KABLE v DPP: TAKING JUDICIAL PROTECTION TOO FAR?

*Robert Orr**

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The recent decision of the High Court in *Kable v The Director of Public Prosecutions for New South Wales*[1] is a significant development of the concept of judicial power in the Australian Constitution, and is evidence of the ongoing tussle between the executive, the Parliament and the judiciary in our constitutional system. I would like to reflect briefly on an aspect of the history of this tussle, outline the New South Wales Community Protection Act 1994 (the law before the High Court in *Kable*), summarise what the High Court said about that Act and the concept of judicial power, and then, in a slightly provocative way, raise some issues which I think flow from the decision, and from another recent decision of the High Court on judicial power, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.[2]

A touch of history

In 1688 James II republished the Declaration of Indulgence which sought to suspend penal ecclesiastical laws. On one view this was a great blow for freedom of religion, although James II clearly had other motives. But these laws had been made by the Parliament. In addition to suspending the laws. King James made an order in council directing that the Declaration be read in all churches. Seven Bishops petitioned the King objecting to the order. For this, they were sent to the Tower and tried before the King's Bench for seditious libel. The King's Bench consisted of judges appointed at the pleasure of the King, and some had recently been dismissed. The judges appointed to the King's Bench were generally supporters of the King. Not surprisingly, when confronted with this case, they avoided the constitutional issues, such as whether the King even had power to suspend the penal ecclesiastical laws and whether there was a right to petition the King, and left the matter to the jury, who acquitted the Bishops. This marked the beginning of the Great and Glorious Revolution of 1688.[3]

The Bill of Rights of 1688 stated in Article 1 that the suspension of laws without consent of Parliament was illegal. It stated in Article 5 that it was the right of the subject to petition the King. Whilst by some oversight the independence of the judiciary was not dealt with in the Bill of Rights, the Act of Settlement of 1701 provided that judges' commissions were not at the pleasure of the King, though judges were to be subject to removal upon address of both Houses of Parliament. The trial of the seven Bishops was a pivotal moment in the constitutional history of England, a moment in the struggle between the executive and the legislature and the judiciary. While less dramatic, the decisions in *Kable* and *Wilson* illustrate that such tensions continue today.

* *Robert Orr is Deputy General Counsel, Commonwealth Attorney-General's Department*

The Community Protection Act 1994 (NSW)

The *Kable* decision concerned the Community Protection Act 1994 *(NSW)*. The Act provided that on application by the New South Wales Director of Public Prosecutions, the Supreme Court could order the detention in prison of a person, if it was satisfied on reasonable grounds that:

- the person 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 persons or the community that the person be held in custody.

The maximum possible period of detention was 6 months, but further orders could be made.

Section 17 provided that the Court was bound by the rules of evidence, but there were specific provisions about obtaining reports which led members of the High Court to suggest that in significant respects the accepted rules of evidence did not in fact apply.

The Act stated that proceedings were civil proceedings (s. 14), and were to be determined on the balance of probabilities (s. 15). Section 3 stated that in construing the Act, the need to protect the community was to be given paramount consideration. Section 3(3) stated that the Act authorised the making of a detention order against Gregory Wayne Kable, and not any other person. The Bill for the Act had originally been introduced into Parliament as a general measure, but section 3(3) and related provisions were added during passage.

Gregory Wayne Kable had stabbed to death his estranged wife in the house in which she lived with the two children of their marriage. Prior to the stabbing, Mr Kable had behaved violently towards his wife, and he was the subject of an apprehended violence order. He pleaded guilty to a charge of manslaughter upon the basis of diminished responsibility, and was imprisoned for over five years. While he was in prison he wrote threatening letters to various members of his wife's family, some of whom had custody of the children. He was charged with relevant offences, but at the time of his impending release, these charges had not been heard.

In proceedings under the Act against Mr Kable brought by the Director of Public Prosecutions, Justice Levine of the Supreme Court of New South Wales made a detention order. That detention order was the subject of an appeal to the Court of Appeal of New South Wales, which upheld the order,[4] and then to the High Court. While the appeal proceedings were progressing, Justice Grove of the Supreme Court of New South Wales refused to make a further detention order in relation to Mr Kable. On 21 August 1995, Mr Kable was released.

