IRREDUCIBLE LIFE SENTENCES, CRAIG MINOGUE AND THE CAPACITY OF HUMAN RIGHTS CHARTERS TO MAKE A DIFFERENCE

ANDREW DYER*

Certain commentators have recently doubted whether, as a normative matter, an irreducible life sentence will always breach an offender's human rights. This article argues that it will. Such commentators ignore the fact that certain punishments are 'inhuman or degrading' however proportionate they are, and however much suffering they cause. After noting that there is a clear trend against irreducible life sentences in Europe, the article then contends that a comparison of the relevant European jurisprudence with some recent decisions of the High Court of Australia demonstrates that charters of rights can improve protections for prisoners against laws that objectify and exclude them. The Victorian government's recent disapplication of its charter for the purposes of legislation that removes the possibility of parole from certain named prisoners, however, also indicates that, if future Australian charters are properly to protect prisoners' rights, they might have to be designed differently from existing Australian charters.

I INTRODUCTION

In *Minogue v Victoria* ('*Minogue (Scope Challenge)*'),[1] five High Court Justices suggested that, if the defendant were to impose an irreducible life sentence on a criminal offender, it would breach section 10(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), which prohibits, relevantly, 'cruel, inhuman or degrading' punishments. That provision, their Honours observed, is 'in substantially the same terms'[2] as article 3 of the *Convention on Human Rights and Fundamental Freedoms* ('*ECHR*').[3] In *Vinter v United Kingdom* ('*Vinter*'),[4] they continued,[5] the Grand Chamber of the European Court of Human Rights ('ECtHR') held to be contrary to that article a life sentence that gave prisoners the prospect of release

* Colin Phegan Senior Lecturer, University of Sydney Law School. Deputy Director, Sydney Institute of Criminology. I thank all three referees for their fair and constructive comments about a draft of this article.

1 (2018) 264 CLR 252, 272–3 [52]–[55] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

2 Ibid 272 [52].

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).

4 [2013] III Eur Court HR 317.

5 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 272 [53] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

only if they were suffering from a terminal illness and were close to death, or were bedridden or similarly incapacitated, and 'other additional criteria [could] … be met'.[6]

In a separate concurring judgment, Gageler J was even more explicit. 'On the widely accepted international understanding that incarcerating a person without hope of release is an affront to the inherent dignity of that person', his Honour said, 'it is not in dispute that the right set out in s 10(b) encompasses the right of a prisoner serving a life sentence to be "offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved"'.[7] Because the provision at issue condemned those to whom it applied 'to a life without hope',[8] it was incompatible with section 10(b).[9] It was also, his Honour thought, incompatible with section 22(1) of the *Victorian Charter*,[10] which provides that '[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'.

In a recent article,[11] Matthew Groves has challenged this reasoning on both factual and normative grounds. According to Groves, it is factually incorrect to argue, as Gageler J did, that a sentence 'with criteria for parole that are stringent to the point of impossibility' will certainly breach the *ECHR*.[12] Indeed, Groves thinks, contrary to the suggestions in *Minogue (Scope Challenge)*, it is very doubtful whether there is a 'trend' in European law against irreducible life sentences.[13] Given that such a trend 'in truth scarcely exists', Groves doubts whether Australian courts should be influenced by it.[14] Rather, they should hold that 'a true or full life sentence is not necessarily incompatible with the *Victorian Charter*'.[15] At this stage, Groves' argument becomes more normative in its focus. For him, it seems, there are two reasons why an irreducible life sentence does not breach human rights. First, he suggests that 'in some cases an offence is so grave' that this is a deserved, or proportionate, punishment.[16] Secondly, he takes issue with the view that a punishment of this nature 'condemns a prisoner to a life without hope'.[17] Rather, it allows the very worst offenders to lead a 'life without false hope'.[18]

Groves' normative argument in favour of the (sparing) use of irreducible life sentences has some distinguished support. According to Richard Lippke, if the opponents of irreducible life sentences are to establish that such sentences are human rights violations, they must persuade 'us that such sentences are cardinally

6 *Vinter* [2013] III Eur Court HR 317, 351–2 [126]. The Court was referring to the United Kingdom Secretary of State's 'restrictive' policy regarding when a prisoner serving a whole life sentence in that jurisdiction could expect to be released: HM Prison and Probation Service, 'PSO 4700 Indeterminate Sentence Manual', *Justice* (Web Page, 11 April 2019) ch 12 <https://www.justice.gov.uk/offenders/psos/pso-4700-indeterminate-sentence-manual>.

7 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 276 [72], quoting *Vinter* [2013] III Eur Court HR 317, 347 [114].

8 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 278 [79].

9 Ibid.

10 Ibid.

11 Matthew Groves, 'A Life without Hope: The *Victorian Charter* and Parole' (2018) 42(6) *Criminal Law Journal* 353.

12 Ibid 367.

13 Ibid 370.

14 Ibid.

15 Ibid 371.

16 Ibid.

17 Ibid.

18 Ibid.

disproportionate'.[19] But they have not yet done this; and it would be difficult to do so.[20] Moreover, he argues, it is not necessarily true that irreducible life sentences crush the hope of those upon whom they have been imposed.[21] In any case, he says, in a manner reminiscent of Groves, would it not be 'cruel' to 'dangl[e] the possibility of release before [such people], when their prospects of release are actually rather dim'?[22]

In this article, I argue that these views do not withstand critical scrutiny. Indeed, they misapprehend why irreducible life sentences breach an offender's human rights. As noted in Part II, while various courts around the world have rightly held that a grossly disproportionate sentence is an inhuman or degrading punishment,[23] Groves and Lippke are, with great respect, wrong to suggest that it is *only* where such disproportionality exists that a punishment will properly be held to breach provisions such as article 3 of the *ECHR*.[24] And they focus unduly on the loss of hope that a 'life means life' prisoner is said to experience.

For, however proportionate such a sentence is, and however much hope the offender subject to it retains, an irreducible life sentence is still contrary to human rights.[25] This is because, like the death penalty,[26] corporal punishment,[27] and torture,[28] it treats the person upon whom it is imposed, not as a *person* to be reasoned with, but as both an '*object* of the executive's power'[29] and a 'member of an inferior breed'[30] (who, as in the case of the death penalty, must be excluded from society).[31] In short, excessive state

19 Richard L Lippke, 'Irreducible Life Sentences and Human Dignity: Some Neglected and Difficult Issues' (2017) 17(3) *Human Rights Law Review* 383, 397.

20 Ibid.

21 Ibid 390–1.

22 Ibid 391.

23 See, eg, *Vinter* [2013] III Eur Court HR 317, 344 [102]; *Reyes v The Queen* [2002] 2 AC 235, 248 [30], 256 [43] (Lord Bingham for the Privy Council) ('*Reyes*'); *Smith v The Queen* [1987] 1 SCR 1045, 1073 (Lamer J for Dickson CJ and Lamer J), 1109 (Wilson J), 1113 (Le Dain J), 1113 (La Forest J); *R v Nur* [2015] 1 SCR 773, 798 [39] (McLachlin CJ for McLachlin CJ, LeBel, Abella, Cromwell, Karakatsanis and Gascon JJ); *S v Dodo* [2001] 3 SA 382 (Constitutional Court) 404 [38]–[39] (Ackermann J).

24 It is well-established that it is not just grossly disproportionate sentences that amount to 'inhuman or degrading punishments'. Punishments that are 'barbaric in themselves' such as the death penalty, also qualify: Dirk van Zyl Smit, 'Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective' (1999) 9(1–2) *Criminal Law Forum* 5, 31. See also, eg, Natasa Mavronicola, 'Crime, Punishment and Article 3 *ECHR*: Puzzles and Prospects of Applying an Absolute Right in a Penal Context' (2015) 15(4) *Human Rights Law Review* 721, 740 ('Crime, Punishment and Article 3 *ECHR*').

25 As the ECtHR held in *Vinter* [2013] III Eur Court HR 317, 346 [110]–[119]; as various other constitutional courts around the world have accepted (see, most recently, *Makoni v Commissioner of Prisons* [2016] ZWCC 8 (13 July 2016)); and as various academic commentators have argued: see, eg, Dirk van Zyl Smit and Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* (Harvard University Press, 2019) 297–301; Judith Lichtenberg, 'Against Life without Parole' (2018) 11(1) *Washington University Jurisprudence Review* 39; Joshua Kleinfeld, 'Two Cultures of Punishment' (2016) 68(5) *Stanford Law Review* 933, 950–8; Andrew Dyer, 'Irreducible Life Sentences: What Difference Have the *European Convention on Human Rights* and the United Kingdom *Human Rights Act* Made?' (2016) 16(3) *Human Rights Law Review* 541, 551–4 ('Irreducible Life Sentences').

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

27 *Tyrer v United Kingdom* (1978) 2 EHRR 1 ('*Tyrer*').

28 *ECHR* art 3.

29 *Khoroshenko v Russia* [2015] IV Eur Court HR 329, 385 [5] (Judges Pinto De Albuquerque and Turković) (emphasis added) ('*Khoroshenko*').

30 *Svinarenko v Russia* [2014] V Eur Court HR 181, 216 (Judge Silvis).

31 See, eg, Kleinfeld (n 25) 948–58, 971–4.

power[32] is the crucial factor, not any suffering that the prisoner endures;[33] and it is not just in cases of disproportionality that such excess is evident.

In Part III, I argue that Groves' factual claims are also dubious. But I first focus on the extraordinary New South Wales ('NSW') and Victorian laws challenged in, respectively, *Crump v New South Wales* ('*Crump*'),[34] *Knight v Victoria* ('*Knight*'),[35] *Minogue (Scope Challenge)*[36] and *Minogue v Victoria* ('*Minogue (Constitutional Challenge)*').[37] I argue that the High Court's decisions in the first, second and fourth[38] of those cases tell us much about the limits of judicial power, and the judicial law-making function, in jurisdictions and cases[39] where the judiciary has been given no power to interpret and apply a charter of rights. While it was undoubtedly open to the Court in those cases to strike down the relevant laws on the basis of Chapter III of the *Commonwealth Constitution*, their Honours instead deployed highly formalistic reasoning to support a less interventionist stance. With respect, it is incorrect to suggest, as Groves does, that the sentences that such legislation mandates might be compatible with the *Human Rights Act 1998* (UK) ('*HRA*') and the *ECHR*. For, whether or not '[a] cursory examination of English and European law' indicates that irreducible life sentences 'may not contravene the *European Convention on Human Rights*',[40] a more thorough examination reveals that, in both Europe and the UK, a sentence of the type legislatively imposed on these offenders[41] would breach article 3 of the *ECHR*.[42] It

32 Many commentators have noted that harsh punishments are a feature of authoritarian regimes, and/or that resistance to them is based upon the liberal suspicion of state power: see, eg, Leon Sheleff, *Ultimate Penalties: Capital Punishment, Life Imprisonment, Physical Torture* (Ohio State University Press, 1987) 25–34; David Luban, 'Liberalism, Torture and the Ticking Bomb' (2005) 91(6) *Virginia Law Review* 1425, 1430.

33 See, eg, *Bouyid v Belgium* [2015] V Eur Court HR 457, 491 [87]–[88], 494 [100]–[101] ('*Bouyid*'). See also Natasa Mavronicola, 'Is the Prohibition against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer' (2017) 17(3) *Human Rights Law Review* 479, 486–7 ('Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute?').

34 (2012) 247 CLR 1 ('*Crump*').

35 (2017) 261 CLR 306 ('*Knight*').

36 (2018) 264 CLR 252.

37 (2019) 93 ALJR 1031 ('*Minogue (Constitutional Challenge)*').

38 In *Minogue (Scope Challenge)*, the Court did not reach the constitutional issue: *Minogue (Scope Challenge)* (2018) 264 CLR 252, 275 [67] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 282 [94] (Gageler J), 284 [101] (Gordon J).

39 The Victorian government disapplied the *Victorian Charter* for the purposes of the provisions impugned in *Knight* and *Minogue (Constitutional Challenge)*: *Corrections Act 1986* (Vic) ss 74AA(4), 74AB(4).

40 Groves (n 11) 367.

41 As argued below, while the High Court has denied that the relevant legislation has altered the sentences judicially imposed on the offenders to whom it applies (see, eg, *Knight* (2017) 261 CLR 306, 323–4 [29] (The Court)), such reasoning is highly unpersuasive.

42 While Groves cites many of the leading English cases, as well as the recent ECtHR cases involving the United Kingdom, he does not refer to recent Strasbourg authority involving claims against other Contracting Parties. As argued below, this authority gives a fuller picture of the Court's attitude to irreducible life sentences: see, eg, *Öcalan v Turkey [No 2]* (European Court of Human Rights, Second Section, Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014) ('*Öcalan*'); *Magyar v Hungary* (European Court of Human Rights, Second Section, Application No 73593/10, 20 May 2014) ('*Magyar*'); *Harakchiev v Bulgaria* [2014] III Eur Court HR 391 ('*Harakchiev*'); *Čačko v Slovakia* (European Court of Human Rights, Third Section Chamber, Application No 49905/08, 22 July 2014); *Trabelsi v Belgium* [2014] V Eur Court HR 301 ('*Trabelsi*'); *Kaytan v Turkey* (European Court of Human Rights, Second Section, Application No 27422/05, 15 September 2015) ('*Kaytan*'); *Murray v The Netherlands* (2017) 64 EHRR 3 ('*Murray*'); *TP v Hungary* (European Court of Human Rights, Fourth Section Chamber, Application Nos 37871/14 and 73986/14, 4 October 2016) ('*TP*'); *Matiošaitis v Lithuania* (European Court of Human Rights, Second Section, Application Nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, 23 May 2017) ('*Matiošaitis*'); and

would also probably breach article 6(1)[43] – and, in the case of the NSW offenders, articles 5 and 7 as well.[44]

Therefore, as I contend in Part IV, the presence of a charter of rights[45] in a jurisdiction *can* improve protections for offenders against harshly punitive laws of the type challenged by Crump, Knight and Minogue. As Lord Mance has reminded us, the 'very purpose' of having such a charter is to give the courts greater power to interfere with legislation that tyrannises unpopular minorities.[46] Accordingly, the ECtHR has felt entitled repeatedly to insist that 'all detention … [be] managed so as to facilitate the reintegration'[47] of detainees into the community;[48] and it has been far more inclined than the Australian courts to scrutinise, and reject, dubious government arguments in cases involving prisoners. Nevertheless, I do use the word 'can' advisedly. During argument in *Minogue (Scope Challenge)*, Nettle J observed that '[i]t is ironic … that the State of Victoria, having so grandiloquently adopted a charter of human rights, so often seeks to distance itself from any application of it'.[49] In other words, the presence of a human rights charter in Victoria has done very little to restrain penal populism in that State.[50] Certainly, it did nothing to prevent the enactment of the legislation that deprived Knight and Minogue of the non-parole periods that their respective sentencing judges had imposed on them.[51]

The lesson seemingly to be drawn is that future Australian charters will only give proper protection to prisoners' rights if they are designed differently from the three

---

Petukhov v Ukraine [No 2] (European Court of Human Rights, Fourth Section Chamber, Application No 41216/13, 12 March 2019) ('*Petukhov*').

43 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 ('*Anderson*').

44 *M v Germany* [2009] VI Eur Court HR 169. Groves' claim that the NSW and Victorian Parliaments' 'legislative honesty' is 'hard to criticise on either human rights or moral grounds' (Groves (n 11) 371) is therefore, with respect, suspect to say the least.

45 Consistently with Dyson Heydon's approach (JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130(3) *Law Quarterly Review* 392, 393), this article treats both the *HRA* and the *ECHR* as a charter of rights. Because the UK government in 1966 accepted its citizens' right of individual petition to Strasbourg, and because it 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), it seems fair to argue that the latter charter was 'present' in the UK from at least that date.

