

Criminal Bar Association of Victoria

Mandatory Minimum Sentencing

Mirko Bagaric's approach to sentencing as expressed in the Herald Sun (7 June 2006) carries the familiar tone of outrage and the attempt to marginalise independent judges. Despite being an academic, he is unable to resist the temptation to embrace populist language in his article. The person to be sentenced ceases to be a person – he is a de-humanised “*crook*”. The important protection to individual rights by the existence of an independent judiciary is trivialised. Judges, he suggests, “*just pluck out a sentence that feels right*”. Surely we can raise the level of debate above this, at least from an academic like Mr. Bagaric. There is no reason, he says, why people “*...from a rotten social background should get a sentencing discount*”. What kind of generalization or statement of legal principle is that? Should the Victorian Parliament pass the Rotten Social Background Act (2006) to ensure that such a history is specifically excluded as a sentencing consideration?

However, perhaps more important for the purpose of the debate is what Mr. Bagaric fails to mention. His article is written as though the sentence in the particular case that he is “*grumpy*” about is unassailable. Throughout Australia we have very capable Courts of Appeal. That is particularly so here in Victoria. If the particular sentence represents an error by the County Court judge concerned then no doubt the Director of Public Prosecutions will appeal and the error will be corrected by the Court. As I assume Mr. Bagaric knows, that happens from time to time, both because the Court concludes that some sentences are excessive and some are inadequate. Obviously such judgments represent a detailed examination of the case by a panel of three judges of Victoria's highest court. The judges of that Court have a very clear understanding of the principle of proportionality. Has Mr. Bagaric no confidence in them either?

If there were a choice to be made between the motives of self interested politicians wanting to be seen to be harsh on crime in fixing mandatory minimum sentences on the one hand and the approach to sentencing by independent judges on the other, then the Victorian Attorney-General is absolutely right – leave it to the judges.

There is a further fundamental problem about Mr. Bagaric's argument. Ultimately, it rests on what he describes as the “*proportionality principle*” and that, he says, is reflected in the notion that “*the punishment must fit the crime*”. Of course it is not that simple and neither should it be. Whilst a sentence passed on an offender must be proportionate to the gravity of the crime, the law requires that there are other relevant and important considerations including the circumstances of the offender and all mitigating factors. And, also importantly, judges are entitled to temper sentences with mercy where they think it appropriate to do so.

Such considerations will never satisfy the populist clamour for retribution but day by day in the Magistrates Court, County Court and Supreme Court, Magistrates and Judges are appropriately and efficiently dispensing justice in sentencing under the supervision of the Court of Appeal. It is open and transparent. It can be viewed by anyone at any time.

Minimum mandatory prison sentences would stop independent judges from bringing their experience and training to bear on the process of depriving citizens of their liberty. Such a regime would inevitably cause injustice and people will be "*grumpy*". Those who are so quick to condemn the system of sentencing as it is should pause to consider what level of independent protection and fairness they would want if they, or a member of their family, were in the dock.

We are pleased the Attorney-General is so strongly opposed to such a regime.

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