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Punished for a breach of the law, and something else?

An analysis of the High Court decision in Minister for Home Affairs v Benbrika (2021) 95 ALJR 166

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I PRELIMINARY

Mr Benbrika was a convicted terrorist offender. His offending was serious; involving his participation in a terrorist organisation with designs to intimidate institutions and communities though violence. For his crimes, Mr Benbrika was sentenced to a term of imprisonment - the most severe form of punishment our legal system can impose.

Mr Benbrika would surely have spent his days incarcerated under the apprehension that he would be released upon the expiry of his sentence. That belief was well-founded. It has been said that one may be 'punished for a breach of law, but…for nothing else'.[1] Even an hour of liberty 'precious' in our constitutional system.[2]

But the expiry of Mr Benbrika's sentence did not spell the end of his custody. After serving 15 years, Mr Benbrika was told by a court vested with federal powers that, though his punishment was over, a further period of 'preventive detention' awaited him. This further incarceration was said to be a measure of social protection; responsive to Mr Benbrika's disposition of character and a concern for his committing future harm.[3]

[1] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27-28; 67 ALJR 125, citing Albert V. Dicey, '*Introduction to the Study of the Law of the Constitution*', 10th ed (1959), p 202.
[2] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 635 per Kirby J.
[3] Douglas Husak, 'Lifting the Cloak: Preventive Detention as Punishment' (2011) 48 *San Diego Law Review* 1173 at 1176.

In a constitutional system where the judicature serves as a 'bulwark of liberty',[4] how can this species of preventative detention be consistent with the fundamental principles that inhere the judicial power? The High Court considered these questions in *Minister for Home Affairs v Benbrika*[5] in the context of a preventative detention regime contained in Div. 105A of the *Criminal Code* (Cth).

The object of this article is to analyse the decision in *Benbrika* and the extent to which protective detention mechanisms are responsive to the federal judicial power. Specific focus will be paid to the implications of *Benbrika* on the principle originally propounded by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[6], known as 'the Lim principle'. The Court's categorisation of the Div. 105A regime as being 'non-punitive' will also be explored.

II BACKGROUND

To properly understand the decision in *Benbrika*, it is first necessary to understand the nature of the judicial power and its separation from the political branches of government. It is also necessary to understand the Lim principle, and preventative detention generally.

Ch. III and a separation of judicial power

The Constitution is structured upon, and incorporates, a doctrine of the separation of judicial power from the executive and legislative powers. Chapter III of the Constitution gives effect to that doctrine and operates to both limit the repositories of federal judicial power and, 'in context, prescribes a separation of the function of the High Court and of other federal courts from the functions of the political branches of government.'[7]

The separation of judicial power connotes two concepts. Firstly, it is said to be beyond the competence of the Commonwealth Parliament to vest with any part of the judicial power any entity except a court.[8] Secondly, the Parliament may vest in those courts only those powers and functions that form part of the

[4] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-13 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ
[5] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166; [2021] HCA 4; 388 ALR 1.
[6] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
[7] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 66 per Brennan CJ.
[8] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269 - 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

judicial power.[9] Courts in which the judicial power of the Commonwealth is vested cannot exercise that power in a manner inconsistent with the nature of judicial power, and that power must be capable of being exercised judicially. [10]

Except for matters incidental to the execution of Ch. III powers,[11] when an exercise of legislative power is directed to the judicial power of the Commonwealth, it must operate through or in conformity with Ch. III. [12] In this respect, Ch. III has been described as 'an exhaustive statement' of the manner in which the judicial power of the Commonwealth is or may be vested.[13] Courts may be vested with federal jurisdiction by a law made in the exercise of the power conferred on the Parliament by s 76(ii).[14] Additionally, s 77(iii) of the Constitution authorises the Commonwealth Parliament to make laws investing any court of a State with federal jurisdiction.