46 Lord Mance, 'Destruction or Metamorphosis of the Legal Order?' (Speech, World Policy Conference, 14 December 2013).

47 *Vinter* [2013] III Eur Court HR 317, 347 [115], quoting Council of Europe, *European Prison Rules* (Council of Europe Publishing, 2006) 7 r 6. As van Zyl Smit and Snacken have observed, the Committee of Ministers, the Committee for the Prevention of Torture and the ECtHR have worked in tandem to require states to adopt penal policies that are aimed at resocialising prisoners: Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press, 2009) 375–6.

48 See, eg, *Khoroshenko* [2015] IV Eur Court HR 337, 373–4 [121]–[122], 379–380 [144]–[145]; *Harakchiev* [2014] III Eur Court HR 391, 445–6 [264]–[265]; *Dickson v United Kingdom* [2007] V Eur Court HR 99, 127 [75]; *Vinter* [2013] III Eur Court HR 317, 346–7 [112]–[115]. See also Sonja Snacken, 'Resisting Punitiveness in Europe?' (2010) 14(3) *Theoretical Criminology* 273, 283–5.

49 Transcript of Proceedings, *Minogue v Victoria* [2018] HCA Trans 84, 2821–4. See also *Minogue (Scope Challenge)* (2018) 264 CLR 252, 257.

50 See Justice Mark Weinberg, 'Human Rights, Bills of Rights and the Criminal Law' (Paper, Bar Association of Queensland 2016 Annual Conference, 27 February 2016) 21; Jeremy Gans, 'The Charter of Law and Order' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 169.

51 For the respective judges' sentencing remarks, see *R v Knight* [1989] VR 705 ('*Knight Sentence*') and *R v Taylor* (Supreme Court of Victoria, Vincent J, 24 August 1988) ('*Taylor and Minogue*').

Australian charters that currently exist.[52] Specifically, such charters will only be able to check penal populism effectively if, as in Europe, certain rights are never subject to parliamentary override[53] – and if judges are given the power to strike down primary legislation.[54] This last point brings me to an area of accord between Groves and me. That author is, with respect, right to suggest that – because of a vociferous campaign against *Vinter* in the UK[55] – English prisoners subject to whole life orders probably have very limited prospects of being released.[56] In this regard, various commentators[57] and judges[58] have accused the Strasbourg Court of applying one standard to the UK and another to the rest of Europe. One of the reasons for the lower level of protection in the UK is the 'weak form' model of judicial review for which the *HRA* provides.[59] For, even if the England and Wales Court of Appeal ('EWCA') in *R v McLoughlin* ('*McLoughlin*')[60] had found that whole life orders were irreducible life sentences, and declared the relevant statutory scheme to be incompatible with article 3 (as it was requested to do),[61] the chances of the Westminster Parliament amending the impugned legislation would have been very minimal indeed.[62]

As observed in Part V, this is not necessarily to say that Parliament should adopt charters of rights of the type just discussed in those Australian jurisdictions without such a measure. This article takes an agnostic stance concerning such charters' desirability;

---

52 In addition to the *Victorian Charter*, there exist the *Human Rights Act 2004* (ACT) and *Human Rights Act 2019* (Qld). The latter came into force on 1 January 2020: Queensland Government, 'Human Rights' (Web Page, 23 January 2020) <https://www.qld.gov.au/law/your-rights/discrimination-and-equality/human-rights>.

53 *ECHR* art 15(2) provides that Contracting Parties may never derogate from certain articles – including *ECHR* art 3. Only '[i]n time of war or other emergency threatening the life of the nation' may they derogate from their other *Convention* obligations; and even then, only 'to the extent strictly required by the exigencies of the situation' and only if 'such measures are not inconsistent with its other obligations under international law': *ECHR* art 15(1). Cf *Victorian Charter* s 31; *Human Rights Act 2019* (Qld) ss 43–7.

54 Cf *Human Rights Act 2004* (ACT) s 32; *Victorian Charter* s 36; *Human Rights Act 2019* (Qld) ss 53–7.

55 As to which, see, eg, Mark Pettigrew, 'A *Vinter* Retreat in Europe: Returning to the Issue of Whole Life Sentences in Strasbourg' (2017) 8(2) *New Journal of European Criminal Law* 128, 131–2 ('A *Vinter* Retreat in Europe'); Mark Pettigrew, 'Retreating from *Vinter* in Europe: Sacrificing Whole Life Prisoners to Save the Strasbourg Court?' (2017) 25(3) *European Journal of Crime, Criminal Law and Criminal Justice* 260, 262–3 ('Retreating from *Vinter* in Europe').

56 Groves (n 11) 369–70.

57 See, eg, Lewis Graham, 'From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights' [2018] 3 *European Human Rights Law Review* 258, 266–7; Lewis Graham, '*Petukhov v. Ukraine No. 2*: Life Sentences Incompatible with the *Convention*, but Only in Eastern Europe?', *Strasbourg Observers* (Blog Post, 26 March 2019) <https://strasbourgobservers.com/2019/03/26/petukhov-v-ukraine-no-2-life-sentences-incompatible-with-the-convention-but-only-in-eastern-europe/>; Mark Pettigrew, 'Politics, Power and Parole in Strasbourg: Dissociative Judgment and Differential Treatment at the European Court of Human Rights' (2018) 4(1) *International Comparative Jurisprudence* 16, 24–5.

58 *Hutchinson v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 47 [38], 49 [40] (Judge Pinto de Albuquerque) ('*Hutchinson*').

59 *Human Rights Act 1998* (UK) s 4.

60 [2014] 1 WLR 3964.

61 Ibid 3971 [13] (Lord Thomas of Cwmgiedd CJ).

62 That is not to accept Groves' apparent claim that the release conditions in the UK are 'stringent to the point of impossibility': Groves (n 11) 367. The Courts in *Hutchinson* and *McLoughlin* made it clear that there would have been a breach of art 3 if release were possible only in the circumstances envisaged by the Secretary of State's policy (see HM Prison and Probation Service (n 6)): *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 18 [43], 20–1 [55]; *McLoughlin* [2014] 1 WLR 3964, 3975 [32]–[33] (Lord Thomas for the Court). It is merely to suggest that, as argued more fully below (see text accompanying nn 393–418) the EWCA's decision in *McLoughlin* is *subtly* protective of whole life prisoners' rights (and that, in *Hutchinson*, Strasbourg treated the UK with some leniency).

indeed, there *might* be good reasons – relating, in particular, to concerns about the politicisation of the judiciary – why they should not be enacted. The point is, rather, that the capacity of future Australian human rights charters actually to protect human rights is most likely to be maximised if they take a form different from that taken by the three instruments that currently exist.

II IRREDUCIBLE LIFE SENTENCES *ARE* HUMAN RIGHTS BREACHES

In *McLoughlin*, the EWCA observed that:[63]

> Although there may be debate in a democratic society as to whether a judge should have the power to make a whole life order, in our view it is evident … that there are some crimes that are so heinous that Parliament was entitled to proscribe, compatibly with the *Convention*, that the requirements of just punishment encompass passing a sentence which includes a whole life order.

In a similar vein, in his extra-curial writings, Judge Robert Spano of the ECtHR, has revealed that his first reaction to *Vinter* was 'not positive'.[64] According to him:[65]

> I feared that the Strasbourg Court might, again, have strayed a bit too far in its interpretation of the *Convention* and, in particular, in restricting legitimate democratic decision-making in the field of penal policy and criminal justice.

One idea to emerge from this is that reasonable minds might differ about whether an irreducible life sentence can be a proportionate, or 'just', punishment. Another, related, idea is that, if a society decides that such a sentence *is* a proportionate disposition in particular circumstances, no court should interfere with its judgment.[66] To do so is to substitute an unaccountable judicial decision for a 'legitimate democratic' one.

The first of these ideas seems accurate. While there does come a point where a sentence is obviously disproportionate,[67] and while it is possible to argue that even the most serious offenders are often not culpable enough to deserve an irreducible life sentence,[68] it seems impossible to regard as *unreasonable* the view that such a sentence is a proportionate punishment for at least some such offenders.[69]

---

63 *McLoughlin* [2014] 1 WLR 3964, 3971 [15] (Lord Thomas of Cwmgiedd CJ). The Court went on to hold, however, that when later reviewing a whole life order the Secretary of State must release the prisoner if, though the order was 'just punishment at the time [that it] …was made, exceptional circumstances have since arisen': at 3975 [31]; and the prisoner's continued detention would be incompatible with art 3 *ECHR*: at 3975 [33].

64 Judge Robert Spano, 'Deprivation of Liberty and Human Dignity in the Case-Law of the European Court of Human Rights' (2017) 4(2) *Bergen Journal of Criminal Law and Criminal Justice* 150, 165.

65 Ibid.

66 See also in this regard *R (Wellington) v Secretary of State for the Home Department* [2009] 1 AC 335, 353–4 [53] (Baroness Hale).

67 As argued by Dirk van Zyl Smit and Andrew Ashworth, 'Disproportionate Sentences as Human Rights Violations' (2004) 67(4) *Modern Law Review* 541, 545–6, 557. See also John Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence' (2012) 35(3) *University of New South Wales Law Journal* 747, 754. For some examples of such sentences, see Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2016) 43(1) *Monash University Law Review* 195, especially 215–16, 223, 227–8.

68 Lichtenberg (n 25) 59–60, argues that: 'Many, perhaps most, of those incarcerated for life have experienced conditions (whether due to nature or nurture or both) that have contributed to their committing crimes, such that if they had not experienced these conditions they would not have committed those crimes. Isn't that *relevant* to determining how much punishment they deserve?' (emphasis in original).

69 See Mirko Bagaric, 'Reflection of Parole without Hope and the Desirability of Capping the Maximum Length of Prison Terms in Light of the *Gargasoulas* Sentence' (2019) 43(1) *Criminal Law Journal* 3, 4. With that said,

The second of these ideas seems at first to be just as compelling. On further reflection, however, it is not. Indeed, as much was recognised by Judge Spano, who proceeded to note that:[70]

> [M]y views on the [*Vinter*] judgment have evolved … . If one is faithful to the text of Article 3, and its underlying rationale, rooted in a dignitarian and individualistic notion of human rights, it is in my view difficult to argue for a contrary position in the field of penal policy … [T]he Court … simply requires that all persons, deprived of their liberty, including those serving life sentences, be treated in accordance with their intrinsic worth and humanity. They must be granted an opportunity for rehabilitation and … a realistic prospect of release. They must not be made objects of the State or suffer purely the wrath of the populace.

In other words, it is not *only* radically disproportionate sentences that breach human rights. No matter how proportionate a sentence is, or might be, it will amount to an 'inhuman or degrading punishment' within the meaning of provisions such as article 3 of the *ECHR* if it nevertheless fails to respect the human dignity of those on whom it is imposed.[71]

No doubt, 'human dignity' is a controversial term.[72] It is also, as McCrudden has shown, a vague one.[73] Beyond a 'minimum core',[74] there is little agreement about when exactly a person's human dignity will be attacked. But, as Carozza has pointed out,[75] even that 'minimum core' has substantial content. The claims that 'every human being possesses an intrinsic worth, merely by being human'; that 'this intrinsic worth should be recognized and respected by others'; and, consequently, that 'the state should be seen to exist for the sake of the individual human being, and not vice versa',[76] place meaningful, liberal, constraints on punishment practices. That is, the term 'human dignity' is not value-free; it is underpinned and shaped by liberalism. And, in the penal context at least, it has a reasonably clear meaning.[77] A punishment will be contrary to an offender's human dignity – and, therefore, to liberalism and human rights – if, instead

---

there is force in John Anderson's suggestion that there are reasons to doubt whether, when a Court imposes an irreducible life sentence on a young offender, cardinal proportionality is respected: see John Anderson, '"Indefinite, Inhumane, Inequitable": The Principle of Equal Application of the Law and the Natural Life Sentence for Murder' (2006) 29(3) *University of New South Wales Law Journal* 139, 150–1. Such an offender might spend up to 60 years in gaol. But his or her crime might not be very much worse than that of a similarly-aged offender who is nevertheless not quite in the worst category of offenders and who is therefore given a non-parole period of, say, 25 years: see at 151.

70 Spano (n 64) 166.

71 See, eg, Jeffrie G Murphy, *Retribution, Justice, and Therapy: Essays in the Philosophy of Law* (D Reidel Publishing, 1979) 233–4, 236. Note, too, that in *Vinter*, the applicants did not argue that their sentences were grossly disproportionate: [2013] III Eur Court HR 317, 344 [103]. Their objection was a different one.

72 It is a term that appeals to some but not others. Compare, eg, Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights (2010) 41(4) *Metaphilosophy* 464; Lippke (n 19) 385–8; Natasa Mavronicola, '*Bouyid* and Dignity's Role in Article 3 *ECHR*', *Strasbourg Observers* (Blog Post, 8 October 2015) <https://strasbourgobservers.com/2015/10/08/bouyid-and-dignitys-role-in-article-3-echr/>; with Michael Rosen, 'Dignity: The Case Against' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 143–54; Mirko Bagaric and James Allan, 'The Vacuous Concept of Dignity' (2006) 5(2) *Journal of Human Rights* 257.

73 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 720.

74 Ibid 679.

75 Paolo G Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19(5) *European Journal of International Law* 931, 936.

76 McCrudden (n 73) 679.

77 As argued by, eg, Michael Tonry, 'Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America' (2018) 47(1) *Crime and Justice* 119, 141–8.

of reasoning with him/her (thus showing respect for his/her 'intrinsic worth' and personhood), it treats him/her as an object to be crushed and/or an 'enemy to be excluded'[78] from membership of the community.

So, as Murphy points out, torture is inconsistent with human dignity, because its aim is not to 'enter into discourse' with the punished, but rather to 'reduce him to a terrified, deficating [sic], urinating, screaming animal'.[79] Likewise, the death penalty treats those upon whom it is imposed, not as 'ordinary people who have committed crimes'[80] who, if possible, are to be restored to the community, but as 'morally deformed people'[81] who cannot be communicated with and 'who must be excluded'.[82] And corporal punishment[83] – indeed, even the slapping of a criminal suspect in police custody[84] – also amounts to a human dignity violation.

According to the Strasbourg Court in *Tyrer v United Kingdom*, the former did not cause the applicant in the case before it to 'suffer any severe or long-lasting physical effects';[85] but he *was* 'treated as an object in the power of the authorities'.[86] According to the same court in *Bouyid v Belgium*, if the latter caused no physical harm in the instant case, that, again, was irrelevant.[87] Rather, '*any* recourse to physical force which has not been made strictly necessary by the person's conduct'[88] is contrary to article 3 of the *ECHR* – '*whatever the impact on the person in question*'.[89] As Mavronicola has pointed out in a series of articles,[90] unlike a proportionate penalty, or self-defensive physical force, because such violence is not a tailored response to (perceived) wrongdoing, it cannot be regarded as necessary or as an act of 'moral communication'.[91] Rather, it is an attempt to intimidate and crush; it is an authoritarian act aimed at *forcing* compliance.

Two points arise from this. The first concerns proportionality. As noted above, when querying whether irreducible life sentences really amount to human rights violations, both Groves and Lippke focus unduly on what they consider to be the possible proportionality of such sentences in some cases. If such sentences are proportionate responses to the crimes of the very worst offenders, they seem to imply, how could they be incompatible with the human dignity of those offenders? For Groves, as we have seen, 'a true or full life sentence is not necessarily incompatible with the *Victorian Charter* because in some cases an offence is so grave that a life sentence will not contravene human rights principles'.[92] And, for Lippke:[93]

78 John Pratt, 'Sex Crimes and the New Punitiveness' (2000) 18(2–3) *Behavioral Sciences and the Law* 135, 140.
79 Murphy (n 71) 233.
80 Kleinfeld (n 25) 941.
81 Ibid.
82 Ibid 949.
83 See, eg, *Tyrer* (1978) 2 EHRR 1.
84 *Bouyid* [2015] V Eur Court HR 457.
85 *Tyrer* (1978) 2 EHRR 1, 11 [33].
86 Ibid.
87 *Bouyid* [2015] V Eur Court HR 457, 494 [101].
88 Ibid 494 [100] (emphasis added).
89 Ibid 494 [101] (emphasis added).
90 Mavronicola, 'Crime, Punishment and Article 3 *ECHR*' (n 24) 733–6; 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(2) *Modern Law Review* 370, 378–9; Mavronicola, 'Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute?' (n 33) 486–7.
91 To use the language of Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 17.
92 Groves (n 11) 371.
93 Lippke (n 19) 396 (citations omitted).

