjoy a constitutional immunity from being imprisoned by

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18 *Lim* at 28.

19 cf *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 per Deane, J at 685.

Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.

Terror Suspects

35. *The Anti-Terrorism Act (No 2)* (2005) (Cth) introduced what are called control orders and preventative detention to pre-emptively frustrate or defeat planned terrorist activity and isolate suspected terrorists during the investigative phase of the criminal justice process.

36. Control orders may be issued by a federal court, including paradoxically, the Family Court, for the purposes of protecting the public against defined terrorists acts by keeping suspects *in communicado* or requiring them to wear electronic tags or tracking devices e.g. anklets for up to one year.

37. Preventative detention, initial or continued, is available to stymie the execution of a planned terrorist action or to preserve evidence relating to an act of terrorism committed within the last 28 days. Initial detention is approved by a senior federal police officer and lasts up to 24 hours. The continued detention of a person for no longer than a further 48 hours may be authorised by a serving or retired judge of a federal court acting as a *persona designata*, that is, in a personal rather than judicial capacity.

38. The issue of a control order is a judicial act by a court. The making of an initial preventative detention order is almost administrative in nature whereas the authorisation of its continuation is executive.

39. These measures are arguably the most efficient, effective and, possibly, the only practical means of incapacitating pending terrorist threats but there are some intriguing aspects of this protective regime. The first is that unlike complementary state legislation in New South Wales the most intrusive of the scheme of coercive powers is conferred by the federal Act on designated federal judges acting in their personal capacity (the persona designata exception) rather than on a court. This is probably because doing it the other way around would be contrary to the federal separation

of powers doctrine and inconsistent with Ch. III of the *Constitution* because of the distinctly non-judicial nature of the procedures. [20]

Alleged terrorists

40. Like any common criminal an accused terrorist is liable to be remanded without bail pending trial.

41. This is one of the special exceptions to the separation of powers doctrine recognised by the High Court in *Lim.* [21] A basic consideration in granting or refusing bail is community protection. So too is the risk of reoffending.

42. The power to hold without bail is not seen by the law as punitive or 'as appertaining exclusively to judicial power'.As McHugh J [22] noted in *Lim* although detention under a law is ordinarily punitive in nature cannot be so characterised if the purpose of the custody is to achieve some legitimate non punitive object. Thus, imprisonment while awaiting trial on a criminal charge is non punitive because its underlying purpose is to prevent flight and ensure that the accused person will appear at court to be dealt with according to law.

43. Pre-trial commitment of an accused person, however, is subject to the supervisory jurisdiction of the courts 'including the "ancient common law" jurisdiction,' "before and since the conquest", to admit to bail. [23] and if imprisonment exceeds what is reasonably necessary to achieve the non punitive objective it will be regarded as penal in character.

Proven terrorists

44. Punishment of convicted killers, including terrorists and other fanatics, is an essential and accepted part of any criminal justice system. [24]

45. It is usually justified on the utilitarian ground that it does more good than harm and has the beneficial effect of reducing crime. [25] Retributivists

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20 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
21 (1992) 176 CLR 1 at 28.
22 *Lim* at 71.
23 See *Lim* at 28 and Blackstone, op cit., Bk. 4, par.298.
24 Australian Law Reform Commission, Sentencing of Federal Offenders, DP 70 (2005), [4.1].
25 C Ten, *Crime, Guilt and Punishment* (1987), 7.

however, argue that criminals deserve to be punished in proportion to the social damage their conduct has caused because they rationally chose that consequence when they committed the crime. [26] Most sentencing principles are derived from one or other of those theories.

46. Thus, as the Australian Law Reform Commission (ALRC) has noted, the underlying purpose of a federal sentence for criminal conduct is to ensure appropriate punishment, effective deterrents, rehabilitation, atonement, community protection, denunciation and, in modern times, to restore proper relations between the offender, the victim and the community generally. [27]

47. The aim is to maintain the authority of the state and promote respect for and observance of its laws to create and preserve a just and safe society and to ensure that punishment is fair and efficient and achieves its purposes in a principled way.

48. A fundamental principle is that a sentence should be proportionate to the objective seriousness or gravity of the crime. It should be no more severe than is necessary to achieve proper sentencing purposes. National sentencing policies pursued unchecked can lead to the imposition of unjust punishment. It is imperative that the purposes of sentencing are pursued only within the boundaries established by the principles of sentencing particularly proportionality. Imprisonment, therefore, is a last resort and imposed only when there is no other viable option.

49. In 1988 ALRC 44 concluded that incapacitation was not a legitimate purpose of sentencing because it required punishment to be imposed by reference to future conduct of an offender and in doing so did not link the punishment to a past crime. [28]

50. However, in ALRC DP 70 (2005) the ALRC changed its view and at 4.25 recognised incapacitation or community protection as a legitimate function of sentencing federal offenders.