Scope of the judicial power

The judicial power of the Commonwealth has defied precise definition. The difficulty, if not impossibility, of framing an exclusive and exhaustive definition of judicial power has been acknowledged by the High Court on a number of occasions.[15] This difficulty is said to arise by virtue of the many elements essential to the exercise of the judicial power that are not by themselves conclusive of it. In *Precision Data Holdings Ltd v Wills*,[16] the High Court observed that whilst the finding of facts, the making of value judgments, and even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power.[17]

[9] *Re Judiciary Act 1903 and Navigation Act 1912 (Advisory Opinions Case)* (1921) 29 CLR 257 at 266 - 267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254
[10] *R v Spicer; Ex parte Australian Builders Labourers Federation* (1957) 100 CLR 277 at 305; *R v Hegarty; Ex parte Salisbury City Corporation* (1981) 147 CLR 617 at 628; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 190-191.
[11] the *Commonwealth Constitution* s 51(xxxix.) extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Chap. III and no doubt to dealing in other ways with matters incidental to the execution of the powers given by the Constitution to the federal judicature.
[12] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269-270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.
[13] See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.
[14] or that provision considered with s. 71 and s. 77 of the *Commonwealth Constitution*.
[15] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188 – 189.
[16] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167.
[17] *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188 – 189.

Fundamentally, the High Court has identified that the judicial power is coercive, and not invoked by mutual consent.[18] Underpinning the judicial power is its 'fundamental character as a sovereign or governmental power exercisable, on application, independently of the consent of those whose legal rights or legal obligations are determined by its exercise.'[19] A famous expression of judicial power lies in the following statement by Griffith CJ:[20]

> *'... the words 'judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.'*

Despite the lack of precise definition, there can be no dispute that certain functions fall within the scope of the judicial power. The necessary involvement of the judiciary in adjudging and punishing criminal guilt 'is a fixed feature of the courts participating in the integrated judicature of the Commonwealth, provided for in the Constitution'[21] That function appertains exclusively to, and cannot not be excluded from, the federal judicial power.[22]

State judicial power

The Constitution does not purport to affect a separation of the courts of a State or Territory from the legislature or executive of those bodies. Nor does the Constitution purport to preclude State Parliaments from conferring a non-judicial power on a State court.[23] However, Ch. III nevertheless imposes limitations upon the powers of State and Territory legislatures to confer judicial power.

One example of this is Ch. III rendering invalid State legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch. III.[24] Another is the circumstance dealt with in *Kable*

[18] *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 452 per Barton J.
[19] *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 per French CJ and Gageler J.
[20] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.
[21] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 633 per Kirby J.
[22] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane, Dawson JJ.
[23] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *British Medical Association v The Commonwealth* (1949) 79 CLR 201.
[24] *The Commonwealth v Queensland* (1975) 134 CLR 298 at 314-315 per Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing.

v Director of Public Prosecutions (NSW)[25] where it was decided that State legislation purporting to confer upon a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.[26] This principle has been considered in a number of subsequent High Court decisions, including in *Fardon v Attorney-General for the State of Queensland*. [27]

Though the decisions in in *Kable* and *Fardon* concerned powers vested in State courts by State parliaments (an area outside the scope of this article), both concerned preventative detention regimes. Certain elements of these decisions bear relevance to Ch. III judicial power (discussed below).

The Lim principle

To understand the decision in *Benbrika*, it is necessary to understand the 'Lim principle'. In *Lim*, Brennan, Deane and Dawson JJ, propounded the principle in this way:[28]

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

The meaning of the Lim principle and has been the subject of controversy. As observed by Edelman J in *Benbrika*, '[i]t has been revised and restated. But rarely has its rationale been explained.'[29]

It has been (controversially) argued that the Lim principle expresses two propositions – one directed at a separation of judicial power, the other at a limitation of judicial power. The first proposition says that the power to order that a person be involuntarily confined in custody is, 'under the doctrine of the separation of judicial from executive and legislative powers enshrined in our Constitution, part of the judicial power of the Commonwealth entrusted exclusively to Ch. III courts.'[30] Thus, in addition to the function of

[25] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[26] It was said that the Constitution does not permit different grades or qualities of justice, and that the conferral of a non-judicial function on a State court that undermines the appearance of the independence and impartiality of the Court will be beyond legislative power.
[27] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575.
[28] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.
[29] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 217 per Edelman J.
[30] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 per Brennan, Deane and Dawson JJ.

adjudicating and punishing criminal guilt under a law of the Commonwealth, the function of ordering that a person be involuntarily confined in custody appertains exclusively to and cannot not be excluded from the Commonwealth judicial power.