> It might be claimed that some crimes are so horrific that those who commit them deserve to spend the rest of their natural lives in prison, even if in prisons more supportive of human dignity than many existing ones. … Some crimes are truly terrible – think of the slaughter of innocents by Anders Brevik. Is it really implausible to claim that persons like him deserve to spend the rest of their lives in prison?

The answer to Lippke's question is that, as argued above, it is *not* implausible to claim that lifelong incarceration is proportionate to the seriousness of the crimes of a person like Brevik. But, contrary to what he proceeds to argue, it is not necessary for opponents of irreducible life sentences to establish that it *is*.[94] For, if, like torture, the death penalty, corporal punishment and the slapping of criminal suspects, irreducible life sentences treat those upon whom they are imposed as an 'object' and/or an 'enemy',[95] they amount to human rights violations – whether or not they would 'proportionally punish'[96] some offenders.[97]

The second point concerns hope and suffering. In *Vinter*, in a concurring judgment, Judge Power-Forde said:[98]

> [W]hat tipped the balance for me in voting with the majority was the Court's confirmation … that Article 3 encompasses what might be described as 'the right to hope.' … Those who commit the most abhorrent and egregious of acts and who would inflict untold suffering upon others nevertheless retain their fundamental humanity and carry with themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.

This passage has been widely quoted.[99] But its 'eloquence'[100] should not be allowed to distract attention from the fact that, in one respect at least, it is misleading. As we have just seen, whether a punishment violates a person's human dignity is determined not subjectively – that is, by assessing the harm that it causes the individual on whom it is imposed – but objectively – that is, by considering whether the state has treated the person without regard for his/her 'unique worth'.[101] It follows that Judge Power-Forde errs insofar as she argues that an irreducible life sentence is objectionable because of how it subjectively affects a person (taking away his/her hope). Accordingly, when Lippke argues that life without parole sentences do 'not entirely [vanquish]'[102] hope, and when he and Groves contend that it is 'kinder and more honest'[103] to tell the worst offenders that they will never be released, the focus seems clearly to be wrong. An offender can retain all the hope in the world, but if s/he is nonetheless being punished incompatibly with his/her human dignity, s/he is having his/her human rights breached.

---

94 Ibid 397.

95 See Robert S Gerstein, 'Capital Punishment – "Cruel and Unusual"?: A Retributivist Response' (1974) 85(1) *Ethics* 75, 77.

96 Lippke (n 19) 398.

97 Tonry (n 77) 144–5 explains the point well.

98 *Vinter* [2013] III Eur Court HR 317, 358 (Judge Power-Forde).

99 See, eg, van Zyl Smit and Appleton, *Life Imprisonment: A Global Human Rights Analysis* (n 25) 299; Mary Rogan, 'Discerning Penal Values and Judicial Decision Making: The Case of Whole Life Sentencing in Europe and the United States of America' (2018) 57(3) *Howard Journal of Crime and Justice* 321, 327; Kleinfeld (n 25) 954.

100 Rogan (n 99) 327.

101 Habermas (n 72) 474 (emphasis omitted).

102 Lippke (n 19) 391.

103 Ibid. See also Groves (n 11) 371.

Is the state treating the 'life means life' prisoner incompatibly with his/her human dignity? It is submitted that it is. Those who stigmatise irreducible life sentences do so because, like the death penalty, such sentences: 'write off a human being as irredeemable';[104] express 'pessimism'[105] about him/her; treat him/her as 'human waste';[106] mark him/her as 'a morally ruined human being, [who must] … be permanently barred from social membership';[107] and 'extinguish the goal of rehabilitation'.[108] Two notions predominate. The first is objectification. The second is exclusion. There is overlap between them.

The state is treating a person who is serving an irreducible life sentence as an object in the following sense. Rather than treating him/her as 'an irreplaceable and unique person'[109] who is not defined by the crime(s) that s/he has committed[110] and is capable of 'moral deliberation'[111] – as it would if it recognised his/her ability, like all other persons, to reform in response to persuasion – the state instead treats him/her as nothing more than a 'wild [animal] to be leashed'.[112] Various scholars have emphasised egalitarianism in this context.[113] With respect, they have been right to do so. For, as soon as the state denies offenders' 'fundamental humanity' (to use Judge Power-Forde's words) – that is, as soon as it disregards their personhood – it necessarily also denies that they enjoy the *same* status as other humans.[114] They do not matter;[115] the state can treat them however it considers to be expedient. Certain comments in recent Australian parliamentary debates are eloquent of such a philosophy. For example, in the Victorian Legislative Council in 2018, Ms Crozier objected in strong terms to a Labor member's decision to refer to Craig Minogue as 'Dr Minogue'.[116] 'He is an absolute, horrendous criminal,' she said, 'and you give him the dignity of that'.[117] In other words, however much reform the prisoner might have achieved, s/he must always now have the status of an incorrigible 'criminal' who lacks the 'dignity' attaching to those law-abiding individuals who have not (yet) 'forfeited their moral humanity'.[118]

By treating such a person as an object, the state necessarily at the same time excludes him/her from membership of the community. The point can be made briefly. Because the person is not a responsible actor who is amenable to reason and persuasion,

104 van Zyl Smit and Appleton, *Life Imprisonment: A Global Human Rights Analysis* (n 25) 300.
105 Rogan (n 99) 327.
106 *Murray* (2017) 64 EHRR 3 (Judge Pinto de Albuquerque) 69 [21], quoting *Léger v France* (European Court of Human Rights, Second Section, Application No 19324/02, 11 April 2006 [13] (President Costa).
107 Kleinfeld (n 25) 955.
108 Mavronicola, 'Crime, Punishment and Article 3 *ECHR*' (n 24) 737.
109 Habermas (n 72) 474.
110 Rogan (n 99) 333.
111 von Hirsch and Ashworth (n 91) 77.
112 Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) *Cambridge Law Journal* 200, 203.
113 See, eg, Michael Tonry, 'Equality and Human Dignity: The Missing Ingredients in American Sentencing' (2016) 45(1) *Crime and Justice* 459, 469–470; Habermas (n 72) 467, 469, 478.
114 See Kleinfeld (n 25) 941.
115 See ibid 986.
116 During his lengthy period of imprisonment, Craig Minogue has become literate and obtained a doctorate: Paul Daley, 'A U-turn on the Road to Redemption: Craig Minogue and the Russell Street Bombing', *The Guardian* (online, 26 August 2018) <https://www.theguardian.com/australia-news/2018/aug/26/a-u-turn-on-the-road-to-redemption-craig-minogue-and-the-russell-street-bombing>.
117 Victoria, *Parliamentary Debates*, Legislative Council, 26 July 2018, 3305 (Georgina Crozier).
118 Kleinfeld (n 25) 985.

but a '[beast]' that is incapable of self-control and must be 'caged',[119] s/he is an 'enemy of the social order'[120] and must be '[banished] … from social life'.[121]

One further point warrants emphasis. Some might consider the above argument to be excessively idealistic. According to it, we must treat even the worst offenders as possessing the human capacity to reason. But, it might be said, what about those offenders who will not be reasoned with, who turn out to be 'beyond rehabilitation'?[122] By treating such offenders as being immune to moral appeals, is the state not merely being realistic? There seems to be an easy answer to such objections. To say that irreducible life sentences are morally impermissible is not to say that a life sentence should always in fact be reduced. Indeed, the ECtHR has acknowledged as much. According to it, a reducible life sentence is perfectly compatible with article 3;[123] and there will be no breach of that article if a person upon whom such a sentence has been imposed ends up serving his/her full sentence because s/he remains dangerous.[124] However, by punishing a person in the first place, we are treating him/her as a responsible agent who has made a genuine choice to break the law.[125] It would be inconsistent with such an approach to treat him/her, once s/he is imprisoned, as having somehow lost the ability to reason and choose. The life prisoner who, in the event, is unpersuaded by the reasons supplied by the prison system for desistance from crime, must serve his/her full sentence. But the life prisoner who achieves reform – as many appear to do[126] – should be released if s/he has served the punitive component of his/her sentence.[127] There is no illogicality in that.

---

119 van Zyl Smit and Appleton, *Life Imprisonment: A Global Human Rights Analysis* (n 25) 47, quoting Indra Warnes, 'Lifer Loses Appeal: Triple Murderer Arthur Hutchinson's Latest Appeal against UK Life Sentences Dismissed by EU Human Rights Judges', *The Sun* (online, 18 January 2017) <https://www.thesun.co.uk/news/2640546/triple-murderer-arthur-hutchinsons-latest-appeal-against-uk-life-sentences-dismissed-by-eu-human-rights-judges/>.

120 Kleinfeld (n 25) 949.

121 Ibid 948.

122 *Khoroshenko* [2015] IV Eur Court HR 337, 385 [5] (concurring opinion of Judges Pinto De Albuquerque and Turković).

123 *Vinter* [2013] III Eur Court HR 317, 345 [106].

124 Ibid 345–346 [108].

125 If s/he were *non*-responsible, but dangerous due to a mental illness, punitive detention would be an inappropriate response: see, eg, *Foucha v Louisiana*, 504 US 71, 83 (1992) (White J for the Court); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); Michael Louis Corrado, 'Sex Offenders, Unlawful Combatants, and Preventive Detention' (2005) 84(1) *North Carolina Law Review* 77, 101.

126 Consider, eg, Allen J's remarks in *R v Crump* (New South Wales Court of Criminal Appeal, Mahoney JA, Hunt CJ at CL and Allen J, 30 May 1994):

> It is the common experience of judges … to note the remarkable affect [sic] which imprisonment for a decade or more so often has on young offenders – notwithstanding how brutally and callously they acted when they committed the crime or crimes. Time and again one wonders: 'How could this apparently well-adjusted applicant be the person who committed such a crime?' Gone is the brashness. Gone is the bravado. Spent is the passion. Young offenders can change so much during a very long time in gaol as to present almost as an entirely different sort of person.

See also *Baker v The Queen* (2004) 223 CLR 513, 539–41 [68]–[71] (Kirby J) ('*Baker*'); Tom Allard, 'Locked Up for Life', *Sydney Morning Herald* (online, 2016) <https://www.smh.com.au/interactive/2016/locked-up-for-life/>.

127 The European Court has indicated that the very worst offenders should be eligible for release after they have served 25 years of their respective sentences: *Vinter* [2013] III Eur Court HR 317, 349–50 [120]. While States have a margin of appreciation here, the Court has held that a Hungarian scheme that provided such prisoners with their first review after they had served 40 years of their sentences violated art 3: *TP* (European Court of Human Rights, Fourth Section Chamber, Application Nos 37871/14 and 73986/14, 4 October 2016) 12 [45].

III THE *CRUMP, KNIGHT* AND *MINOGUE* LEGISLATION (AND LITIGATION) – AND WHETHER SUCH LAWS COULD VALIDLY BE ENACTED IN EUROPE

A The Law Impugned in *Baker v The Queen*, and the Majority's Decision in That Case

On 20 April 1974, Taylor J, sitting in the Supreme Court of New South Wales, sentenced Kevin Crump and Allan Baker to life imprisonment for the murder of Ian James Lamb and conspiracy to murder Virginia Gai Morse.[128] As French CJ later noted in the High Court, '[t]he killings were callous, and in the case of Mrs Morse, preceded by pitiless and degrading abuse'.[129] In declining to set a non-parole period, Taylor J told the offenders:[130]

> I believe that you should spend the rest of your lives in gaol and there you should die. If ever there was a case where life imprisonment should mean what it says – imprisonment for the whole of your lives – this is it.

At the time, this 'non-release recommendation'[131] had no legal effect.[132] Accordingly, on 24 April 1997, McInerney J, acting pursuant to section 13A of the *Sentencing Act 1989* (NSW), re-determined Crump's sentence,[133] imposing upon the offender a non-parole period of 30 years and a maximum sentence of life imprisonment.[134] A fortnight later, amid public furore, the New South Wales Parliament passed legislation that greatly restricted judges' ability to grant a non-parole period to the remaining nine New South Wales prisoners whose sentencing judge had recommended should never be released.[135] Judges could now make such an order only if they found that 'special reasons' existed that justified such a determination.[136] A majority of the High Court in *Baker v The Queen* ('*Baker*')[137] found that legislation to be constitutionally valid. To an argument that, as in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*'),[138] the NSW Parliament was using the courts to implement a legislative decision that the relevant prisoners never be released,[139] Gleeson CJ noted that the 'special reasons' requirement was not impossible to satisfy.[140] And while the plurality accepted that McInerney J had '[altered] … or [varied] the order of

128 *R v Crump* (Supreme Court of NSW, Taylor J, 20 April 1974). The actual murder of Mrs Morse took place in Queensland, so the Supreme Court of NSW had no jurisdiction concerning it.
129 *Crump* (2012) 247 CLR 1, 7 [1].
130 *R v Crump* (Supreme Court of NSW, Taylor J, 20 April 1974).
131 As described by *Crimes (Administration of Sentences) Act 1999* (NSW) s 154A.
132 *Crump* (2012) 247 CLR 1, 8 [2] (French CJ); *Jamieson v R* (1992) 60 A Crim R 68, 80 (Gleeson CJ, Lee AJ and Hope AJA agreeing at 80). In the latter case, the Chief Justice indicated that he did not support such recommendations: at 80.
133 *R v Crump* (Supreme Court of NSW, McInerney J, 24 April 1997).
134 Ibid.
135 In his second reading speech, the Minister named all of those prisoners – and Crump: New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 May 1997, 8337 (Paul Whelan). Consistently with the argument, just presented, that irreducible life sentences attack human dignity because they are instances of state objectification and exclusion, he also repeatedly referred to the relevant prisoners as 'animals': at 8337.
136 *Sentencing Act 1989* (NSW) s 13A(3A), as repealed by *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) s 2.
137 (2004) 223 CLR 513.
138 (1996) 189 CLR 51.
139 *Baker* (2004) 223 CLR 513, 522–523 [11].
140 Ibid 524–525 [17]–[19].

the sentencing judge',[141] their Honours did not accept that Parliament had altered McInerney J's sentence. The legislation at issue had merely altered the conditions that the prisoners had to satisfy if they were to be released.[142] It had not made their sentences of life imprisonment 'more punitive or burdensome to liberty'.[143]

Four things must be noted. First, as I have argued elsewhere,[144] the majority's conclusion was not the only one that was legally possible.[145] As *Kable* itself showed, and contrary to what Gleeson CJ stated,[146] it was not necessary for the applicant to demonstrate that it was *impossible* for him to satisfy the 'special reasons' standard. This is because the majority struck down the *Community Protection Act 1994* (NSW) in that earlier case even though the Supreme Court of New South Wales retained some discretion concerning whether to order Kable's preventive detention.[147] Moreover, the fact that the *Baker* law's clear aim and effect was to 'ensure, so far as legislation can do it',[148] that a small, identifiable group[149] of unpopular offenders would be imprisoned for life, did tend to strengthen the inference that, as in *Kable*, Parliament was using the Supreme Court as 'an instrument of executive government policy'.[150]

Secondly, it is not only Gleeson CJ who might be accused of deploying dubious reasoning. There is force in Kirby J's contention[151] that there was some formalism in the plurality's conclusion that the relevant offenders' sentences had not been 'made heavier' or 'more punitive'.[152] Admittedly, such reasoning is not nearly as implausible as that favoured in subsequent cases (discussed below): on one view, Parliament *had* merely changed – albeit significantly – the conditions that these prisoners needed to satisfy if they were to be released. Nevertheless, it was perhaps arguable that, as Kirby J found,[153] the new conditions were so stringent as to make the sentence more 'burdensome'.[154] At the very least, the plurality's reasoning was a precursor of the