The High Court's decision

The High Court, by a majority of four to two (Toohey, Gaudron, McHugh and Gummow JJ, Brennan CJ and Dawson J dissenting) allowed the appeal and held that the Act was invalid. There were a number of grounds upon which it was argued before the Court that the Act was invalid. It was suggested that the Act was an improper exercise of judicial power by the Parliament of New South Wales, on the one hand, and that it was an improper conferral of legislative power on the Supreme Court of New South Wales, on the other. The basis of the High Court's decision was that the Act was invalid because it infringed Chapter III of the Australian Constitution which, the Court held, prohibited the conferral on the Supreme Court of New South Wales of such non-judicial powers as those contained in the Act.

Each of the four Justices who comprised the majority wrote a separate judgment, but time does not permit me to outline the reasoning of each. In some areas there are significant differences. But in summary, the reasoning of the majority was as follows.

First of all, the Court (in particular Gaudron, McHugh and Gummow JJ) held that there is an integrated system in Australia for the exercise of federal judicial power. Section 71 of the Australian Constitution provides that the judicial power of the Commonwealth is vested in the High Court, in such other federal courts as the Parliament creates, and in such other courts as Parliament invests with federal jurisdiction. These other courts (which are State courts and have jurisdictions pursuant to s. 77 of the Constitution) are not less worthy courts, or subordinate in any sense. Rather, in this integrated system, these other courts play an equal role. The Justices drew on s. 73 of the Constitution, which provides for the appellate jurisdiction of the High Court, to reinforce this view of an integrated judicial system with the High Court at its apex. The Justices also drew on s. 118 (full faith and credit for judicial proceedings), s.51(xxiv) (service and execution of process and judgments) and s.51(xxv) (the recognition of the judicial proceedings of a State). Justices McHugh and Gummow suggested that there is a unified system of common law in Australia. Justice Gummow stated that 'there is but one stream of authority in Australia and it flows from this Court throughout the nation'.[6]

Secondly, the Court noted that for the purpose of vesting federal judicial power, the Commonwealth has to take the State courts as it finds them. But the majority held that this proposition had been overstated. They said this proposition relates only to appointments to the courts, their administration and their State jurisdiction. Otherwise those courts are subject to the limitations imposed by Chapter III of the Australian Constitution.

Thirdly, the Court articulated the limitations which Chapter III imposes on State courts.

- There must be State courts which can exercise federal judicial power. Several of the Justices specifically rejected the contention that a State could, in essence, abolish their Supreme Courts, and have no courts able to exercise federal judicial power.

- A State could not prevent a right of appeal from its Supreme Court to the High Court. Justice McHugh said the Constitution had withdrawn any such power from each State.

- Most importantly, a State could not invest in a Supreme Court functions that are repugnant to, or inconsistent with, offensive to, or incompatible with federal judicial power. A State could invest its Supreme Court with non-judicial functions only if such functions were not incompatible with judicial functions.

The Court drew this incompatibility doctrine from *Grollo v Palmer*[6] and *Wilson*. Those decisions do not deal directly with the exercise of federal judicial power. Rather they are concerned with the *persona designata* doctrine, that is the performance of non-judicial functions by persons who are judges. The Court held in *Grollo* that judges could not exercise *persona designata* functions incompatible with their judicial role. In *Kable*, the Court in a sense borrowed this incompatibility doctrine, and imposed it as a restriction on the functions that State Parliaments are able to confer on State Courts which exercise federal jurisdiction.

In addition, various American authorities were relied on, in particular the decision in *Mistretta v United States*,[7] which was

referred to in *Wilson*, and also in *Grollo*. *Mistretta* concerned the establishment of the United States Sentencing Commission. That Commission was an independent body, but was said to be part of the judicial branch. The Commission made guidelines, in effect binding rules, in relation to sentencing by federal courts. Some of the members of this Commission were judges. The US Supreme Court held that the Commission was validly established. But in doing so, the Court articulated an incompatibility doctrine for federal judges.

As to the rationale for the principle in this context, Gaudron J held that there is a necessity to ensure the integrity of the judicial process. Public confidence in that judicial process must be maintained and the courts must be, and must be seen to be, independent. Justice McHugh said that a State Parliament could not confer functions on the courts that might lead an ordinary member of the public to conclude that the courts were not independent of the executive, or were biased in favour of the executive.

So, applying this incompatibility principle to the New South Wales Act, the Court held that the Act exhibited a number of features which fell foul of this limitation upon the exercise by the Supreme Court of federal judicial power. A number of these can be mentioned.

First of all there was imprisonment involved. Mr Kable was detained by order of the Court. The High Court had considered issues concerning compulsory detention in *Polyukovich v The Commonwealth*[8] and *Chu Kheng Lim v Minister for Immigration*.[9] In a sense this decision is a further development of the Court's judgments in those cases. The Court in effect stated that it is inconsistent with the exercise of judicial power for a court to be empowered to imprison persons except for traditional reasons and by a traditional judicial process.