The second proposition, explicitly referred to in the judgment of Gummow J in *Fardon*,[31] is more controversial. It is to say that 'the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt… *for past acts*' [emphasis added].[32] In other words, power to detain a person for future conduct (i.e. for a protective purpose) falls outside the limits of the judicial power. In this sense, the Lim principle does not simply articulate a division of power, but also imposes 'a limitation on power…that is protective of liberty'.[33] As will be seen below, there is controversy as to whether this second proposition does in fact fall within the scope of the principle.

The High Court has recognised 'exceptional cases' where the Lim principle has no application. One such category of case is non-punitive detention. Where a non-punitive purpose can be established, the assumption articulated by the principle that 'the involuntary detention of a citizen in custody by the State is penal or punitive' will no longer bear relevance.[34]

To fall within the 'non-punitive' exception to the Lim principle, it is said to be insufficient for a law to have a non-punitive objective. The power to detain in custody must be 'reasonably capable of being seen as *necessary* for a *legitimate* non-punitive objective'.[35] If the power goes further than is necessary to achieve that objective, it can be inferred that the law has a purpose to effect punishment and will be responsive to the limitations imposed by Ch. III.

The plurality in *Lim* provided examples of exceptional cases where the power to detain can legitimately be seen as non-punitive and as not necessarily involving the exercise of judicial power. The examples provided were the arrest and detention in custody, pursuant to executive warrant, of a person accused of

[31] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 611 to 612 per Gummow J.
[32] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 612 per Gummow J.
[33] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 189 per Gageler J.
[34] *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 342 per Kiefel CJ, Bell, Keane and Edelman JJ.
[35] *Kruger v The Commonwealth* (1997) 190 CLR 1 at 162 per Gummow J; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 343 per Kiefel CJ, Bell, Keane and Edelman JJ; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 653 per Callinan and Heydon JJ.

crime to ensure that he or she is available to be dealt with by the courts, and the 'involuntary detention in cases of mental illness or infectious disease'. It has been emphasised that exceptions to the Lim principle (i.e. categories of non-punitive, involuntary detention) are not closed.[36]

Preventative detention

The practice of preventative detention has become more commonplace in recent decades. Preventive detention is said to be 'any state practice of confining individuals in order to prevent them from committing future harms.'[37] Fundamentally, it is a species of detention that arises not by virtue of any past criminal offending, but because of a prediction of future criminal conduct. The practice is borne of a governmental interest to 'bind people over to be of good behaviour or to keep the peace' and confer power on the judicature to detain in the absence of any further conviction.[38] Over the years, a number of preventative detention regimes have previously come before the High Court. However, until *Benbrika*, none of these regimes had been a product of Commonwealth legislation.

III BENBRIKA

Benbrika concerned the preventative detention regime contained in Div. 105A of the *Criminal Code*. That regime empowered the Supreme Court of a State or Territory, upon the application of the Minister for Home Affairs,[39] to order that a person who has been convicted of a terrorist offence be detained in prison for a further period after the expiration of his or her sentence of imprisonment ('a CDO'). The object of the division was 'to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community.'