141 Ibid 529 [33] (McHugh, Gummow, Hayne and Heydon JJ).
142 Ibid 528 [29].
143 Ibid.
144 Dyer, 'Irreducible Life Sentences' (n 25) 561–2.
145 Other commentators, too, have noted that the decisions in *Baker* – and/or *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*') – were not the only ones that were legally open: see, eg, Oscar Roos, '*Baker v The Queen* and *Fardon v Attorney-General for the State of Queensland*' (2005) 10(1) *Deakin Law Review* 271, 279–82; Dan Meagher, 'The Status of the *Kable* Principle in Australian Constitutional Law' (2005) 16(3) *Public Law Review* 182, 185; Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15, 25; Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30(1) *Sydney Law Review* 100, especially at 102–11; Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38(2) *University of New South Wales Law Journal* 756, 774; Anthony Gray, 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Detention Laws' (2005) 10(1) *Deakin Law Review* 177, 184–8.
146 *Baker* (2004) 223 CLR 513, 525 [19] (Gleeson CJ).
147 Indeed, as McHugh J noted in *Kable*, Grove J had ultimately decided not to make such an order: *Kable* (1996) 189 CLR 51, 123.
148 Ibid 122 (McHugh J).
149 As Kirby J noted, although this was not a one-person law, the fact that it applied only to 10 persons meant that it was to this extent 'ad hominem in nature': *Baker* (2004) 223 CLR 513, 547 [94].
150 *Kable* (1996) 189 CLR 51, 124 (McHugh J).
151 *Baker* (2004) 223 CLR 513, 549 [104].
152 Ibid 528 [29] (McHugh, Gummow, Hayne and Heydon JJ).
153 Ibid 549 [104].
154 Justice Kirby thought that the law converted the prisoners' sentences from reducible life sentences into irreducible life sentences: ibid 559 [137]. But the better view might be that, especially in the case of the two targeted offenders who were juveniles at the time of their crimes, there remained *some* prospect of release. In this regard, Gleeson CJ considered that a judge could treat an offender's extreme youth at the time of offending

undoubtedly extremely unpersuasive and formalistic reasoning that the Court later deployed in *Crump*, *Knight* and *Minogue (Constitutional Challenge)*.

Thirdly, such formalistic and/or highly contestable reasoning is surely evidence of a judicial 'desire … to reach a particular conclusion'.[155] In his judgments in both *Baker* and *Fardon v A-G (Queensland)* ('*Fardon*'),[156] Gleeson CJ provided some indications as to *why* the majority might have been unwilling to uphold the *Kable* challenges in those cases. In *Baker*, his Honour said that the *Kable* principle:[157]

> was not an invention of a method by which judges may wash their hands of responsibility of applying laws of which they disapprove. In some of the judgments in *Kable*, references were made to public confidence in the courts. Confidence is not something that exists in the abstract. It is related to some quality or qualities which one person believes to exist in another. The most basic quality of courts in which the public should have confidence is that they will administer justice according to law.

In *Fardon*, Gleeson CJ made similar observations. After referring once more to the statements in *Kable* about the *Community Protection Act*'s capacity to 'diminish public confidence in the judiciary',[158] his Honour contended that:[159]

> nothing would be more likely to damage public confidence in the integrity and impartiality of courts than judicial refusal to implement the provisions of a statute upon the ground of an objection to legislative policy. If courts were to set out to defeat the intention of Parliament because of disagreement with the wisdom of a law, then the judiciary's collective reputation for impartiality would quickly disappear.

These remarks were not made in a vacuum. In the years before Gleeson CJ was appointed Chief Justice of the High Court of Australia in 1998, a perception had arisen in some quarters that, in certain cases, the High Court had *not* '[administered] justice *according to law*',[160] and had, therefore, *not* acted with the required 'impartiality'.[161] Rather, some thought that, in cases such as *Australian Capital Television Pty Ltd v Commonwealth*,[162] *Dietrich v The Queen*,[163] *Mabo v Queensland [No 2]*,[164] *Wik Peoples v Queensland*[165] and *Kable* itself, the Court had arrived at its decisions on ideological rather than legal grounds.[166] Such perceptions were not only held by members of the

---

as a 'special reason': at 525 [17]. And Callinan J held that matters such as 'improved prospects of rehabilitation … [and] genuine contrition' (at 574 [176]), either alone or in combination with other factors (at 573–4 [175]), might be capable of qualifying. On the other hand, some of the other factors that his Honour referred to – 'senility, disability … [or] an act … of heroism in prison' (at 574 [176]) – would not by themselves prevent a sentence from being regarded as irreducible: see, eg, *Murray* (2017) 64 EHRR 3, 38–9 [100], concerning the first two of these factors. And, on any view, the impugned law did seem to make it practically impossible for at least most of the prisoners ever to be released.

155 Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2014) 40(1) *Monash University Law Review* 75, 109.

156 (2004) 223 CLR 575.

157 *Baker* (2004) 223 CLR 513, 519–20 [6].

158 (2004) 223 CLR 575, 593 [23].

159 Ibid.

160 *Baker* (2004) 223 CLR 513, 519–520 [6] (Gleeson CJ) (emphasis added).

161 *Fardon* (2004) 223 CLR 575, 593 [23] (Gleeson CJ).

162 (1992) 177 CLR 106.

163 (1992) 177 CLR 292 ('*Dietrich*').

164 (1992) 175 CLR 1.

165 (1996) 187 CLR 1.

166 See, eg, Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10(4) *Otago Law Review* 493; Fiona Wheeler and John Williams, '"Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19, especially at 37–50. James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary

public; a number of academic commentators also held them. So, for example, George Winterton considered that the last of these decisions reflected an 'understandable', though misguided, judicial concern to promote Kable's human rights.[167] And, in like vein, Greg Taylor thought that the majority had invalidated the impugned Act because it did 'not like' it[168] (that is, to use Gleeson CJ's language, because of its 'objection to legislative policy').[169] This was the context in which the 'Gleeson Court' drew the 'subtle distinctions'[170] it did in *Fardon* and *Baker*. Underlying such an approach seems to have been a desire to restore confidence in the Court,[171] as well as a realisation that, if the Court had instead used the controversial *Kable* principle to strike down legislation that targeted widely reviled murderers and sex offenders, further claims of 'judicial activism' were only too likely to result.

Fourthly, and relatedly, there were indications in the judgments of both Gleeson CJ and McHugh J in *Fardon* that, once a charter of rights is enacted in a jurisdiction, the judiciary enjoys greater freedom to intervene in cases involving 'patently unjust'[172] legislation that raises '[s]ubstantial questions of civil liberty'.[173] For the Chief Justice, it was significant that, unlike in the United States and Canada:[174]

> [i]n Australia, the *Constitution* does not contain any general statement of rights and freedoms. Subject to the *Constitution*, as a general rule it is for the federal Parliament, and the legislatures of the States and Territories, to consider the protection of the safety of citizens in the light of the rights and freedoms accepted as fundamental in our society.

Likewise, McHugh J was keen to stress that legislation that 'could not be countenanced in a society with a Bill of Rights'[175] might well survive constitutional challenge in Australia. And he was equally keen to emphasise, as of course Gleeson CJ had, that he was unwilling to use *Kable* to strike down legislation simply because he considered it to be 'foolish ... [or] unwise'[176] and/or had a 'personal dislike'[177] of it. As will be argued below, these Justices were, with respect, right to observe that charters of rights facilitate more expansive reasoning, and bolder results, in cases involving the liberty of the subject. Because such charters provide the Courts with an explicit mandate to determine whether a law is contrary to human rights, they give the judges greater scope to protect unpopular minorities from legislative tyranny.[178]

---

between Professor James Allan and the Hon Michael Kirby AC CMG' (2009) 33(3) *Melbourne University Law Review* 1032, 1041.

167 George Winterton, 'Justice Kirby's Coda in Durham' (2002) 13(3) *Public Law Review* 165, 170.

168 Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 456.

169 *Fardon* (2004) 223 CLR 575, 593 [23] (Gleeson CJ).

170 Wheeler (n 145) 25.

171 The Gleeson Court seems to have been successful in this undertaking: Wheeler and Williams (n 166) 56.

172 *Fardon* (2004) 223 CLR 575, 601 [41] (McHugh J).

173 Ibid 586 [3] (Gleeson CJ).

174 Ibid 590 [14].

175 Ibid 601 [41].

176 Ibid.

177 Ibid 601 [42].

178 Nevertheless, even Courts with a charter at their disposal have to be mindful of perceptions; they too must ensure that they are not seen to be exceeding their more considerable powers: Dyer, 'Irreducible Life Sentences' (n 25) 579–81.

B The *Crump, Knight* and *Minogue* Legislation, and the High Court's Decisions in Those Cases

As noted above, the legislation upheld by the majority of the High Court in *Baker* applied to the New South Wales prisoners *apart from Kevin Crump* in respect of whom sentencing judges had made a non-release recommendation. Because McInerney J had already re-determined Crump's sentence, granting him a non-parole period, Crump was required to persuade no one that he satisfied the 'special reasons' requirement in the amended Act. In 2001, however, the New South Wales Parliament passed legislation that essentially removed any prospect that either Crump or any of the other non-release recommendation prisoners would ever be released.[179] Indeed, under section 154A(3) of the *Crimes (Administration of Sentences) Act 1999* (NSW), such release can only take place if the Parole Authority is satisfied that the prisoner is:

> in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person, and … has demonstrated that he or she does not pose a risk to the community, and … is further satisfied that, because of those circumstances, the making of such an order is justified.

For Groves, such legislation is 'extraordinary, even unfair'.[180] I respectfully agree, though I would substitute the word 'and' for 'even';[181] and, unlike Groves,[182] I would add that it is also clearly contrary to human rights. But, according to the High Court in *Crump*,[183] its constitutional validity could not be doubted. In response to the plaintiff's argument, based on *Kable*, that the NSW Parliament had impermissibly altered or varied the sentence imposed by McInerney J in 1997, French CJ stated that, '[o]n any view'[184] there was no such alteration. According to his Honour,[185] and to Heydon J,[186] section 154A changed not McInerney J's sentence – 'penal servitude for life'[187] – but, instead, 'the conditions to be met before the plaintiff could be released on parole'.[188] The plurality agreed. While accepting that '[i]n this, … regard properly may be had to matters of substance as well as form',[189] their Honours denied that, as a matter of substance, section 154A did 'impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty'.[190] In so holding, their Honours cited with approval the plurality Justices' contention in *Baker* that later legislation altering the circumstances in which parole may be granted does not make a life sentence 'more punitive or burdensome to liberty'.[191]

---

179 *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* (NSW).
180 Groves (n 11) 371.
181 This is especially so given that two of the offenders to whom it applies were well under the age of 18 at the time of committing their offences. For further discussion, see Wendy O'Brien and Kate Fitz-Gibbon, '"Cemented in Their Cells": A Human Rights Analysis of Blessington, Elliott and the Life Imprisonment of Children in New South Wales' (2016) 22(1) *Australian Journal of Human Rights* 111; Kate Fitz-Gibbon, 'Life without Parole in Australia: Current Practices, Juvenile and Retrospective Sentencing' in Dirk van Zyl Smit and Catherine Appleton (eds), *Life Imprisonment and Human Rights* (Hart Publishing, 2016) 85–7.
182 Groves (n 11) 371.
183 (2012) 247 CLR 1.
184 Ibid 18 [34].
185 Ibid 19 [35].
186 Ibid 29 [72].
187 Ibid 29 [74].
188 Ibid 29 [72] (Heydon J).
189 Ibid 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
190 Ibid 27 [60].
191 Ibid 20–1 [41], quoting *Baker* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ).

It is factually incorrect to say, as French CJ did, that the only possible view of section 154A's effect was the one he took. As Kirby J's judgment in *Baker* makes clear, a different, far less formalistic view is open.[192] Indeed, such a view is more than open; it seems irresistible. However arguable it was that the *Baker* legislation did not touch the life sentence that Taylor J had imposed upon the appellant,[193] it is totally implausible to contend that the *Crump* law, too, merely made more stringent the conditions that the plaintiff had to satisfy before he could be released. As the High Court implied in *Minogue (Scope Challenge)*,[194] and as various commentators[195] and courts[196] around the world have acknowledged, an irreducible life sentence is a different type of sentence from a life with the possibility of parole sentence. Before section 154A's enactment, Kevin Crump was serving a life with parole sentence. There remained a possibility that the Parole Authority would release him some time after he had served 30 years in prison.[197] Section 154A undoubtedly transformed his sentence into an irreducible life sentence. For, as the ECtHR has repeatedly insisted, 'a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age' is not enough to render a sentence reducible.[198] And, even more tellingly, the United Nations Human Rights Committee has found[199] that the 'restrictive conditions'[200] in section 154A(3) do not offer those to whom that section applies 'a real possibility of release on parole.'[201] Their sentences are therefore irreducible,[202] and they amount to 'cruel, inhuman or degrading … punishment[s]' within the meaning of article 7 of the *International Covenant on Civil and Political Rights*.[203]

Nevertheless, in *Knight*, all seven Justices accepted the view that section 74AA of the *Corrections Act 1986* (Vic), which is modelled on section 154A,[204] 'did not replace a judicial judgment with a legislative judgment'.[205] Section 74AA is entitled 'Conditions

192 *Baker* (2004) 223 CLR 513, 549 [104].

193 See above text accompanying nn 153–4.

194 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 272–3 [53]–[54] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 276 [72] (Gageler J). See also *Minogue (Constitutional Challenge)* (2019) 93 ALJR 1031, 1039 [30] (Gageler J).

195 See, eg, the discussion in van Zyl Smit and Appleton, *Life Imprisonment: A Global Human Rights Analysis* (n 25) 41–9, 60–9.

196 See, eg, *Vinter* [2013] III Eur Court HR 317, 345 [106]–[107], 346 [110]. There, the ECtHR made it clear that, whereas a state may impose a life sentence compatibly with art 3 *ECHR*, it may not impose an irreducible life sentence. See also *Communication No 1968/2010: Views Adopted by the Committee at its 112th Session*, UN Doc CCPR/C/112/D/1968/2010 (17 November 2014) 16 [7.7] ('*Blessington and Elliott*').

197 Justice Heydon denied – or at least doubted – that the plaintiff *did* have 'any real prospect of release' before the enactment of s 154A: *Crump* (n 34) 29 [73]. But this is wrong. Certainly, before that date, the Parole Board was required to give very serious consideration to the beliefs and intentions of the judge who sentenced Crump (Taylor J), when deciding whether to release him: at 14 [17] (French CJ). But while it was required to state its reasons for departing from that judge's non-release recommendation, it *was* possible for it so to depart. Accordingly, as French CJ observed, the scheme 'left open the possibility that … [Crump] could eventually be released on parole': 14 [17].

198 *Murray* (2017) 64 EHRR 3, 38–9 [100]. See also, eg, *Vinter* [2013] III Eur Court HR 317, 352 [127]; *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 18 [43].

199 *Blessington and Elliott*, UN Doc CCPR/C/112/D/1968/2010 (2014) 17 [7.8], [7.12].

200 Ibid.

201 Ibid 16 [7.2].

202 Ibid 16 [7.2], 16–17 [7.7]–[7.12].

203 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

204 Victoria, *Parliamentary Debates,* Legislative Council, 18 February 2014, 305 (Edward O'Donohue, Minister for Corrections).