Secondly, the Act provided for imprisonment without a crime - imprisonment on the basis of what a person might do, rather than what he had done. An order under the Act was a preventive order. The NSW Court of Appeal had not seen this as a problem. Mahoney JA had stated that 'the ordinary citizens would, I suspect, see it as more important that harm be prevented than that it be punished' (at 377).

Thirdly, the Court suggested that the Act failed to set up a proper judicial process. Rather, an essentially non-judicial process had been dressed up with judicial trappings. Justice Gaudron stated that it was a 'mockery of the judicial process'.[10]

Fourthly, the Act focussed upon one person. It was not a law of general application. Justice Gaudron in particular commented that laws applied by the judiciary must be laws of general application. There was some discussion of the fact that the legislature has made a range of laws which are addressed to one person or one situation. But this factor added to the Act's bundle of inappropriate attributes.

Fifthly, the process set out in the Act was not otherwise known to law. It was novel. There was one example, a Victorian law, which came close, but that law had been much criticised.

These characteristics, and others, in combination suggested that the Act conferred an incompatible function on a court which exercised federal judicial power. There are some suggestions in the judgments that if some of these attributes had not been present then the Court might not have found the Act invalid. Justice Toohey, in particular, suggests it was a combination of these factors which led him to this conclusion. But, of course it is difficult to say which of the factors if left out would have resulted in validity. In summary, the Court held that the Act made the NSW Supreme Court an

instrument of the legislature and the executive government. The authority and standing of the judiciary was being borrowed by the executive and the legislature. The functions conferred by the Act upon the NSW Supreme Court were incompatible with federal judicial power and therefore the Act breached Chapter III of the Australian Constitution.

Comment

I would like to make a number of brief comments about the decision.

First of all, the Court's reasoning is interesting. The basis of the decision is an implication drawn from the structure and terms of Chapter III of the Constitution. The minority Justices were unwilling to draw this implication. Chief Justice Brennan said that there is no textual or structural foundation for this implication. He noted that there are no earlier relevant cases nor any relevant debate in the Conventions. He concluded that the concept of incompatibility based on *Grollo* was simply irrelevant to this situation. But, as noted above, the majority was prepared to draw the implication. Justice McHugh stated that there is an assumption in the Constitution that there will be State courts, that they will be courts capable of exercising federal judicial power, and that there will be functions which the State cannot confer on those courts because they are incompatible with the exercise of federal judicial power. The substance of the principle is drawn by analogy from the distinct but related test developed by the Court with regard to the *persona designata* doctrine.

Secondly, this case marks a major development in the High Court's thinking about judicial power. It now appears that State Courts which exercise federal jurisdiction are subject to an aspect of the separation of powers doctrine in the Australian Constitution in relation to their functions under State laws.

Thirdly, there is not a great deal of talk about human rights in the decision. Justice Gaudron does say that one central purpose of the judicial process is to protect the individual from arbitrary punishment.[11] I briefly noted above her comments about the need for general rules and equal justice. But the other Justices are more concerned with the reputation of the courts than the liberty of subjects. However, the effect of the decision may be to limit the powers of governments to imprison their subjects.

Fourthly, the test for incompatibility interestingly rests squarely on what reasonable ordinary members of the public are assumed to think. I think it is interesting that in a constitutional context we have a test which is based on the opinion of ordinary reasonable members of the public. It would be possible to obtain evidence of what ordinary members of the public think, although the High Court had no such evidence before it. But, we have sophisticated electoral and parliamentary systems which are meant to reflect what the people of New South Wales and Australia think. The Parliament of New South Wales had, after significant debate, passed the Act the subject of the *Kable* decision. The appointment of Justice Mathews (considered by the High Court in *Wilson*) was publicly made by the Minister for Aboriginal and Torres Strait Islander Affairs, and he was accountable to the Commonwealth Parliament for that decision. In a sense the Court is disregarding that evidence about "what the people think" and relying, in essence, on what it thinks is appropriate or inappropriate.