A Supreme Court could make a continuing detention order under s 105A.7 of the *Criminal Code* if 'satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community'[40] and if 'satisfied that there is no other less restrictive measure that would be effective in

[36] *Kruger v Commonwealth* (1997) 190 CLR 1 at 162 per Gummow J citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 33, 46, 56, 65, 71. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 653 per Callinan and Heydon JJ.
[37] Douglas Husak, 'Lifting the Cloak: Preventive Detention as Punishment' (2011) 48 *San Diego Law Review* 1173 at 1175.
[38] David Feldman, 'The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding over Powers' (1988) 47 *Cambridge Law Journal* 101 at 101.
[39] administering the *Australian Federal Police Act 1979* (Cth).
[40] *Criminal Code Act 1995* (Cth) s 105A.7(1)(b).

preventing the unacceptable risk'.[41] The expression 'serious Part 5.3 offence' encapsulated offences against Part 5.3 that attracted a maximum penalty of seven or more years of imprisonment.[42] These offences included not only the substantive offence of engaging in a terrorist act, but also preparatory offences, and offences relating to membership, recruitment and terrorist financing.[43]

The effect of a CDO was to commit the offender to detention in prison for the period of time that the order is in force,[44] which may be no more than three years.[45] There was no legislative restriction on the number of successive CDOs that the court could make against a terrorist offender.[46] Notably, the Division was modelled on the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ('DP(SO Act') – a State regime held to be compatible with Ch. III by the High Court in *Fardon* (discussed further below).

Mr Benbrika had been convicted in the Supreme Court of Victoria of two terrorist offences under the *Criminal Code*.[47] The first offence involved the intentional membership of a terrorist organisation knowing that the organisation was a terrorist organisation.[48] The second offence involved intentionally directing the activities of a terrorist organisation knowing the organisation to be a terrorist organisation.[49] Each offence was a 'serious Part 5.3 offence'.[50] Prior to the expiry of Mr Benbrika's 15 year prison sentence, the appellant Minister commenced proceedings in the Supreme Court seeking a CDO pursuant to s 105A.7(1).[51]

Before the High Court, Mr Benbrika challenged the validity of Div. 105A of the Criminal Code on grounds that the power to make a continuing detention order under s 105A.7 was not within the judicial power of the Commonwealth and had been conferred on the Supreme Court of Victoria contrary to Ch. III of the Constitution. At issue was whether 'the Supreme Court of a State or Territory may commit a person to prison in the exercise of federal judicial power after determining, by orthodox judicial process, that the person presents an unacceptable risk of committing a terrorist offence if released from custody.'[52]

[41] *Criminal Code Act 1995* (Cth) s 105A.7(1)(c); In deciding whether the Court is satisfied that there is an 'unacceptable risk', the Supreme Court must have regard to the matters set out in s 105A.8(1) of the *Criminal Code Act 1995* (Cth).
[42] *Criminal Code Act 1995* (Cth) s 105A.2.
[43] *Criminal Code Act 1995* (Cth) ss 101.1-6, 102.3-4, 103.102.
[44] *Criminal Code Act 1995* (Cth) s 105A.3(2).
[45] *Criminal Code Act 1995* (Cth) s 105A.7(5).
[46] *Criminal Code Act 1995* (Cth) s 105A.7(6).
[47] *Criminal Code Act 1995* (Cth) ss 102.2(1) and 102.3(1)
[48] *Criminal Code Act 1995* (Cth) s 102.3(1).
[49] *Criminal Code Act 1995* (Cth) s 102.2(1).
[50] defined in s 105A.2 of *Criminal Code Act 1995* (Cth) as 'an offence against Pt 5.3, the maximum penalty for which is 7 or more years of imprisonment.'
[51] notably, the Minister also sought an interim detention order pursuant to s 105A.9(2).
[52] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 172 - 173 per Kiefel CJ, Bell, Keane and Steward JJ.

Ultimately, a majority of the High Court (Kiefel CJ, Bell, Keane, Steward and Edelman JJ) held that the regime prescribed by Div. 105A was valid. Gordon and Gageler JJ dissented.

Kiefel CJ, Bell, Keane and Steward JJ

By their joint judgment, Kiefel CJ, Bell, Keane and Steward JJ concluded that the power to make a continuing detention order under s 105A.7 was within the judicial power of the Commonwealth and had not been conferred on the Supreme Court contrary to Ch. III. Their Honours held that Div. 105A had an evident non-punitive purpose –to ensure the safety and protection of the community from the risk of harm posed by the threat of terrorism. This protective purpose was said to qualify the power conferred by div. 105A as an exception to the Lim principle.