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26 N Walker *Why Punish?* (1991), 73-75.

27 Australian Law Reform Commission, *Sentencing of Federal Offenders* DP 70 (2005), [4.3].

28 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [37].

51. Incapacitation aims to impose some form of restraint on an offender in order to render him or her incapable of reoffending and thus ensure community protection. [29]

52. The most extreme form of incapacitation is capital punishment but that is not available in Australia. The most heavily used form of incapacitation is imprisonment. Mandatory maximums are rare. So too are indefinite terms such as life without parole. Both are reserved for the most serious category of crime and criminals. Selective incapacitation is the strategy of attempting to identify and then incapacitate particular offenders who are likely to reoffend. [30] As such, it is a policy that relies on predictions of future criminality which are widely criticised as inherently unreliable and more often than not result in erroneous forecasts that an offender is likely to reoffend (so called false positives).

53. Legislation in Queensland provides for two separate species of the selective incapacitation. [31] Both have a common purpose – containment and protection. The consequences too are the same – extra jail time. Assessed risk is a shared criterion. The difference is the date the assessment is made. In one it is just before release at the expiration of the definite sentence while the other assess future risk at the time of sentencing. Under the first a decision has to be made whether it is safe to let the prisoner out. Under the second it is whether it *will* probably be safe to release the prisoner when the nominal sentence has expired. One assesses the current level of a postponed risk. The other looks at probable future risk.

54. Part 10 of the *Penalties and Sentences Act 1992* (Q) provides for indefinite sentences instead of fixed terms of imprisonment for violent offenders. In imposing such a sentence the sentencing court must state the term of imprisonment (the nominal sentence) that would have ordinarily been imposed for the crime. The indefinite sentence must be reviewed within six months after half the nominal sentence has been served and thereafter

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29 von Hirsch & Ashworth (eds), *Principle Sentencing: Readings on theory and policy* (2nd ed., 1998) 88.

30 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 124 at – 125.

31 Most other States and territories have similar provisions. See for example, B McSherry, 'Indefinite and Preventative Detention Legislation: From Caution to an

at regular intervals no longer than two years. An indefinite prisoner may make an application for review at any time after the the first review. The indefinite sentence must be discharged unless the reviewing court finds that the offender is still a menace to the public.

55. A court imposing an indefinite sentence must give detailed reasons for doing so and must be satisfied that there would be a risk of serious physical harm to members of the community if the offender was to be released after the expiration of the nominal sentence and that the public needed to be protected against that risk.

56. Part 10 proceeds on the assumption that some people are simply too dangerous and the risks they represent to public safety much too high for them to be released. Depriving them of their liberty longer than what is proportionate to their crime is often justified by the utilitarian concept of the greater good.

57. The offender in *Buckley v The Queen* [32] indiscriminately attacked and raped three women in 2000. He had a family history of mental disorder and exhibited zoophilia and paraphilia as well as sexual sadism tendencies.

58. Based on expert psychiatric opinion the sentencing judge imposed an indefinite sentence. He would have otherwise imposed a fixed term of 22 years reduced from a life due to guilty pleas.

59. The High Court upheld an appeal against the imposition of the indefinite sentence because the reasons of the sentencing court did not make it evident that full weight had been given to the exceptional nature of indefinite detention or why it was preferred in the circumstances to a lengthy finite term. Important considerations of proportionality were identified as militating against the application of s 163.

60. The Court noted that the reasoning of the sentencing judge did not deal with predictability issues in his remarks and observed that a matter of particular difficulty in the case was '…the uncertainty that is necessarily involved in estimating the danger to the community of a person who, on any view, will be incarterated for such a long time.'

Open Door" (2005) 29 *Criminal Law Journal* 94.

[32] (2006) 80 ALJR 605.

61. *Buckley* makes it clear that indefinite sentences are neither a standard response nor a default option. The power is to be exercised sparingly and only in clear cases i.e. where the protective element of an appropriate definite term calculated according to ordinary sentencing principles represents an inadequate response to the risk of serious danger to the community if an indefinite sentence was not imposed.

62. The other form of preventative detention in this state operates under Pt 2, Div. 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 which permits the Supreme Court of Queensland to order a prisoner serving time for a 'serious sexual offence' be kept in custody indefinitely on public safety grounds.

63. A continuing detention order may only be made by a court if it is satisfied of an *unacceptable risk* that the prisoner would commit a similar offence upon release. The onus of establishing that a particular prisoner constitutes such a serious danger to the community rests on the Attorney-General and must be established by acceptable cogent evidence to a high degree of probability. Detailed reasons must be given for the order. Such an order is subject to periodic review and appeal to the court of appeal.