205 *Knight* (2017) 261 CLR 306, 324 [29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

for making a parole order for Julian Knight'. It applies, that is, only to that prisoner. Though on 10 November 1988, Hampel J imposed on Knight a life sentence with a minimum term of 27 years,[206] section 74AA(3) makes it clear that he will be released only if, as the High Court put it:[207]

> the Adult Parole Board [is] … satisfied, amongst other things, that Mr Knight is in imminent danger of dying or is seriously incapacitated and that, as a result, he no longer has the physical ability to do harm to any person.

According to their Honours, this was not one of those situations where the *ad hominem* nature of the legislation pointed towards its invalidity.[208] Indeed, this case was no different from *Crump*.[209] 'By making it more difficult for Mr Knight to obtain a parole order after the expiration of the minimum term,' they held, 's 74AA does nothing to contradict the minimum term that was fixed'.[210] And, as in *Crump*, their Honours saw fit to quote from the plurality's decision in *Baker*: Knight's sentence of life imprisonment, they thought, had not been made 'more punitive or burdensome to liberty'.[211]

For the reasons just given, this reasoning is extremely unpersuasive. The whole purpose of section 74AA, and its effect, was to contradict the minimum term that Hampel J had imposed on Knight. And that section clearly made his sentence more burdensome. That is why Knight was challenging it. In short, as with Crump, Knight's sentence *had* been altered: section 74AA had turned it into an irreducible life sentence.

It was at this stage that the Victorian Parliament turned its attention to Craig Minogue. On 24 August 1988, Vincent J sentenced Minogue to life imprisonment with a minimum term of 28 years for his participation in 'one of the most serious criminal actions ever to take place in this community'.[212] His Honour was referring to the Russell Street bombing of 27 March 1986, which resulted in the death of a police constable named Angela Taylor, of whose murder Minogue had been convicted.[213] In declining to provide Minogue's co-offender, Stan Taylor, with a minimum term, Vincent J acknowledged the 'terrible' nature of the sentence that he was imposing.[214] Such a sentence, his Honour held, was not suitable in the case of Minogue. Because of Minogue's youth (he was 23 years of age when sentenced), his prospects of rehabilitation and Taylor's dominance over him, Vincent J was persuaded that there 'should be some disparity between the sentence imposed on [him] … and that of … [his] co-offender'.[215]

---

206 *Knight Sentence* [1989] VR 705. Knight was sentenced for seven counts of murder and 46 counts of attempted murder: at 710. The charges arose from the so-called 'Hoddle St Massacre', which he perpetrated on 9 August 1987: at 705. Justice Hampel imposed a minimum term mainly because of Knight's youth (he was 19 at the time of offending: at 705), prospects of rehabilitation and 'other mitigatory factors': at 711.

207 *Knight* (2017) 261 CLR 306, 317 [3] (The Court).

208 Ibid 323 [26].

209 Ibid 323 [25].

210 Ibid 323–4 [29].

211 Ibid 324 [29], quoting *Baker* (2004) 223 CLR 513, 528 [29] (McHugh, Gummow, Hayne and Heydon JJ).

212 *Taylor and Minogue* (Supreme Court of Victoria, Vincent J, 24 August 1988).

213 Ibid.

214 Ibid.

215 Ibid. Later in 1988, Minogue was sentenced for the murder of a fellow prisoner at Pentridge Prison; this second murder took place about a month before he was sentenced by Vincent J. In these second sentencing proceedings, Hampel J did not think that he had the power to make any part of the sentence that he was imposing 'cumulative on the present minimum term of 28 years': *R v Minogue* (Unreported, Supreme Court of Victoria, Hampel J, 14 December 1988). But he did add, with some prescience, that 'the fact of convictions whilst in custody is likely to

The Victorian Parliament has recently decided that it disagrees with such an assessment. In 2016, it inserted section 74AAA into the *Corrections Act 1986* (Vic).[216] That provision's effect was to prevent the Adult Parole Board from releasing on parole, except in the circumstances envisaged by the *Crump* and *Knight* legislation,[217] any person serving a sentence with a non-parole period for the murder of a person whom s/he knew was, or was probably,[218] a police officer.[219] Though expressed in general terms, the section's primary aim was to 'deal … with Craig Minogue',[220] whose minimum term had recently expired, and who had recently applied for parole.[221] 'The bill does not change the courts' sentencing', Mr McGuire assured members during the Legislative Assembly debate.[222] 'What [it] … *does*',[223] as Mr Pearson put it (accurately):[224]

> is basically say to people who have killed sworn officers of Victoria Police that they are to be imprisoned and there is no chance of rehabilitation because they are incapable of being rehabilitated …

'[S]omeone like Craig Minogue', he continued, does not 'deserve … next year to wander the streets and to be in our midst as a member of our community'.[225]

Unfortunately for the Victorian government, however, the legislation did not in fact apply to Craig Minogue. In *Minogue (Scope Challenge)*, the High Court unanimously found that, properly construed, section 74AAA applied only to those prisoners who had been sentenced on the basis that they knew that the victim was a police officer performing duties or exercising powers of a police officer, or were reckless as to this fact.[226] Justice Vincent, their Honours continued, had *not* sentenced Craig Minogue on this basis.[227] Therefore, nothing in section 74AAA prevented him from immediately being granted parole.[228]

Nevertheless, the inconvenience that this caused the government was not too pronounced. Predictably enough, it responded just over one month later by passing legislation that undoubtedly *does* apply to Craig Minogue.[229] The new Act inserted into the *Corrections Act 1986* (Vic) a provision immediately after section 74AA, which of course applies only to Julian Knight. The new provision, section 74AB, is entitled

---

make the eventual release date more remote': ibid. Having said that, however, it is mainly Minogue's first victim's occupation that has caused his present difficulties.

216 *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic).

217 *Corrections Act 1986* (Vic) s 74AAA(4), repealed by *Corrections Amendment (Parole) Act 2018* (Vic).

218 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 274 [61] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

219 *Corrections Act 1986* (Vic) s 74AAA(1), as amended by *Corrections Amendment (Parole) Act 2018* (Vic).

220 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4850 (Robert Clark).

221 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 259 [4] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

222 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4855 (Frank McGuire).

223 Ibid 4858 (Daniel Pearson) (emphasis added).

224 Ibid (Daniel Pearson).

225 Ibid (Daniel Pearson). This of course is another example of an Australian parliamentarian demonstrating, articulately but unwittingly, exactly why irreducible life sentences are contrary to human rights.

226 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 269–273 [38]–[57] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 280–1 [87]–[90] (Gageler J), 284 [102]–[103] (Gordon J).

227 Ibid 274–5 [63]–[66] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 282 [94] (Gageler J), 284 [101] (Gordon J).

228 David King, 'Russell Street Bomber Craig Minogue Wins Parole Battle', *The Australian* (online, 20 June 2018) <https://www.theaustralian.com.au/nation/nation/russell-st-bomber-craig-minogue-wins-parole-battle/news-story/a516e685aa0de11d129f27ac27e36aba>.

229 *Corrections Amendment (Parole) Act 2018* (Vic).

'Conditions for making a parole order for Craig Minogue'.[230] Section 74AB(3) makes it clear that the Adult Parole Board is only to make a parole order in his favour in the highly restrictive circumstances noted above.[231] Section 74AB(4) provides that the *Victorian Charter* is disapplied for the purposes of the section.[232]

In recent High Court proceedings, Craig Minogue challenged the constitutional validity of section 74AB.[233] But while, in both his written[234] and oral[235] submissions, he denied that his primary argument required the Court to reopen *Crump* and *Knight*, that argument was in substance no different from the one that the Court unanimously rejected in those earlier cases.[236] According to that argument, although it had to be accepted that provisions such as section 74AB do not alter the sentences of those to whom they apply,[237] they do impose an *additional*,[238] legislative[239] punishment for the relevant offence(s). This is because they 'lengthen the minimum term imposed by the sentencing court'[240] and, by converting the relevant sentences into irreducible life sentences,[241] subject the affected prisoners to a 'qualitatively heavier'[242] sentence than that which was judicially fixed.

It follows from the above that, if there is some flaw in arguments of this nature, I am quite unable to see it. Again, the clear effect of provisions such as section 74AB is to substitute for a judicial sentence a harsher legislative one. An irreducible life sentence replaces a life with parole sentence. Nevertheless, the High Court predictably unanimously rejected such reasoning. According to a five Justice plurality, section 74AB 'does not alter or contradict [Minogue's] … non-parole period'[243] or make his punishment more severe.[244] Rather, as explained in *Knight* and *Crump*, it merely alters the conditions that he must satisfy before the executive may grant him parole.[245] Likewise, Gageler J held that *Crump* and *Knight* were indistinguishable from the present case, and that both of these authorities demonstrated 'that the legislative removal of a meaningful prospect of release on parole does not render the life sentence more restrictive of [Minogue's] … liberty or otherwise impose greater punishment for the

230 That is, 'the Craig William Minogue who was sentenced by the Supreme Court on 24 August 1988 to life imprisonment for one count of murder': *Corrections Act 1986* (Vic) s 74AB(6).

231 Another section, *Corrections Act 1986* (Vic) s 74AAA, provides that the same consequences apply to a person convicted of and sentenced for the murder of a police officer, whether before or after the coming into force of s 74AAA(1), if the Adult Parole Board is satisfied that, at the time of the act or omission causing death, the person: (i) intended to kill or inflict really serious injury on a police officer; (ii) knew that the deceased was a police officer; or (iii) knew that his/her conduct would probably kill or inflict really serious injury on a police officer: cf *Minogue (Scope Challenge)* (2018) 264 CLR 252, 269–271 [40]–[46].

232 Similarly, s 74AA(4) disapplies the *Victorian Charter* for the purposes of that section.

233 *Minogue (Constitutional Challenge)* (2019) 93 ALJR 1031.

234 Craig William John Minogue, 'Plaintiff's Submissions', Submission in *Minogue v Victoria (Constitutional Challenge)*, M162/2018, 27 February 2019, 19 [65].

235 Transcript of Proceedings, *Minogue v Victoria* [2019] HCATrans 124, 407–11 (18 June 2019).

236 Something that the Court recognised: *Minogue (Constitutional Challenge)* (2019) 93 ALJR 1031, 1035 [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 1039 [32]–[33] (Gageler J).

237 Minogue, 'Plaintiff's Submissions' (n 234) 1 [4].

238 Ibid.

239 Ibid 13–14 [46]–[50].

240 Ibid 7 [25]. See also 9 [34].

241 Ibid 11 [39].

242 Ibid 12 [41].

243 *Minogue (Constitutional Challenge)* (2019) 93 ALJR 1031, 1037 [20] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

244 Ibid 1037–8 [21].

245 Ibid 1035 [9]. See also 1037–8 [21].

offence of which he was convicted'.[246] And while Edelman J thought it 'arguable' that section 74AB's *practical effect* was to remove, and thus alter, Minogue's non-parole period,[247] he also thought it necessary to differentiate between such a law and one that was 'enacted for the purposes of imposing additional punishment on a particular person, and thus amending their sentence, for the past offence'.[248] If Parliament were to pass legislation increasing a particular prisoner's non-parole period from four to eight years, his Honour continued, it is possible that that law would be invalid.[249] But, for Edelman J, section 74AB was not enacted for the purpose of increasing Minogue's punishment for a past offence.[250] Rather, it was 'forward looking'.[251] That is, its purpose is to protect the public by changing the conditions that Minogue must satisfy if he is to be granted parole.[252]

Jeffrey Goldsworthy has considered the question of when, if ever, judges are justified in knowingly employing 'implausible legal reasoning'[253] to strengthen judicial independence, the rule of law and human rights.[254] He has concluded that the answer to this question is: only in 'exceptional and extreme circumstances'.[255] A similar question, which seems not to have attracted very much attention at all, is when the judges may properly deploy implausible reasoning to *frustrate* a result that would promote human rights. If *Baker* was not an example of this then, as I have argued, *Crump*, *Knight* and *Minogue (Constitutional Challenge)* were. And if some recent comments by the two most senior judges in Australia about judicial method are anything to go by, the judges themselves might believe that such action is permissible whenever a different approach would risk diminishing the courts' reputation as neutral appliers of the law.

In three recent speeches,[256] Bell J has acknowledged that the High Court – and, indeed, the senior judiciary more generally[257] – has an 'undoubted law-making role'.[258] But her Honour was also keen to emphasise that the judges enjoy no unlimited power to develop or change the law.[259] A clue to where the limits lie can be found in the following statement. 'The judge', Bell J said, '[should] not seek to be seen very much

246 Ibid 1039 [32].
247 Ibid 1040 [40].
248 Ibid 1040–1 [41].
249 Ibid 1040–1 [41]. But the question that arises here is: why would Parliament ever do *that*? Surely, it would instead simply provide that the relevant prisoner was not to be released until he or she satisfied the conditions that Minogue, Crump and Knight must satisfy if they are to be granted parole. For the latter legislation would achieve the same result as – or, if the prisoner's head sentence was longer than eight years, an even more punitive result than – the former, without there being any risk of its being held to be constitutionally invalid.
250 Ibid 1041 [43].
251 Ibid 1042–3 [48].
252 Ibid 1041–2 [45]. Given (i) the punitive remarks about Dr Minogue in the relevant Victorian parliamentary debates: see ibid 1041 [42] (Edelman J); (ii) that he will serve the rest of his sentence *in prison*, and (iii) that he probably no longer poses a danger to anyone, this reasoning is impossible to accept.
253 Goldsworthy (n 155) 76.
254 Ibid 76, 113.
255 Ibid 114.
256 Justice Virginia Bell, 'Keeping the Criminal Law in "Serviceable Condition": A Task for the Courts or the Parliament?' (2016) 27(3) *Current Issues in Criminal Justice* 335 ('Keeping the Criminal Law in "Serviceable Condition"'); Justice Virginia Bell, 'Judicial Activists or Champions of Self-Restraint: What Counts for Leadership in the Judiciary?' (General Sir John Monash Leadership Oration, 4 August 2016) ('Judicial Activists'); Justice Virginia Bell, 'Examining the Judge' (Speech, Launch of Issue 40(2) University New South Wales Law Journal, 29 May 2017).
257 Bell, 'Keeping the Criminal Law in "Serviceable Condition"' (n 256) 336.
258 Bell, 'Judicial Activists' (n 256) 4.
259 Bell, 'Examining the Judge' (n 256) 7.

at all'.[260] For, consistently with what Gleeson CJ said in *Baker* and *Fardon*, when a community is 'uninterested in the judges', this is 'because of an unstated acceptance that [their] decisions are made on legal merit and not on [their] political or ideological sympathies'.[261] According to Bell J – and this is the crux of the matter – the courts will enjoy such confidence so long as the changes that they wreak reflect, and do not move ahead of, 'contemporary societal values'.[262] Even dubious reasoning is tolerable, her Honour proceeds to suggest,[263] so long as public opinion will be supportive of – or, presumably, indifferent to[264] – the result that the court has reached.[265]

In two even more recent speeches,[266] Kiefel CJ has associated herself with a very similar judicial philosophy. If the law is to be 'altered or adapted in some way', her Honour has argued, 'there should be seen to be an identifiable change in social values or thinking'.[267] It is not enough that the individual judge thinks that the change is desirable.[268] And while her Honour argued that this is because a judge who acts contrary to such limitations crosses 'the Rubicon that divides the judicial and the legislative powers',[269] perhaps the real problem is that s/he is apt to create a *perception* that s/he is legislating. As Lord Devlin has remarked, perceptions are what matters in this context:[270] once the judge is *seen* to be legislating, there is bound to be trouble; the judge who unobtrusively does so is in no real danger of reducing the courts' legitimacy.[271] In turn, as McHugh J has observed, the community tends only to entertain the relevant perception when it disagrees with the result that the judge has reached.[272]

The legal development that Kevin Crump, Julian Knight and Craig Minogue were asking the High Court to make was arguably not a very radical one. If the impugned legislation had the effect of altering their sentences, then surely there was a good argument that this damaged the appearance and reality of the Supreme Courts' independence and impartiality, contrary to *Kable*.[273] Indeed, in *Attorney-General v Lawrence*,[274] the Queensland Court of Appeal struck down analogous legislation