A number of features of the Div. 105A regime were said to reinforce the 'protective purpose' categorisation including, relevantly, a requirement that a person detained under a CDO, as far as reasonably possible, be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment.[53] Additionally, it was said that Div. 105A was subject to the 'ordinary incidents of the exercise of judicial power' including principles of open justice, application of the rules of evidence and procedure, the availability of examination and cross-examination, and the imposing of the onus of proof on the Minister to establish the conditions for the making of the order.[54]

Gordon and Gageler JJ

It was the variability inherent in the concept of 'serious Pt 5.3 offences' that concerned Gageler and Gordon JJ in their separate judgments. By Her Honour's dissenting judgment, Gordon J held that the power to make a CDO under s 105A.7 was not within the judicial power of the Commonwealth and was contrary to Ch. III of the Constitution. Her Honour found that the regime in Div. 105A was not sufficiently tailored to its stated purpose of ensuring the safety and protection of the community to be an exercise of Commonwealth judicial power. Her Honour noted that the nature and extent of the harm that may be caused to persons or property by commission of a 'serious Part 5.3 offence' would vary widely. In Her Honour's view, the concern to which Div. 105A was directed was not of harm, but of the offender

[53] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 182 per Kiefel CJ, Bell, Keane and Steward JJ; *Criminal Code Act 1995* (Cth) s 105A.4(2).
[54] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 175 per Kiefel CJ, Bell, Keane and Steward JJ.

'committing an offence regardless of the consequence of that offending for the community.'[55] This was not a legitimate 'non-punitive' purpose and thus was not exempt from the Lim principle.

Gageler J held that the power to make a CDO conformed to the Ch. III judicial power only to the extent that the 'serious Part 5.3 offence' to be prevented by the making of a CDO involves doing or supporting or facilitating a terrorist act.' His Honour observed that the prevention of harm is a legitimate non-punitive objective, at least where the harm is grave and specific.[56] Conversely, His Honour observed that 'the objective merely of preventing commission of a criminal offence cannot be legitimate.'[57]

Edelman J

Whilst Edelman J reached the same conclusion as the plurality that Div. 105A was constitutionally valid, aspects of His Honour's reasoning departed significantly from the other justices. Edelman J found that detention under s 105A.7 fell within the ambit of 'punishment' in the sense contemplated by the joint judgment in *Lim*. It was said to be a 'category error' to reason that Div. 105A was not punitive by virtue of it aiming to protect the community by preventing the commission of offences.

Notwithstanding this finding, Edelman J held that the punitive nature of the law did not make it inconsistent with the judicial power. In view of His Honour, the Lim principle went only to the division of power and did not impose any restriction on the kinds of detention that could be imposed by a Ch. III court. In other words, the second proposition was not part of the principle. Edelman J's reasoning is explored in more detail below.

IV DISCUSSION

An expansion of the Lim principle?

Edelman J characterised the second proposition as representing an unjustified expansion of the Lim principle, rather than an existing feature of it. His Honour argued that there was insufficient constitutional foundation to expand the Lim principle 'from one which is concerned with the separation of powers to one which is also founded upon the liberty of the individual and is a substantive constraint upon all

[55] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 209 per Gordon J.
[56] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 191 per Gageler J.
[57] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 192 per Gageler J.

legislative, executive, and judicial power.'[58] Consequently, in His Honour's view, the fact that the involuntary detention of a person in custody under Div. 105A was not done as a consequential step adjudication of criminal guilt for past acts did not prevent the regime from being responsive to the Ch. III judicial power.