64. The appellant in *Fardon v AttorneyGeneral (Qld)* [33] was sentenced to 14 years imprisonment for rape and other sexual offences committed while on parole for similar offences committed in 1980. The Dangerous Prisoners Act commenced three weeks before he was due for release. The Attorney-General applied for his indefinite continued detention order under the Act. The order was made mainly on the basis of the prisoner's failure to take responsibility for his own rehabilitation and his refusal to complete relapse prevention therapies.

65. The order was challenged in reliance on the earlier decision of the High Court in *Kable v Director of Public Prosecutions (NSW)* [34] on the ground that the function discharged by judges in making continuing detention orders under the Act was repugnant to the 'institutional integrity'.

66. In *Kable* the High Court held that the *Community Protection Act 1994* (NSW) was incompatible with Ch. III of the Constitution because it

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33 (2004) ALJR 1519.

required or permitted the Supreme Court of New South Wales to order the continued imprisonment of a specified person on the expiration of his sentence for manslaughter. The majority justices in that case held that because state courts can be invested with federal jurisdiction neither state nor federal legislation can confer jurisidictional powers on them that comprises their integrity as courts exercising federal jurisdiction. [35]. The Court declared the legislation in *Kable* to be ad hominem because, although disguised as a legal proceeding, the obvious object of the exercise was to ensure that Kable remained in prison when his sentence expired.

67. McHugh J thought that it made the Supreme Court [36]:

> the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process that is far removed from the judicial process that is ordinarily invoked when a court is asked to imprison a person.

68. However, the High Court dismissed the appeal in *Fardon* by a six to one majority. Two of the four members of the majority in *Kable* (McHugh and Gummow JJ) upheld the legislation in *Fardon* as valid. The differences between the two cases were identified by McHugh J in *Fardon.* [37] Only Kirby J was prepared to hold that the Dangerous Prisoners Act offended the repugnancy doctrine established in *Kable.* The majority held that continuing detention had a legitimate preventative that is non punative purpose in the public interest achieved with due regard to 'a full and conventional judicial process' including appellate review and the role played by the Supreme Court in that process did not involve the exercise of any power inconsistent with its function as a court exercising judicial power pursuant to Ch. III of the Constitution.

69. Notably, the challenge mounted against the legislative scheme in the Dangerous Prisoners Act was not based on any alleged human rights violation or civil liberty issues and it was conceded that the Act was unimpeachable if the power to make the relevant decision were to be

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34 (1996) 189 CLR 51.

35 *Kable* (1996) 189 CLR 51 at 96 per Toohey J, 103 per Gaudron J., 116-119 per McHugh J., 127-128 per Gummow J.

36 at 122.

37 at 1527. These suggested points of distinction have been criticised as unconvincing: See Gray., A. *Preventive Detention Laws* (2005) Deacon Law Review 177 at 185.

vested in a panel of psychiatrists or presumably retired judges i.e. non-judicial officers.

70. There is room for arguing that Fardon has reinterpreted and watered down the *Kable* repugnancy test and incompatibility principle but I do not want to go into the logical consistency between the reasoning of the High Court in *Kable* and *Fardon* here. Instead I want to ask and answer a deceptively simple question - would a federal law drawn along the same lines as the Queensland Dangerous Prisoners Act or Penalties and Sentences Act survive constitutional scrutiny?

71. Gaudron J [38] expressed the opinion in *Lim* that detention in custody in circumstances not involving some breach of the criminal law and not coming within the established exceptions of the kind referred to by Brennan, Deane and Dawson JJ is offensive to ordinary notions of what is involved in a just society. However**,** Her Honour was not persuaded that legislation authorising detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably inconsistent with Ch. III.

72. Two members of the majority in *Fardon,* McHugh and Gummow JJ, and the lone dissenter, Kirby J, in *Fardon* held that it would be. Gleeson CJ and Hayne J, in the same case, expressly reserved their opinions on the point.

73. Having intervened in the High Court the Attorney-General of the Commonwealth contended in *Fardon* that the Dangerous Prisoners Act was within the limit established by *Kable* because the Commonwealth Parliament itself could validly confer the same powers on a Ch. III court. In other words, a federal court could order the detention of a person on the basis of criminal propensity rather than a finding of criminal responsibility or guilt.

74. Gummow J rejected this proposition as contrary to the 'constitutional conception of involuntary detention as penal or punitive in character' and

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38 *Lim* at 55.

an incident of 'the exclusive judicial function' of adjudging and punishing criminal guilt. [39]

75. His Honour found a constitutional principle derived from Ch. III to the effect that, exceptional cases aside, the involuntary detention of a citizen in custody by the State is permissible *only as a consequential step in the adjudication of criminal guilt for past acts.* This formulation emphasises '…that the concern is with the deprivation of liberty without adjudication of guilt rather than with the question whether the deprivation is for a punitive purpose.' [40]

76. Justice Gummow drew a distinction between preventative detention regimes *attached by legislation to the curial sentencing process upon conviction* which have a long history in common law countries and those that were detatched from that process.