260 Bell, 'Judicial Activists' (n 256) 17.
261 Bell, 'Examining the Judge' (n 256) 6.
262 Bell, 'Judicial Activists' (n 256) 4.
263 Bell, 'Keeping the Criminal Law in "Serviceable Condition"' (n 256) 339–40.
264 See Lord Devlin, 'Judges and Lawmakers' (1976) 39(1) *Modern Law Review* 1, 9–10.
265 Bell, 'Keeping the Criminal Law in "Serviceable Condition"' (n 256) 340.
266 Chief Justice Susan Kiefel, 'Social Values and the Criminal Law's Adaptability to Change' (Speech, International Criminal Law Congress, 6 October 2018); Chief Justice Susan Kiefel, 'The Adaptability of the Common Law to Change' (Speech, Australasian Institute of Judicial Administration Banco Court, 24 May 2018).
267 Kiefel, 'Social Values and the Criminal Law's Adaptability to Change' (n 266) 8.
268 Ibid 5.
269 Ibid 5, quoting *Dietrich* (1992) 177 CLR 292, 320 (Brennan J).
270 Devlin (n 264) 3.
271 For instance, the High Court was undoubtedly legislating in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531; but, as I have argued elsewhere, because the press and public were far from hostile to the result in that case, no perception of judicial self-aggrandisement arose – except among some academics: Dyer, '(Grossly) Disproportionate Sentences' (n 67) 212–3. See also Ronald Sackville, 'Bills of Rights: Chapter III of the *Constitution* and State Charters' (2011) 18 *Australian Journal of Administrative Law* 67, 77.
272 Justice MH McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 42–3.
273 See, eg, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, especially 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Bradley*'); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89 [125] (Hayne, Crennan, Kiefel and Bell JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593–4 [39] (French CJ, Kiefel and Bell JJ).
274 (2014) 2 Qd R 504 ('*Lawrence*').

essentially on this basis. The impugned law[275] granted the executive government an unreviewable power to reverse the Supreme Court's decisions to release on supervision sex offenders who had hitherto been in preventive detention pursuant to the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld).[276] Attaching particular importance to the fact that the executive's declaration was 'equivalent to a reversal of the Court's order',[277] their Honours appeared to accept the respondents' argument that the Act undermined the Supreme Court's 'decisional independence'.[278] It is far from obvious that the legislation considered in *Crump*, *Knight* and *Minogue (Constitutional Challenge)* is relevantly distinguishable from this Queensland law. On the contrary, by effectively reversing the sentencing orders of, respectively, McInerney, Hampel and Vincent JJ, and by substituting far harsher sentences for the ones that their Honours had seen fit to impose, Parliament has undermined judicial independence as brazenly as had the Queensland legislature. When it deployed highly formalistic reasoning to avoid acknowledging as much, was the High Court motivated by a desire not to be 'seen'?[279] As in *Baker* and *Fardon*, it seems that the judges' eagerness not to develop the law in the teeth of 'contemporary values'[280] might have had something to do with the results that it reached. The press and public might not have responded with equanimity to a decision that had the effect of protecting the human rights of sadistic murderers, police killers and massacrers.

We can now return to a question posed above.[281] If, in these cases, the Court knowingly deployed implausible reasoning to avoid reaching a human rights-protective outcome, was it justified in doing so? Greg Taylor has concluded that the 'barely even plausible'[282] reasoning in *Kable* damaged the rule of law and was therefore unjustified.[283] The majority Justices, he thinks, were led to their conclusion by their 'distaste'[284] for the *Community Protection Act 1994* (NSW) and the effect that it had on Kable's human rights.[285] Highly questionable reasoning, he suggests, cannot strengthen the rule of law;[286] and intolerably vague principles, such as those that have emerged from subsequent *Kable* cases, positively undermine it.[287] But, if *Kable* is unjustifiable because of its effect on the rule of law, might not *Crump*, *Knight* and *Minogue (Constitutional Challenge)* be just as indefensible? As Street CJ observed in *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations*:[288]

---

275 *Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013* (Qld).
276 *Lawrence* (2014) 2 Qd R 504, 528 [35] (The Court).
277 Ibid 530 [41] (The Court).
278 Ibid 523 [24] (The Court).
279 Bell, 'Judicial Activists' (n 256) 17.
280 Bell, 'Keeping the Criminal Law in "Serviceable Condition"' (n 256) 340.
281 See above nn 253–5 and accompanying text.
282 Greg Taylor, 'Conceived in Sin, Shaped in Iniquity: The *Kable* Principle as Breach of the Rule of Law' (2015) 34(2) *University of Queensland Law Journal* 265, 265 ('Conceived in Sin, Shaped in Iniquity'), quoting George Winterton, 'Justice Kirby's Coda in *Durham Holdings*' (2002) 13 *Public Law Review* 165, 168.
283 Ibid.
284 Ibid 266.
285 Ibid 265. See also Taylor, *The Constitution of Victoria* (n 168) 456.
286 Taylor, 'Conceived in Sin, Shaped in Iniquity' (n 282) 265. Taylor also argues that such reasoning undermines the separation of powers and parliamentary sovereignty; instead of interpreting and applying the law, the judges are passing on its desirability: at 266.
287 Ibid 268.
288 (1986) 7 NSWLR 372, 375–6 ('*BLF*').

> Fundamental to the rule of law and the administration of justice in our society is the convention that the judiciary is the arm of government charged with the responsibility of interpreting and applying the law as between litigants in individual cases. … For Parliament, uncontrolled as it is by any of the safeguards that are enshrined in the concept of due process of law, to trespass into this field of judging between parties by interfering with the judicial process is an affront to a society that prides itself on the quality of its justice.

No doubt, the High Court must be mindful of the need not to create the perception that it is an 'activist' court that is prone to legislating. No doubt, Bell J is right to argue that the politicisation of the judiciary, as has occurred in the United States, is something to be avoided.[289] But concerns about charges of 'judicial branch aggrandizement' cannot justify the judiciary in sheltering behind formalism[290] and highly suspect reasoning where Parliament has taken it upon itself fundamentally to attack 'the quality of [our] … justice',[291] by itself sentencing individuals who have earned its disfavour. By favouring form over substance in *Crump*, *Knight* and *Minogue (Constitutional Challenge)*, the High Court has seemingly made every judicially imposed non-parole period in Australia subject to whimsical legislative reversal.[292] In short, though the Court was certainly placed in a difficult position in those cases, it should have used some of the 'reputational capital'[293] it has acquired over the past 20 years, and those clear rules that do emerge from the *Kable* authorities,[294] to strike down laws that, in truth, 'distort the fundamental precepts of our democracy'.[295]

C The Position *is* Different in Europe and the UK

As foreshadowed, Groves has suggested that the position would be no different in Europe or the UK. The *Crump*, *Knight* and *Minogue (Constitutional Challenge)* laws, he suggests, would not breach article 3 of the *ECHR*.[296] With respect, this is wrong. While Groves bases himself largely on the ECtHR Grand Chamber's decision in *Hutchinson v United Kingdom* ('*Hutchinson*'),[297] the actual decision in that case[298] is at

289 Bell, 'Examining the Judge' (n 256) 5–6.

290 See Peter A Gerangelos, 'The Separation of Powers and Legislative Interference in Pending Cases' (2008) 30(1) *Sydney Law Review* 61, 89.

291 *BLF* (1986) 7 NSWLR 372, 376 (Street CJ).

292 See Jeremy Gans, 'One-Person Parole Law Enacted in Victoria', *Opinions on High* (Blog Post, 27 March 2014) <https://blogs.unimelb.edu.au/opinionsonhigh/2014/03/27/news-one-person-parole-law-enacted-in-victoria/>. As that commentator foreshadowed, the success of the Victorian government's argument in *Knight* means that there might be a 'future Bayley bill, Farquharson bill, Freeman bill, Hudson bill …' Of course, as noted above, in *Minogue (Constitutional Challenge)* (2019) 93 ALJR 1031, Edelman J did query whether Parliament could validly pass a law that increased an individual offender's non-parole period from, say, four to eight years: at 1040–1 [41]. But, as also noted above, Parliament could avoid any such difficulty simply by instead passing legislation that required the Parole Board not to release the relevant offender until he or she satisfied the conditions that Crump, Knight and Minogue must satisfy: see above n 249. Such legislation would have the practical effect of preventing the prisoner's release until his or her maximum sentence had expired, and would clearly be constitutionally valid.

293 Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press, 2015) 2.

294 Relevantly, the rule that no state law may undermine the appearance or reality of a state court's independence or impartiality: *Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

295 *BLF* (1986) 7 NSWLR 372, 379 (Street CJ).

296 Groves (n 11) 370–1.

297 (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017).

298 As opposed to the principles that the Grand Chamber stated: ibid 17–18 [42]–[45].

odds with the 'general trend' of the Court's irreducible life sentences case law.[299] And, in any case, even though the European Court has, for political reasons, extended greater tolerance in this area to the UK than to other contracting parties, Crump, Knight and Minogue's sentences would still be contrary to article 3 if they had been imposed in the UK. They would also probably be contrary to article 6(1) and, in the case of Crump, to articles 5(1) and 7 as well.

In *Hutchinson*, Groves observes that[300]

> [t]he Grand Chamber affirmed several key points. One was that a whole of life sentence imposed on those convicted of 'especially serious crimes' is not contrary to the *European Convention of Human Rights*. But somewhat counterintuitively, all life sentences must accommodate the prospect of review and possible release. … While the tenor of the Grand Chamber's judgment suggested that rehabilitation might eventually outweigh other issues if the time served was long enough, the Chamber did not expressly preclude the possibility that punishment and public protection might sometime [sic] prevail over other issues until an offender died in prison. This last possibility may be why one English commentator suggested that this decision represents a clear retreat by the Chamber on the earlier one of *Vinter*.
>
> The somewhat ambivalent position reached by the Grand Chamber in *Hutchinson* showed both a tolerance to UK practices, which included an emphatic use of whole life sentences, while also providing that regime with a veneer of compliance with European human rights law.

There are some matters here that perhaps require clarification. Groves cites paragraph 42 of *Hutchinson* for the proposition that a '*whole* of life sentence' is not always contrary to the *ECHR*.[301] In fact, at that point in its judgment, the Court stated, as it had in *Vinter*,[302] that the *ECHR* 'does not prohibit the imposition of *a life sentence* on those convicted of especially serious crimes',[303] so long as that sentence is 'reducible *de jure* and *de facto*'.[304] It is true that, elsewhere in its judgment, the Grand Chamber in *Hutchinson* did hold that English whole life orders comply with the *ECHR*.[305] But, as Groves possibly could have made clearer, the Court in *Hutchinson* accepted that a whole life order is *not* an irreducible life sentence.[306] Importantly for present purposes, if release from a whole life order were possible only if the prisoner were 'terminally ill or physically incapacitated and other additional criteria [could] be met',[307] that order *would* amount to such a sentence.[308] In other words, the legislation that the High Court held to be valid in *Crump*, *Knight* and *Minogue (Constitutional Challenge)* would certainly not pass constitutional muster in the UK. But because the Secretary of State was not limited to considering such criteria – because, that is, when reviewing the continuing need for

299 Graham, 'From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases at the European Court of Human Rights' (n 57) 267.

300 Groves (n 11) 370 (citations omitted).

301 Groves (n 11) 370 (emphasis added).

302 *Vinter* [2013] III Eur Court HR 317, 345 [106].

303 *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 17 [42] (emphasis added).

304 Ibid.

305 Ibid 25 [72].

306 Ibid.

307 *Vinter* [2013] III Eur Court HR 317, 352 [126].

308 *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 18 [43]. See also, eg, *Murray* (2017) 64 EHRR 3, 169 [100]; *Matiošaitis* (European Court of Human Rights, Second Section, Application Nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, 23 May 2017) 43 [162].

detention, s/he was required to act compatibly with article 3,[309] providing reasons for her/his decision,[310] which was amenable to judicial review[311] – there was no breach of the *ECHR*.

There is nevertheless some truth in what Groves argues in the above passage. He is, with respect, wrong to think that the English commentator to whom he referred, Jonathan Bild, was saying that *Hutchinson* constituted a retreat from *Vinter*[312] because the Court 'did not expressly preclude the possibility that punishment and public protection might sometimes prevail over other issues until a prisoner dies in prison'.[313] As noted above,[314] in *Vinter* the Court accepted that a state could, compatibly with article 3, fail ever to release a life prisoner who remained dangerous.[315] And while it placed enormous emphasis on the rehabilitative aim of punishment,[316] it never *expressly* stated that punitive considerations would always be displaced by other 'penological grounds' when a whole life sentence was reviewed.[317] But, as Groves indicates, the Court in *Hutchinson* did extend greater latitude to the UK than it has to other contracting parties. We will return to this point below.

For now, it is necessary to note two things. First, Groves is, with respect, wrong to doubt that there is a 'trend' in European law against life sentences.[318] For, however leniently the ECtHR might have treated the UK government in *Hutchinson*, it has made it clear in a series of recent judgments that it will hold other contracting parties to reasonably exacting standards. Emerging from the Court's case law is the principle that a life sentence will be compatible with article 3 only if, at time of the sentence's imposition, there is both a prospect of release and the possibility of review.[319] The review assesses whether the prisoner's progress to rehabilitation is 'so significant that continued detention can no longer be justified on legitimate penological grounds'.[320] Domestic law must state with clarity the criteria to be applied at the review, so that life prisoners know from the beginning of their sentences what they must do to be considered for release.[321] This 'objective, pre-established criteria'[322] must comply with the ECtHR's case law.[323] Prisoners must also be told at the outset when they may seek

309 *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 20 [51].
310 Ibid.
311 Ibid [52].
312 Jonathan Bild, 'Whole of Life Order: Article 3 Compliant After All?' (2017) 75 *Cambridge Law Journal* 230, 233.
313 Groves (n 11) 370.
314 See above n 124 and accompanying text.
315 *Vinter* [2013] III Eur Court HR 317, 345 [108].
316 Ibid 347–9 [114]–[119].
317 Ibid 346 [111]. As Graham has explained, it was not at the level of principle that *Hutchinson* retreated from *Vinter*; rather, it was when *applying* the relevant principles that the Court departed from that earlier authority: Graham, 'From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases at the European Court of Human Rights' (n 57) 264, 266–7.
318 Groves (n 11) 370.
319 *Murray* (2017) 64 EHRR 3, 169 [100].
320 *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 18 [43]. See also *Murray* (2017) 64 EHRR 3, 170 [101].
321 *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 18 [44].
322 *Murray* (2017) 64 EHRR 3, 169 [100]; *Trabelsi* [2014] V Eur Court HR 301, [137]. Cf *Lendore v Attorney-General of Trinidad and Tobago* [2017] 1 WLR 3369, 3395 [69]–[70] (Lord Hughes).
323 *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 18 [44]; *Murray* (2017) 64 EHRR 3, 169 [100].

their first review,[324] which may be either executive or judicial in nature,[325] but which should take place no longer than 25 years after the imposition of the sentence.[326] It might be necessary for the state to provide reasons for its decision at that review,[327] and at subsequent ones,[328] and any such decision should be subject to judicial review.[329] When determining whether a particular life sentence is irreducible, the Court will take into account statistical information concerning how many prisoners have actually been released from it.[330] And, finally, a life sentence will be de facto irreducible if the State has failed to do what is reasonable to provide the individual prisoner with access to such rehabilitative treatment as is necessary to make his/her review one that is genuinely capable of leading to release.[331]

Accordingly, in *Petukhov v Ukraine [No 2]* ('*Petukhov*'),[332] a ECtHR Chamber found that Ukrainian life sentences breached article 3, principally because: prisoners were not told from the outset what they had to do to be considered for release;[333] the executive gave no reasons for its decisions concerning clemency;[334] such decisions were not subject to judicial review;[335] and prisoners were provided with no rehabilitative opportunities.[336] And reinforcing the Court's conclusion that the relevant sentences were irreducible ones was the fact that the executive had apparently only ever granted one clemency request.[337] For similar reasons, another Chamber in *Matiošaitis v Lithuania* ('*Matiošaitis*')[338] found Lithuanian life sentences to breach the *ECHR*. In the absence of any reasons for clemency decisions,[339] and of judicial review of those decisions,[340] there was nothing to suggest that the President actually applied the published criteria.[341] Moreover, as in Ukraine, there was evidence of only one pardon ever having been granted;[342] and the applicants' prison conditions 'seriously weakened' their chances of establishing that their progress to rehabilitation was such as to warrant a sentence reduction.[343] The Court has made similar findings against Turkey[344] – where release from

---

324 *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 18 [44].