Edelman J's interpretation of the Lim principle raises a number of interesting questions. One could argue that the second proposition does not represent any material departure from the Lim principle as it was originally expressed by Brennan, Deane and Dawson JJ. Their Honours were explicit that any involuntary detention be a consequence of, not only an exercise of judicial power, but specifically an exercise of judicial power that amounts to performance of '*the exclusively judicial function of adjudging and punishing criminal guilt*' [emphasis added].[59] On one view, the above wording has no work to do if the Lim principle is construed as being limited to first proposition (i.e. that the power to detain as exclusively judicial). By definition, the adjudging and punishing of criminal guilt cannot be for anything other than past acts.

Whether, as Edelman J found, there insufficient constitutional grounding to construe the Lim principle as a limitation on power that is protective of liberty (confining the power to detain to past acts) is also a contentious issue. In her judgment, Gordon J explained that the core values which underpin the separation of powers prescribed by the Constitution – the protection of liberty and the independence of the judiciary, also underpin the 'essential characteristic…of judicial power, namely the determination of controversies about *existing rights*.'[60] The use of imprisonment to punish crimes feared, anticipated or predicted in the future is, prima facie, an affront to liberty and inconsistent with the judicial power. In *Fardon*, Kirby J explained:[61]

> *'the focus of the exercise of judicial power upon past events is not accidental. It is an aspect of the essential character of the judicial function. Of its nature, judicial power involves the application of the law to past events or conduct. Although, in discharging their functions, judges are often called upon to predict future happenings, an order imprisoning a person because of an estimate of some future offence is something new and different.'*

[58] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 220 per Edelman J.
[59] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 189 per Gageler J.
[60] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 204 per Gordon J.
[61] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 637 per Kirby J.

More generally, the High Court has held that a concern for personal liberty lies at the core of our inherited constitutional tradition.[62] It is 'the most elementary and important'[63] of the basic common law rights that are integral to our constitutional system, and consequently, legal provisions derogating from liberty have been viewed by courts with 'heightened vigilance.'[64] In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[65] Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ explained that the separation of the judicial function itself advances the 'constitutional objective' of the guarantee of liberty.

The punitive/non-punitive dichotomy

The High Court's categorisation in *Benbrika* of the regime in Div. 105A as falling within the 'non-punitive' exception to the Lim principle has been the subject of dispute. With the exception of Edelman J, all justices held the power conferred by Div. 105A to be non-punitive. Their Honours drew sharp distinction between preventative non-punitive detention and criminal punishment.

Edelman J disagreed, finding that CDO under s 105A.7 fell within the ambit of 'punishment' in the sense contemplated by the joint judgment in *Lim*. It was said to be a 'category error' to reason that Div. 105A was not punitive by virtue of it aiming to protect the community by preventing the commission of offences. Edelman J asserted that, properly characterised, the power to grant a CDO within Div. 105A involves notions sufficiently similar to traditional criminal punishment so as to confer a form of 'protective punishment'. His Honour held that both traditional criminal punishment and protective punishment should be characterised as punitive and as generally exclusive to the judicial function.

Of course, controversies of this kind are not new. Much has been said about the difficulties inherent in distinguishing between, on the one hand, penal or punitive detention and, on the other, non-punitive, preventive detention. It is clear that no bright line can be drawn between the two. Criminal punishment has been described as centrally 'backward-looking' and hinges upon the conviction of criminal offences

[62] *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at [141]-[142], quoting *R v Davison* (1954) 90 CLR 353 at 381-382.
[63] *Williams v The Queen* (1986) 161 CLR 278 at 292, quoting *Trobridge v Hardy* (1955) 94 CLR 147 at 152.
[64] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 633 per Kirby J.
[65] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-12.

based on moral desert.[66] Conversely, preventive detention is centrally 'forward-looking' and based upon a prediction concerning future offending.