77. He conceded [41] that the list of exceptions referred to in *Lim* is not closed but noted that the Commonwealth did not suggest that regimes imposing upon the court's functions removed from the sentencing process form a new exceptional class nor that the detention, for example, of those mentally ill for treatment is of the same character as the incarceration of those 'likely to' commit certain classes of offence.

78. His Honour distinguished detention by reason of apprehended conduct from pre-trial custody as being of a different character. Detention by reason of apprehended rather than proven conduct is, he said, 'at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct.

79. His Honour identified the vice for a Ch.III court and for the federal laws postulated by the Commonwealth Attorney's submissions as having more to do with the nature of the outcome than the means by which it was obtained. [42]

80. Thus, even though the *Kable* doctrine of repugnancy did not render the state legislation invalid, the opposite result would be reached in relation to a federal law containing the same provisions.

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39 at 77.
40 at 81.
41 at 83.

Summary

81. Subject to the incompatibility principle preventative detention is arguably available at federal level under the persona designata exception for suspected and alleged terrorists provided it is for a short period and only for the purposes of investigation or due process.

82. Having regard to what the High Court said in *Buckley* proven terrorists can arguably be detained indefinitely, provided that the risk is assessed at the time and as part of the original sentencing process provided that due consideration and weight is given to the reformative role and the incapacitation aspects of the nominal finite sentence.

83. The terrorist who has finished serving a fixed sentence could probably be further confined under state legislation by a court subject to the *Kable* repugnancy doctrine but apparently not at federal level.

84. There is, of course, a paradox in this. If it is lawful and appropriate for state judges under Queensland legislation to impose indefinite detention on violent sexual offenders at the time of sentencing or near the time of imminent release because they are considered too dangerous to be at large why should not a judge exercising federal jurisdiction be able to offer the same protection?

85. Similarly, it would clearly be more logical for a regime that allowed the assessment of danger to the community at or near the time of release (when the danger might be assessed more reliably) rather than at the time of sentencing (perhaps many years before an offender is due to be released)? [43]

86. However, unless and until the *Lim* exceptions are enlarged or the conventional common law concept of 'punishment' is redefined to cover <u>any</u> interference with personal liberty or the constitutional limits of federal judicial power are extended, there is no room in Australia for continuing detention regimes (civil or criminal) at federal level.

Conclusion

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[42] at 85.

[43] see the comments of Gleeson CJ in *Fardon* at 1521.

87. As Gleeson CJ pointed out in *Fardon* [44] the way in which the criminal justice system should react to the case of a person who represents a serious danger to the community is an almost intractable problem. No doubt, predictions of future risk can be unreliable and result in serious injustice, but, they might also be right and capable of preventing a human disaster.

88. All judicial processes permit or require an element of prediction or estimation and unreliability is a risk in any human judgment or assessment.

89. As the well known Harvard law professor and human rights activist Alan Dershowitz recently noted the shift from responding to past wrongs to preventing future harm challenges our traditional reliance on a model of human behaviour that pre-supposes a rational person capable of being deterred by the threat of punishment. The classic theory of deterrents postulates a calculating evil doer who can evaluate the cost benefits of proposed actions and will act –or not– on the basis of these calculations. It also assumes society's ability (and willingness) to withstand the anticipated blows and to use the visible punishment of them as threats capable of deterring repetition. These assumptions are now being widely questioned as the threat of large scale death and destruction becomes more credible and our ability to deter such harms by classic rational cost benefit theory becomes less realistic. [45]

90. More and more, however, this presumption against pre-emptive action in favour of a default position of deterrents is being overwhelmed by the perceived dangers and implications of inaction. We currently have no morally or legally acceptable way of deterring religious extremists or political idealogues willing to die for their cause who are promised rewards in the after life that cannot be matched in this one. They are beyond being discouraged because perceived benefits like eternity in paradise far outweigh the personal costs of their action. The price of eternal happiness which is death cannot be conferred on earth. The stakes have increased for both taking and not taking pre-emptive steps as our very way of life is put in jeopardy.

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44 at 1523.

45 Dershowitz, A.M., *Pre-emption: A Knife that Cuts Both Ways* (2006) W.W. Naughton & Co., New York at 8.

91. The most basic and deeply rooted of all democratic entitlements, however, must be to live free of fear. The corresponding social duty is to let others do the same. International terrorists respect neither. The continuing conumdrum is whether in each case the probability and gravity of the assessed harm they represent to the lives and rights of others justifies depriving them of their liberty and denying them the same freedoms they would unhesitatingly refuse their potential victims.