325 Ibid [45]; *Murray* (2017) 64 EHRR 3, 169 [99]; *Vinter* [2013] III Eur Court HR 317, 349–50 [120].

326 Ibid. In *TP* (European Court of Human Rights, Fourth Section Chamber, Application Nos 37871/14 and 73986/14, 4 October 2016) 12 [45], 13 [48], the Court held a life sentence to be de facto irreducible on the basis that those upon whom it had been imposed had to wait 40 years before the first review.

327 *Murray* (2017) 64 EHRR 3, 169 [100].

328 See *Vinter* [2013] III Eur Court HR 317, 349–50 [120].

329 *Murray* (2017) 64 EHRR 3, 169 [100].

330 Ibid.

331 Ibid 171 [104], 172–73 [108]–[112].

332 (European Court of Human Rights, Fourth Section Chamber, Application No 41216/13, 12 March 2019).

333 Ibid [174]. They were merely told that clemency might be granted in 'exceptional cases and subject to extraordinary circumstances': at [173].

334 Ibid [177]–[178].

335 Ibid [179].

336 Ibid [181]–[184].

337 Ibid [185]–[186].

338 (European Court of Human Rights, Second Section, Application Nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, 23 May 2017).

339 Ibid [170].

340 Ibid.

341 Ibid [171]. Those criteria are set out at [168].

342 Ibid [172].

343 Ibid [179].

344 *Öcalan* (European Court of Human Rights, Second Section, Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014) 38 [207]; *Kaytan* (European Court of Human Rights, Second Section, Application No 27422/05, 15 September 2015) 13 [67].

life imprisonment was found to be possible only on humanitarian grounds[345] – and Hungary[346] – where the executive's release power was considered to be totally lacking in transparency.[347] And it has stigmatised as an irreducible life sentence the US imposition considered in *Trabelsi v Belgium*,[348] essentially because the release decision was 'completely at the discretion of the executive',[349] and because prisoners were not given 'precise cognisance' of the criteria that they had to satisfy if they were to be released.[350]

The second thing to note is that the House of Lords' decision in *R (Anderson) v Secretary of State for the Home Department* ('*Anderson*')[351] makes it fairly clear that the Crump, Knight and Minogue legislation would also breach article 6; and the ECtHR's decision in *M v Germany*[352] shows that the Crump law would probably breach articles 5(1) and 7 too. Article 6(1) provides, relevantly, that '[i]n the determination of [a] … criminal charge … everyone is entitled to a fair [trial] … by an independent and impartial tribunal'. In *Anderson*, their Lordships accepted that, because the imposition of a sentence is part of the trial, and because the fixing of a tariff (or non-parole period) is legally indistinguishable from imposing a sentence, the Home Secretary could no longer set tariffs compatibly with article 6(1).[353] In so holding, Lord Bingham noted the 'fundamental' importance of 'the complete functional separation of the judiciary from the executive … since the rule of law depends upon it'.[354] In the light of this result, and such reasoning,[355] it seems inconceivable that the UK courts and the ECtHR would hold the Crump, Knight or Minogue laws to be compatible with article 6(1). For, while the High Court has of course found that such laws do not alter the sentence imposed on the prisoners to whom they apply,[356] no court that insisted on a 'complete' separation of judicial power – or that took seriously the proposition that such matters 'must be judged as one of substance, not of form or description'[357] – could possibly adopt such an approach. Again, the NSW and Victorian parliaments have in truth substituted

345 *Öcalan* (European Court of Human Rights, Second Section, Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014) 37 [203]; *Kaytan* (European Court of Human Rights, Second Section, Application No 27422/05, 15 September 2015) 13 [65].

346 *Laszlo Magyar* (European Court of Human Rights, Second Section, Application No 73593/10, 20 May 2014) 11–12 [58]; *TP* (European Court of Human Rights, Fourth Section Chamber, Application Nos 37871/14 and 73986/14, 4 October 2016) 14 [50].

347 *Laszlo Magyar* (European Court of Human Rights, Second Section, Application No 73593/10, 20 May 2014) 11–12 [57]–[58]; *TP* (European Court of Human Rights, Fourth Section Chamber, Application Nos 37871/14 and 73986/14, Fourth Section, 4 October 2016) 13–14 [49].

348 [2014] V Eur Court HR 301.

349 Ibid 965 [133].

350 Ibid 966 [137].

351 [2003] 1 AC 837.

352 [2009] VI Eur Court HR 169. See also *Haidn v Germany* (European Court of Human Rights, Fifth Section Chamber, Application No 6587/04, 13 January 2011).

353 *Anderson* [2003] 1 AC 837, 880–2 [20]–[28] (Lord Bingham, Lord Nicholls agreeing at 883 [32], Lord Steyn agreeing at 895 [61], Lord Hutton agreeing at 901 [84], Lord Hobhouse agreeing at 901 [85], Lord Scott agreeing at 902 [86] and Lord Rodger agreeing at 902 [87]).

354 Ibid 882 [27].

355 See also *Stafford v United Kingdom* [2002] IV Eur Court HR 115, 141 [78].

356 *Minogue (Constitutional Challenge)* (2019) 93 ALJR 1031, 1035 [9] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 1039 [32] (Gageler J), 1043 [49] (Edelman J); *Knight* (2017) 261 CLR 306, 323 [25], 323–4 [29] (The Court); *Crump* (2012) 247 CLR 1, 18–19 [34] (French CJ), 27 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 28–29 [70]–[72], 29 [74] (Heydon J).

357 *Anderson* [2003] 1 AC 837, 876 [13] (Lord Bingham).

minimum terms of life imprisonment for the lengthy non-parole periods imposed by the judges who sentenced these offenders.

Further, the Crump law would breach article 5(1), because the detention for which it provides is not detention 'after' conviction by a court;[358] and nor is it covered by any of the other 'permissible grounds on which persons may be deprived of their liberty'.[359] In *M v Germany*, the sentencing court, upon convicting the applicant of various violent offences in 1986, had ordered that he serve five years' imprisonment and then be placed in preventive detention.[360] At the time, the maximum period of such detention was 10 years, but by the time that period had expired in 2001, the German government had enacted laws – which operated retrospectively – that enabled offenders sentenced to preventive detention for the first time to be detained indefinitely.[361] When the authorities continued M's detention, he complained successfully to the ECtHR that there had been a breach of article 5(1). While the initial 10 years of preventive detention did result from his conviction, and so was covered by article 5(1)(a),[362] the Court held that this was not true of the preventive detention beyond that time.[363] The sentencing court did not order, and could not have ordered, such detention; rather, it was made possible only because of the 'subsequent change in the law'.[364] And nor was the detention covered by: article 5(1)(c), which authorises detention reasonably considered necessary to prevent the commission of a *concrete and specific* offence;[365] article 5(1)(e),[366] which provides for the detention of those of 'unsound mind'; or, clearly, any of the other sub-paragraphs of article 5(1).[367]

Such reasoning has obvious relevance to the Crump law. It was not possible for Taylor J to impose an irreducible life sentence on Kevin Crump and Allan Baker. Rather, the NSW parliament imposed such a sentence on them – and the others whom it targeted – by virtue of a subsequent legislative enactment. Their cases are therefore indistinguishable from that of M. Further, as in *M v Germany*,[368] the European Court would be likely to hold in cases like these that, additionally, a heavier sentence had been imposed on the offenders than was possible at the time that they committed their offences, contrary to article 7(1).

IV THE EFFECTIVENESS OF HUMAN RIGHTS CHARTERS

It follows that, contrary to what Groves' article might suggest, there are good reasons to believe that charters of rights can improve protections for offenders against the types of draconian, penal populist laws that the High Court upheld in *Crump* and *Knight*. The reason for this is easy to find. It is not that courts without the power to

358 *ECHR* art 5(1)(a).

359 *Al-Jedda v United Kingdom* [2011] IV Eur Court HR 305, 372 [99]. See also *A v United Kingdom* [2009] II Eur Court HR 137, 215 [162]; *Saadi v United Kingdom* [2008] I Eur Court HR 31, 52 [43]. As is made clear in those authorities, arts 5(1)(a)–(f) states an exhaustive list of grounds on which a person may be deprived of his/her liberty compatibly with the *ECHR*.

360 *M v Germany* [2009] VI Eur Court HR 169, 177–8 [12].

361 Ibid 179 [19].

362 Ibid 203 [96].

363 Ibid 204–5 [100].

364 Ibid 205 [100].

365 Ibid 205–6 [102].

366 Ibid 206 [103].

367 Ibid 205 [102].

368 Ibid 217 [137].

apply such a charter always lack the *legal* resources to uphold such offenders' claims. As argued above, there is a very good argument that, in the case of the Crump, Knight and Minogue laws, state parliaments have exercised judicial power in a manner incompatible with Chapter III of the *Australian Constitution*. Rather, there is a political impediment. As Kiefel CJ and Bell J have explained, such courts will usually be willing to develop or change the law only if they can be as sure as possible that the development or alteration is consistent with 'the relatively permanent values of the Australian community'.[369]

As a number of senior English judges have observed, the same impediment does not exist in cases where the court has been given the responsibility of applying a charter of rights. So for Lord Dyson, while, consistently with Kiefel CJ and Bell J's observations, common law judges are limited to[370]

> developing the common law responsibly, making changes incrementally only where these are considered to be necessary to respond to changing social conditions, values and ideas … [t]he position with regard to the *Convention on Human Rights* is different. The effect of the *Human Rights Act* is that Parliament has given judges a power that they did not previously possess. It requires them to make value judgments which are different from those which, as custodians of the common law, they have been accustomed to making.

Similarly, Lord Neuberger has accepted that the boundary between legitimate and illegitimate judicial lawmaking is different in jurisdictions with a human rights charter from the one that exists in jurisdictions without such an instrument;[371] and Lords Bingham[372] and Mance[373] have told us why that is. The 'very reason' for such instruments, they have noted, is to allow the judges to 'protect the rights of unpopular minorities and others who cannot protect their rights adequately through the democratic process'.[374] And judges can only carry out this function if, in some cases, they declare to be incompatible with human rights, parliamentary legislation that, however popular it is, tyrannises such a minority. To act differently, as a minority of English judges seem to think the UK courts should,[375] would be apt to render their charter nugatory and inefficacious.

Lord Bingham's speech in *Anderson* provides a good example of the UK courts' willingness to reason in a more expansive way than their Australian counterparts. By contrast with the High Court's approach in *Crump*[376] and *Knight*,[377] his Lordship's resolution to look to substance not form[378] when assessing whether there had been a breach of article 6(1), had real content. So too did his Lordship's insistence that article 6(1) must be interpreted in such a manner as to require 'complete functional'[379] judicial independence.[380] And of course it is possible to view in a similar way the ECtHR's

369 Bell, 'Judicial Activists' (n 256) 15.
370 Lord Dyson, 'Are the Judges Too Powerful?' (Speech, Bentham Association, London, 12 March 2014) 11.
371 *R (Nicklinson) v Ministry of Justice* [2015] AC 657, 788–9 [100]–[101].
372 *Reyes* [2002] 2 AC 235, 246–7 [26].
373 Lord Mance (n 46).
374 *Reyes* [2002] 2 AC 235, 246–7 [26] (Lord Bingham), quoting *S v Makwanyane* [1995] 3 SA 391, 431 [88] (Chaskalson P). See also Lord Mance (n 46).
375 See, eg, Lord Sumption, 'The Limits of Law' (Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013).
376 (2012) 247 CLR 1, 26 [60] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
377 (2017) 261 CLR 306, 317 [6] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
378 *Anderson* [2003] 1 AC 837, 876 [13] (Lord Bingham).
379 Ibid 882 [27] (Lord Bingham).
380 Such an approach is consistent with his Lordship's statement in *Reyes* [2002] 2 AC 235, 246 [26] that

> [a] generous or purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to

constant recent emphasis[381] on the importance of 'the rehabilitative aim of imprisonment'[382] and on ensuring that contracting parties do what is possible to ensure that even the worst offenders[383] are '[reintegrated] into society'.[384] Such reasoning has surely only been possible because that Court has explicitly been empowered to protect the rights of those, like prisoners, whom majoritarian institutions are liable to oppress. There is nothing in the, general, language of article 3 that *mandates* it.

There is, however, one further point that requires explication. Victoria is one of three Australian states and territories with a human rights charter,[385] and yet that *Charter* had no effect whatsoever on the Knight or Minogue legislation. As noted above, sections 74AA(4) and 74AB(4) of the *Corrections Act 1986* (Vic) disapply the *Victorian Charter* for the purposes of those sections. And while there was no such disapplication of the provision[386] considered by the High Court in *Minogue (Scope Challenge)*,[387] it is noteworthy that, in those proceedings, Craig Minogue declined to seek a declaration of inconsistent interpretation.[388] This was not because he conceded that his sentence was compatible with the rights protected by the *Victorian Charter*. On the contrary, he contended that its *incompatibility* with them was a further reason why the Court should construe section 74AAA in such a way as to make it inapplicable to him.[389] Rather, he took the approach that he did undoubtedly because a declaration of inconsistent interpretation would have done him absolutely no good. When apprised of the High Court's view that the section was inconsistent with section 10(b) of the *Charter*, it is most unlikely that the Victorian government would have felt persuaded to deal more humanely with Dr Minogue.[390] Certainly, the UNHRC's finding that the Crump legislation breached article 7 of the *ICCPR* has not caused the NSW Parliament to reconsider the merits of that legislation.[391]

---

consider the *substance* of the fundamental right at issue and ensure contemporary protection of that right in the light of the evolving standards of decency that mark the progress of a maturing society: see *Trop v Dulles* 356 US 86, 101 (emphasis added).

381 See, eg, *Vinter* [2013] III Eur Court HR 317, 347–9 [114]–[119]; *Khoroshenko* [2015] IV Eur Court HR 329, 373–4 [121]–[122]; *Murray* (2017) 64 EHRR 3, 170–1 [101]–[104].

382 *Murray* (2017) 64 EHRR 3, 170 [101].

383 Ibid 170 [103].

384 Ibid 170 [102].

385 As noted above, the other two Australian jurisdictions with such a charter are the Australian Capital Territory and Queensland, though the Queensland Act has only very recently come into force: see above n 52.

386 *Corrections Act 1986* (Vic) s 74AAA(4), repealed by *Corrections Amendment (Parole) Act 2018* (Vic).

387 As noted in *Minogue (Scope Challenge)* (2018) 264 CLR 252, 272 [51] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

388 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.

389 *Minogue (Scope Challenge)* (2018) 264 CLR 252, 272–3 [50]–[55] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ). The *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) states that: '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'. Dr Minogue's argument was essentially that, given that the construction of s 74AAA for which he was arguing was 'possible', the Court should adopt that construction, because it would render that provision more compatible with human rights than would the State's preferred construction: it would apply to fewer prisoners. The Court noted the novelty, and 'apparent logic', of this submission; but it relied on different reasoning to justify its conclusion that s 74AAA did not apply to Dr Minogue: *Minogue (Scope Challenge)* (2018) 264 CLR 252, 273 [55] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

390 Monique Moffa, Greg Stratton and Michele Ruyters note that recent Victorian parliamentary debates have 'displayed a disdain for the protection of prisoners' rights, expressing any allegiance to such policies as siding with criminals': Monique Moffa, Greg Stratton and Michele Ruyters, 'Parole Populism: The Politicisation of Parole in Victoria' (2019) 31(1) *Current Issues in Criminal Justice* 75, 83.