As observed by Edelman J, there is overlap between the two concepts - 'traditional criminal punishment and protective punishment both involve backwards-looking and forward-looking criteria although giving different weight to each.'[67] Criminal punishment is also usually shaped by 'forward-looking criteria such as specific and general deterrence of the commission of similar offences in the future.'[68] Additionally, protective punishment is 'backwards-looking' in the sense that it is, in part, predicated on the commission of a past offence of the same nature.[69]

On this issue, Edelman J referenced statements by the United States Supreme Court in *US v Brown*[70] where it was said to be 'archaic to limit the definition of "punishment" to "retribution."' Punishment, the Supreme Court explained, serves several objectives including retributive, rehabilitative, deterrent and preventive purposes. The fact that the state imprisons those convicted of crimes to keep them from inflicting future harm 'does not make imprisonment any the less punishment.'[71]

Further matters

The assertion by the plurality in *Benbrika* that the Div.105A scheme is purely an exercise in protective lawmaking is, in the author's view, a controversial one. Clearly, the preventive detention regime contemplated by Div. 105A involves elements of intentional hardship, deprivation, stigmatisation and censorship – elements central to the concept of punishment.[72]

At a general level, good arguments can be made that there is an element of punishment in all forms of involuntary imprisonment. Detention is unpleasant and oppressive. It deprives a person of their of freedom – something said to be so precious in our system.[73] The right to personal liberty as is 'the most elementary and important of all common law rights'[74]. In the words of Kirby J, the 'deprivation of liberty

[66] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 216 – 217 per Edelman J.
[67] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 216 – 217 per Edelman J.
[68] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 216 – 217 per Edelman J.
[69] *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1247 per Bell, Keane, Nettle and Edelman JJ.
[70] *United States v Brown* (1965) 381 US 437 at 458.
[71] *United States v Brown* (1965) 381 US 437 at 458.
[72] Douglas Husak, 'Lifting the Cloak: Preventive Detention as Punishment' (2011) 48 *San Diego Law Review* 1173 at 1189.
[73] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 632 - 633 per Kirby J.
[74] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 152.

should continue to be seen for what it is. For the person so deprived, it will usually be the worst punishment that our legal system now inflicts.'[75]

It is emphasised that Mr Benbrika's detention under the CDO was served in a prison. Despite having already completed a term of imprisonment, he remained, in effect, a 'prisoner'. As explained by Kirby J in relation to the analogous preventative detention regime in *Fardon*, '[f]rom the point of view of the person so detained, the imprisonment "continues" exactly as it was'.[76]

Apparently in response to concerns of this kind, div. 105A included a requirement that a person detained under a CDO, as far as reasonably possible, must be 'treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment.' Further, it is a requirement under the regime that such a detainee must not be accommodated in the same area of the prison as prisoners serving sentences of imprisonment.[77] The extent to which there was, on the ground, any difference in between the facilities made available to Mr Benbrika, and those available to regular prisoners is unclear.

In *Benbrika*, the plurality drew analogy between the regime established by Div. 105A and protective detention regimes for persons suffering from mental illness or infectious disease. It was observed: 'there is no principled reason for distinguishing the power of a Ch. III court to order that a mentally ill person be detained in custody for the protection of the community from harm and the power to order that a terrorist offender be detained in custody for the same purpose'.[78] Again, this component of the Court's reasoning raises a number of complex issues. Persons do not serve involuntary detention for reasons of mental illness or disease in prison. There are specialised institutions designed for that kind of custody where appropriate levels of treatment and support are made available to restore persons as quickly as possible to liberty.

From the above discussion, it can be seen that these are contentious matters. One can understand why the High Court has, over the years, struggled to reach settled views on the concept of non-punitive detention.

[75] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 634 per Kirby J.
[76] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 634 per Kirby J.
[77] *Criminal Code Act 1995* (Cth) s 105A.4(2); unless that is necessary, or unless the person elects to be so accommodated.
[78] *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 181 per Kiefel CJ, Bell, Keane and Steward JJ.

Kable and Fardon

The author emphasises that *Benbrika* is not the first time the High Court has had to grapple with the punitive/non-punitive dichotomy. Though the decisions *Kable* and *Fardon* concerned powers to detain vested in State courts by State legislation (an area outside the scope of this article), particular aspects of these decisions are nevertheless relevant to the matters that faced the Court in *Benbrika*.