Fifthly, we now have in effect two judicial power tests, judicial power test A and judicial power test power B. Judicial power test A applies to functions which can be conferred by the Commonwealth Parliament on the High Court, on other federal courts created by the Commonwealth Parliament and on State

Courts. It is difficult enough to apply. Judicial power test B applies to judges of the High Court and federal courts when they are exercising *persona designata* functions, and also applies to State Courts which exercise federal jurisdiction in relation to their State functions. This is also a difficult test to apply, resting, as I have noted, on what reasonable ordinary members of the public think, but not on what their elected representatives think. It requires an assessment as to whether the function is repugnant to, or inconsistent with, or incompatible with, or offensive to, Chapter III of the Constitution. This makes it difficult to advise governments on what they can and what they cannot do in implementing their policy objectives.

Sixthly, the case highlights that the principle of judicial power is a conservative force. Judicial functions are to a large extent functions the courts have traditionally exercised, in the way they have traditionally exercised them, and non-judicial functions are functions which the courts have not traditionally exercised. In *Brandy v The Human Rights and Equal Opportunity Commission*,[12] the Court stated that in the end, judicial power is power exercised by the courts and is defined by what the courts do and the way in which they do it.[13] This is a circular definition. In a sense that ties the hands of the Commonwealth - and now, after *Kable*, the hands of the States. It means that in developing new policies, processes and systems to deal with issues troubling the Australian community, governments are bound to a significant extent to what courts have traditionally done and the ways they have traditionally done them. Further, in the *Kable* decision, Justice McHugh looked to what judges have traditionally done, and he noted that Justices of State Supreme Courts often acted as Governor of States. Governors of States are heads of, and represent the executive of the State. Nevertheless, the High Court found that this did not compromise the independence of the courts from the executive. The concept of a judge acting as head of the executive is acceptable because judges have traditionally done so. In any event, the doctrine is a conservative one; courts and judges can only be asked to do what they have traditionally done, and even some of these functions may need to be reassessed. There is a somewhat different emphasis in some of the American cases. In *Mistretta* the US Supreme Court said that the constitutional principle of separated powers was not violated by mere anomaly or innovation.

The seventh point takes us back to James II, the House of Commons and the King's Bench. What does *Kable* say about the current relationship between the executive, the legislature and the judiciary? I have to disclose my interests as an adviser of the executive, and whilst I do not want to make comments which show I am oversensitive, I do want to provoke some discussion. On one view we have moved away from a separation of powers doctrine, to a judicial protectionism doctrine. The separation of powers doctrine is based on checks and balances between the three arms of government. It seeks to protect the role of each. It should lead to a concern about issues such as the delegation of legislative power, which the *Mistretta* decision discusses. It should include a concern with interference in the executive power by other arms of government. Rather than considering these broader issues, the Australian courts seem to be particularly concerned with protecting judicial power and reputation. And there is a certain amount of antagonism to the executive and to the legislature. Notwithstanding that we are now well removed from the 17th century, the Court seems to see the judiciary as still under threat.

The Court stated in *Kable* that the Act under consideration might lead people to think the Supreme Court was simply an instrument of the executive government. There was concern that the judicial reputation should not be borrowed, and

therefore sullied, by other arms of government. But I think we could equally say that it may be useful for the Australian community if judicial skill and reputation were available to assist society to deal with significant issues. *Kable* and *Wilson* concern such issues. In the Act under consideration in *Kable*, the New South Wales Parliament was grappling with the issue of apprehended violence. In the actions under consideration in *Wilson*, the executive was seeking to deal with an Aboriginal heritage issue which had become a matter of great controversy. Notwithstanding the importance of these issues, the judiciary has sought to distance itself from them, and leave the other arms of government to do their best. It seems that the skill and reputation of judges are not to be available to deal with these issues.

In *Mistretta* there is discussion of the concept of reciprocity amongst the branches of government. There, the Court noted that in order to facilitate workable government, some conversing may take place between the co-ordinate branches on matters of vital interest. Perhaps the co-mingling in *Kable* and *Wilson* was too extreme, but facilitation of workable government on matters of vital interest is clearly something which we should expect from our constitutional system. Arguably, these decisions of the High Court have done little to further this objective.

Endnotes

1 (1990) 136 ALR 577.
2 (1996) 138 ALR 220.
3 See generally Theodore Plucknett, *Taswell Laymead's English Constitutional History* (11th ed 1960).
4 *Kable v Director of Public Prosectuions* (1995) 36 NSWLR 374.
5 (1996) 138 ALR 577.
6 (1995) 184 CLR 348.
7 (1989) 488 US 361.
8 (1991) 172 CLR 501.
9 (1992) 176 CLR 1.
10 (1996) 138 ALR 517.
11 *Id.*
12 (1995) 127 ALR 1.
13 *Ibid* 17.