391 Tom Allard, 'Janine Balding Killers: NSW Government Rejects UN Finding', *Sydney Morning Herald* (online, 25 November 2014) <https://www.smh.com.au/national/nsw/janine-balding-killers-nsw-government-rejects-un-

This brings to mind a submission in *McLoughlin*.[392] In that case, the applicants sought to capitalise on the *Vinter* insistence[393] that British whole life orders breached article 3 of the *ECHR*. They contended that the EWCA should use its power under section 4(2) of the *HRA* to declare the provisions authorising such orders to be incompatible with that article. Although commentators have criticised the Court for its refusal to issue such a declaration,[394] such criticisms ignore the political context in which this decision was made. As the Court noted, if it had granted the section 4 remedy, this 'would not [have] … affect[ed] the continuing operation of the statutory scheme'.[395] That scheme would have remained in force until Parliament decided to amend it.[396] Given the press and public's strongly adverse response to *Vinter*,[397] and the Conservative government's implacable hostility to it,[398] it was inconceivable that Westminster would amend the relevant scheme in the face of a declaration of incompatibility.[399] In those circumstances, it was far more astute for the Court to hold, as it did, that contrary to *Vinter*,[400] there was in fact no lack of clarity concerning the circumstances in which whole life prisoners would be released.[401] When reviewing a prisoner's case, the Secretary of State could not 'fetter his discretion'[402] by taking into account only those matters referred to in his 'highly restrictive'[403] policy[404] – which of course only contemplated release on grounds similar to those provided for in the Crump, Knight and Minogue legislation.[405] He was instead bound to exercise his power compatibly with both article 3 and the 'principles of domestic administrative law'.[406]

As should be clear from the above,[407] in *Hutchinson*, the Grand Chamber fell into line with this approach. In doing so, it certainly took a more generous approach to the UK than the one it has taken to other contracting parties. Similarly to the position in Lithuania[408] and Ukraine,[409] no prisoner subject to a British whole life order has been

finding-20141125-11tmn4.html>. See also Australian Government, 'Response of Australia to the Views of the Human Rights Committee in Communication No 1968/2010 (*Blessington and Elliot v Australia*)' Response to the Human Rights Committee in *Blessington and Elliot v Australia* <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/BlessingtonAndElliotVAustralia-AustralianGovernmentResponse.pdf>.

392 [2014] 1 WLR 3964.

393 *Vinter* [2013] III Eur Court HR 317, 353 [130]. In *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017), the Grand Chamber of course retreated from this finding.

394 See, eg, Steve Harold Foster, 'Whole Life Sentences and Article 3 of the *European Convention on Human Rights*: Time for Certainty and a Common Approach?' (2015) 36 *Liverpool Law Review* 147, 156.

395 *McLoughlin* [2014] 1 WLR 3964, 3973 [24] (Lord Thomas).

396 *Human Rights Act 1998* (UK) s 4(6)(a).

397 See, eg, Rogan (n 99) 327; Mark Pettigrew, 'Public, Politicians, and the Law: The Long Shadow and Modern Thrall of Myra Hindley' (2016) 28(1) *Current Issues in Criminal Justice* 51, 61.

398 See, eg, Pettigrew, 'Retreating from *Vinter* in Europe' (n 55) 265–6; Pettigrew, 'A *Vinter* Retreat in Europe' (n 55) 131–2.

399 It is noteworthy that the UK government has declined to amend *Representation of the People Act 1983* (UK) s 3 despite the ECtHR's finding that it violated the *ECHR* in the prisoner voting case of *Hirst [No 2] v United Kingdom* [2005] IX Eur Court HR 187.

400 [2013] III Eur Court HR 317, 352–53 [129].

401 *McLoughlin* [2014] 1 WLR 3964, 3975 [29]–[34] (Lord Thomas).

402 Ibid 3975 [32] (Lord Thomas).

403 Ibid.

404 Secretary of State for the Home Department (n 66).

405 See above n 6 and accompanying text.

406 *McLoughlin* [2014] 1 WLR 3964, 3975 [29] (Lord Thomas).

407 See above nn 307–12 and accompanying text.

408 See above n 338 and accompanying text.

409 See above n 341 and accompanying text.

released; and yet, unlike in proceedings involving those other two nations, the Court simply ignored this fact.[410] Further, it failed to consider whether sufficient rehabilitative opportunities are presented to whole life prisoners while in prison,[411] and it did not examine whether there was a clear review mechanism in place from the start of the applicant's sentence.[412] Nevertheless, Mary Rogan is, with respect, right to suggest that the Court was 'sensibl[e]'[413] to act as it did. Perhaps there is some truth in Dirk van Zyl Smit and Catherine Appleton's observation that, however de jure reducible whole life orders are

> [i]n England and Wales, the unfortunate effect of *Hutchinson* is likely to be that whole-life orders will continue to make the life sentences to which they attach irreducible in practice.[414]

Certainly, it is difficult to imagine the Secretary of State ever finding that there is no longer a penological justification for a whole life prisoner's detention, so as to make any further such detention contrary to article 3.[415] That said, as noted above, s/he does have to provide reasoned conclusions for such decisions,[416] which are subject to judicial review.[417] Might this not mean that there is *some* prospect of release for the whole life offender who can provide the authorities with compelling evidence that s/he has achieved rehabilitation? Certainly – and this is the real point – his/her prospects of release are higher than they would have been had the EWCA in *McLoughlin* issued a declaration of incompatibility. In such circumstances, the government would not have been instructed – as their Lordships in *McLoughlin* subtly did instruct it – that whole life prisoners are not to be released merely when they are terminally ill or very severely disabled.[418]

In short, the Victorian government's disapplication of its *Charter* for the purposes of sections 74AA and 74AB; Craig Minogue's tactical decision in *Minogue (Scope Challenge)* not to seek a declaration of inconsistent operation; and the UK government's response to *Vinter*, provide powerful evidence that, if they are properly to protect prisoners' rights, any future Australian human rights charters must be designed differently from the *Victorian Charter*.[419] If the 'very purpose'[420] of having a human

410 As observed by Graham, 'From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases at the European Court of Human Rights' (n 57) 265.

411 Cf *Matiošaitis* (European Court of Human Rights, Second Section, Application Nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, 23 May 2017) 49–50 [179]; *Petukhov* (European Court of Human Rights, Fourth Section Chamber, Application Nos 24069/03, 197/04, 6201/06 and 10464/07, 12 March 2019) 36 [181]–[184].

412 Graham, 'From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases at the European Court of Human Rights' (n 57) 266. See also Graham, '*Petukhov v Ukraine No. 2*: Life Sentences Incompatible with the Convention, but only in Eastern Europe?' (n 57).

413 Rogan (n 99) 328.

414 van Zyl Smit and Appleton (n 25) 47.

415 If s/he were ever to do so, or if a court were to make such a finding when reviewing the Secretary of State's decision, the prisoner would have to be released: *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 20 [51]–[52].

416 Ibid [51]; *McLoughlin* [2014] 1 WLR 3964, 3975 [34] (Lord Thomas).

417 *McLoughlin* [2014] 1 WLR 3964, 3975 [34] (Lord Thomas); *Hutchinson* (European Court of Human Rights, Grand Chamber, Application No 57592/08, 17 January 2017) 20 [52].

418 See Secretary of State for the Home Department (n 66).

419 But again, to be clear, this is different from claiming that charters with such a different design *should* be introduced. Consistently with what is said in both the introduction and conclusion of this article, a Charter's capacity to protect prisoners' rights is not the only relevant consideration when determining whether such an instrument is desirable.

420 Lord Mance (n 46).

rights charter really is to protect unpopular minorities, perhaps it should not be left open to the government to disapply it whenever it determines that the affected minority group is so unpopular that the relevant law is unlikely to arouse any public concern.[421] This is especially so concerning the crucial rights that section 10 of the *Victorian Charter* protects. Likewise, if prisoners' unpopularity is such as to mean that there is no point in seeking a declaration of incompatibility/inconsistent operation in many cases involving their rights, it seems that, if future Australian charters are to protect such rights effectively, they must give the judiciary the power to strike down primary legislation.[422] The effect of the High Court's decision in *Momcilovic v The Queen* seems to be that, while judges can validly exercise the power conferred on them by provisions such as section 36(2) of the *Victorian Charter*, they should not issue a declaration of incompatibility/inconsistent operation in a 'criminal trial proceeding'.[423] To do otherwise, Crennan and Kiefel JJ thought, would tend to undermine a conviction.[424] Such reasoning does not prevent a Court from issuing a declaration in a case where a prisoner has challenged on human rights grounds his/her sentence, or has objected to his/her conditions of confinement.[425] But it does tend to add further weight to the view that, as the former High Court Justice, Michael McHugh, has argued, a 'dialogue' model of human rights protection of the type for which the *Victorian Charter* provides 'may not work as effectively'[426] in Australian conditions as its supporters had hoped it would.[427]

V CONCLUSION

In a lecture delivered at the Oxford University Law School in January 2013, another retired High Court Justice, Dyson Heydon, disputed the notion that charters of rights

421 Cf *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31; *Human Rights Act 2019* (Qld) ss 43–7. This is not to say that the government should lack the power to disapply certain *Charter* rights in the sorts of circumstances contemplated by *ECHR* art 15(1).

422 Cf *Human Rights Act 2004* (Vic) s 32; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36; *Human Rights Act 2019* (Qld) ss 53–7.

423 *Momcilovic v The Queen* (2011) 245 CLR 1, 229 [605] (Crennan and Kiefel JJ). The other two Justices who held s 36(2) to be constitutionally valid insisted on no such limitation: at 67–8 [95]–[97] (French CJ), 241 [661] (Bell J).

424 Ibid 229 [605] (Crennan and Kiefel JJ).

425 Such a declaration would not undermine a conviction.

426 Michael McHugh, 'A Human Rights Act, the Courts and the Constitution' (Speech, Australian Human Rights Commission, 5 March 2009) 35.

427 McHugh proceeded to argue (ibid 35) that

> [i]nstead of the dialogue model, the Parliament should give effect to the *International Covenant on Civil and Political Rights* and, if thought necessary, the *International Covenant on Economic, Social and Cultural Rights* by legislation that empowers courts invested with federal jurisdiction to hold that legislation that is inconsistent with the human rights legislation is invalid in the case of the State and Territory legislation and that, in the absence of an express statement to the contrary, all federal legislation is to be read subject to the human rights legislation of the Parliament.

Rosalind Dixon has indicated some support for a fairly similar proposal insofar as federal legislation is concerned, noting in the process that Parliament has seldom used the Canadian Charter of Rights and Freedom's 'notwithstanding' clause (see *Canada Act 1982* (UK) ch 11 sch B pt I s 33) to override Charter rights: Rosalind Dixon, 'A Minimalist Charter of Rights' (2009) 37 *Federal Law Review* 335, 358–9. The recent Victorian overrides do seem to show, however, that, if implemented, such a proposal might not protect prisoners adequately against penal populist laws. That said, as indicated above, when determining whether a Charter – or a particular Charter model – is desirable, its capacity to protect prisoners' interests is not the only factor that must be considered: see above n 418.

are necessary in mature modern democracies such as the UK and Australia.[428] Indeed, according to him[429]

> [t]here are other techniques for [human rights] protection, some of which can be developed more intensely than they have been, which are likely to be more effective than the techniques employed by the [*UK Human Rights*] *Act* and the [*European*] *Convention*.

One of those techniques, he continued, was the separation of powers.[430] In tension with this, however, is a statement by another prominent opponent of human rights charters, James Allan, in his submission to a Queensland parliamentary committee about three years later. As well as costing lots of money, Allan argued, charters deliver little, 'save to lawyers, judges, *criminals,* and some articulate, well-educated members of the professional class'.[431] Also in tension with Heydon's fears about the ineffectiveness of charters of rights, as argued here, is the case law concerning irreducible life sentences in the UK and Europe on one hand, and Australia on the other.

If the real objection to human rights charters is that they do assist 'criminals',[432] by requiring that they be treated fairly, as equals and as possessing agency, then there seems to be a ready response to it. In fact, Heydon suggested it in his lecture. The aim of such charters is not, and nor should their effect be, to allow a group of unelected 'aristocratic'[433] judges routinely, or even often, to override decisions democratically arrived at by a hitherto sovereign Parliament. Heydon is right: Parliament is in 'close touch' with both electors[434] and the experts;[435] accordingly, *it* should normally resolve contested matters of public policy. But when executive governments behave tyrannically, as Heydon acknowledges they can[436] – that is, when the public opinion to which they are responding is the hysterically punitive product of irresponsible media coverage,[437] and when they ignore the experts to whom they have unrivalled access[438] – it is reasonable to believe that the affected disfavoured minority should be protected against such conduct.[439] It is no answer to this to say, as Lord Sumption has, that when legislation of this sort targets prisoners:[440]

> [T]he … issue [that is raised] has nothing whatever to do with the protection of minorities. Prisoners belong to a minority only in the banal and legally irrelevant sense that most people do not do the things which warrant imprisonment by due process of law.

For, of course, a person can be part of a minority for any number of reasons. Whatever that reason is, s/he is still part of a minority.[441]

---

428 Heydon (n 45).
429 Ibid 407.
430 Ibid 407–8.
431 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (Report No 30 of 2016, June 2016) xv, 27(emphasis added).
432 Ibid.
433 James Allan, '"Do the Right Thing" Judging? The High Court of Australia in *Al-Kateb*' (2005) 24(1) *University of Queensland Law Journal* 1, 2.
434 Heydon (n 45) 393.
435 Ibid 400.
436 Ibid 392.
437 See, eg, Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003) ch 5.
438 See eg John Pratt, *Penal Populism* (Routledge, 2007) 13–14.
439 Heydon concedes that '[m]any' have thought that this was the 'main function' of human rights charters: Heydon (n 45) 392.
440 *R (Chester) v Secretary of State for Justice* [2014] 1 AC 271, 327 [112].
441 Perhaps Lord Sumption's real point is that we need not be too concerned about the rights of such 'criminals'?

In short, if charters of rights are to be resisted, this should not be on the basis that they will inevitably be ineffective. As argued above, there are good reasons to suppose that a charter that lacked a parliamentary override provision, and that allowed the judges to strike down primary legislation, would cause laws such as those impugned in *Crump*, *Knight* and *Minogue (Constitutional Challenge)* to be declared invalid. Instead, perhaps the strongest argument against human rights charters of this kind is suggested by the High Court's apparent reasons for circumspection in cases where draconian legislation has been challenged on Chapter III grounds.[442] Again, Bell J is rightly conscious of the need for the High Court to avoid developing a reputation, as the US federal judiciary has,[443] for deciding cases on political or personal grounds. For, as Sir Gerard Brennan has pointed out, once the courts lose their legitimacy, the very 'stability of our society'[444] is threatened. If the adoption of charters of the type mooted here would inevitably lead to an erosion of 'public confidence in the constitutional institutions of government',[445] no matter how shrewdly and cautiously the judges used them, then it is arguable that such instruments should not be adopted – despite their beneficial effects. But that is a question for another day.

442 It is not just in *Crump* and *Knight* that their Honours used strained and formalistic reasoning when declining to use Chapter III to strike down penal populist legislation: Dyer, '(Grossly) Disproportionate Sentences' (n 67) 204–10; Andrew Dyer, 'Can Charters of Rights Limit Penal Populism?: The Case of Preventive Detention' (2018) 43(3) *Monash University Law Review* 520, 539–40.

443 Bell, 'Examining the Judge' (n 256) 5.

444 Wheeler and Williams (n 166) 44.

445 Ibid.