The decision in *Kable* concerned a successful challenge to the validity of the *Community Protection Act 1994* (NSW) ('CP Act'). The object of that statute was 'to protect the community by providing for the preventive detention' of a specified person, Mr Gregory Wayne Kable, upon the expiration of his sentence for manslaughter.[79] In short, the CP Act vested power in the Supreme Court of New South Wales to order the continued detention of Mr Kable in prison for a specified period if it was satisfied on reasonable grounds that Mr Kable was 'more likely than not' to commit a serious act of violence and that it was appropriate, for the protection of a particular person or the community generally that the person be held in custody.

A number of the majority judgments in *Kable* hinged, in part, upon the punitive nature of the legislation. McHugh and Gummow JJ each expressly held that the relevant law was punitive in nature[80] and that it provided for 'punishment by way of imprisonment for what the appellant is likely to do as opposed to what he has done.' [81]

The later decision in *Fardon* involved an unsuccessful challenge to the constitutional validity of the DP(SO) Act. The DP(SO) Act vested power in the Queensland Supreme Court to order the continued detention in custody or supervised release of prisoners serving imprisonment for a 'serious sexual offence' to ensure adequate protection of the community, and to provide continuing control, care and treatment of those prisoners to facilitate their rehabilitation.[82] The Court was vested with power make such an order only if satisfied that the person would constitute a serious danger to the community in the form of 'an unacceptable risk that the prisoner [would] commit a serious sexual offence'.[83]

[79] *Community Protection Act 1994 (NSW)* s 3(1).
[80] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 132 per Gummow J.
[81] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 121 - 122 per McHugh J.
[82] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 3 and 5.
[83] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13(2). Notably, the onus of establishing the serious danger to the community rests on the Attorney-General. It can only be discharged by acceptable, cogent evidence which satisfies the Court to a high degree of probability - s 13(3).

Notably, the Court in *Fardon* was divided on the issue of whether the detention contemplated under the DP(SO) Act was punitive. In their joint judgment, Callinan and Heydon JJ found that the statute was intended to protect the community from predatory sexual offenders, and was 'a protective law authorising involuntary detention in the interests of public safety.' In so saying, Their Honours pointed to several features of the Act including its stated objects to ensure protection of the community and to facilitate rehabilitation, and the fact that the focus of the inquiry in determining whether to make a CDO was on whether the prisoner was a serious danger, or an unacceptable risk to the community. McHugh J also held that the relevant legislation was 'not designed to punish' the prisoner. Rather His Honour held that the law was 'designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment'.[84]

Conversely, Gummow and Kirby JJ held that the DP(SO) Act was punitive. In his dissenting judgment, Kirby J observed that '[i]nvalidity does not depend on verbal formulae or the proponent's intent. Rather, it depends upon the character of the law.'[85] Kirby J drew a distinction between the 'civil commitment' of a person to detention, and punishment observing that:[86]

> *'Effectively, the Act does not provide for civil commitment of a person who has completed a criminal sentence. Had it done so, one would have expected commitment of that person to a different (non-prison) institution, with different incidents, different facilities, different availability of treatment and support designed to restore the person as quickly as possible to liberty..'*

Overall, the decisions in *Kable*, *Fardon* and now *Benbrika* disclose the longstanding difficulties that the High Court has had in reaching a settled view on preventative detention regimes and, more specifically, the concept of 'non-punitive' custody.

V SUMMARY

Ultimately, the decision in *Benbrika* raises a number of important (but very difficult) questions that strike at the heart of the federal judicial power. The decision demonstrates the difficulties in reconciling the

[84] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 597 per McHugh J. It has been said that this was a contradiction to His Honour's judgment in Kable where he had held that the relevant law provided for 'punishment by way of imprisonment for what the appellant is likely to do as opposed to what he has done.'
[85] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 635 per Kirby J.
[86] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 635 per Kirby J.

judicature's role as a 'bulwark of liberty',[87] with its evolving function in preventing communities and institutions from harm.

[87] *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-13 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ.