DO HARD LAWS MAKE BAD CASES? — THE HIGH COURT'S DECISION IN *KABLE V DIRECTOR OF PUBLIC PROSECUTIONS (NSW)*

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INTRODUCTION

In 1994 the New South Wales Parliament passed an extraordinary piece of legislation, the demise of which one is hard-pressed to mourn. Be that as it may, the means by which that demise was achieved are hardly to be celebrated, as the High Court decision which accomplished the task represents a further entrenchment of the unfortunate doctrine of "incompatibility" introduced the previous year in *Grollo v Palmer and Others*.[1] In short, the decision in *Kable v Director of Public Prosecutions (NSW)*[2] extends the doctrine of incompatibility to State courts so that State parliaments, although they remain entitled to usurp the functions of those courts, cannot assign to those courts any powers whose exercise is incompatible with the judicial power of the Commonwealth vested in those courts by Commonwealth legislation. In this respect, the decision represents the worst of both worlds by placing severe limitations on State courts without any corresponding limitations on State parliaments (except to the extent they may wish to confer powers on the courts in question). The result is that the States have judiciaries which are half-independent, and that half is the less important half.

The Act

The Community Protection Act 1994 (NSW) (the Act) purported to empower the Supreme Court of the State to order the detention of one person, Gregory Wayne Kable, for up to 6 months "if it is satisfied, on reasonable grounds: (a) that [he] is more likely than not to commit a serious act of violence; and (b) that it is appropriate, for the protection of a particular person or persons or the community generally, that [he] be held in custody".[3] Mr Kable had been convicted and imprisoned in 1990 for the manslaughter (by stabbing) of his wife. It was believed that he had made a practice while in prison of writing threatening letters to members of his wife's family, and to his own children.[4] At the time the Act was passed, his release was imminent. Hunter J made an interim order against him two days before his minimum sentence expired; at

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1 (1995) 184 CLR 348.

2 (1996) 138 ALR 577.

3 Section 5(1), together with s 3.

4 (1996) 138 ALR 577 at 607 per Toohey J.

that time he was in custody pending the hearing of 17 charges under s 85S of the Crimes Act 1914 (Cth) relating to his alleged use of the mail for sending threatening letters. On 23 February 1995, Levine J made an order under the Act for Mr Kable's detention for 6 months. The Court of Appeal of New South Wales dismissed an appeal against that order in May, and the High Court heard this appeal on 7 and 8 December 1995. In the meantime, that is, on 21 August 1995, Grove J had refused to grant a further order under the Act, with the result that Mr Kable was released from prison. Prior to the hearing of the High Court appeal, he had obtained a permanent stay of the federal charges on the ground of double jeopardy.[5] The High Court's decision was handed down on 12 September 1996.

Several aspects of the Act made it very unusual. First and foremost, it purported to grant the Supreme Court the power to order the involuntary incarceration of a mentally sound person for what that person was likely to do in the future, rather than for what that person had done in the past. The problematic nature of this feature of the Act was compounded by the provision that there was only one person against whom an order could be made under the Act. (It might be noted that this very limited operation of the Act makes the title's reference to "community protection" a little misleading — the incarceration of one person can hardly have the effect of protecting a whole community!) Furthermore, the Act provided that proceedings under it were "civil proceedings" (meaning that the burden of proof was only on the balance of probabilities)[6] and that some evidence was to be admissible, though it would not have been admissible in a normal criminal trial.[7] Such legislation clearly rings alarm bells for any person who cares about civil liberties; it also raises clear concerns about the restriction of the judiciary to the exercise of judicial power.

Precedent on the New South Wales Constitution

The problem is that neither of these concepts — civil liberties or the separation of judicial power — has any legal status under the Constitution Act 1902 (NSW) (the Constitution Act). Improper, undesirable and contrary to tradition though the legislation may have been, the sovereign status of the New South Wales Parliament and the absence of a doctrine of separation of judicial power under the Constitution Act meant that there could be no legal challenge to the legislation on either of those grounds. In particular, *Building Construction Employees' and Builders' Labourers' Federation of NSW v Minister for Industrial Relations* (the *BLF* case)[8] had made it very clear that the Constitution Act contains nothing to prevent the exercise of judicial power by the Parliament of the state. In that case, the Parliament had legislated to dictate the outcome of pending administrative law proceedings involving the deregistration of a union. This usurpation of judicial power — which would clearly have been unconstitutional if attempted by the Commonwealth Parliament against the judicial power of the Commonwealth — was tolerated on the ground that the Constitution Act does not provide for separation of powers between the legislature and

5 Information obtained during the course of a conversation with Mr Kable's solicitor, Angus Neil-Smith of Brezniak Neil-Smith & Co, on 16 December 1996. Mr Neil-Smith also informed me that after the High Court's decision came down he filed a false imprisonment claim on Mr Kable's behalf against the New South Wales government.

6 Section 14.

7 Section 15.

8 (1986) 7 NSWLR 372.

the judiciary. Indeed, the judiciary at the time had no protection at all under the Constitution Act.[9] The decision in *Kable* did not purport to disturb the Court of Appeal's finding in the *BLF* case, but rather struck down the Act on the basis of separation of judicial power under the Commonwealth Constitution (the Constitution).

Before going on to consider the grounds of the *Kable* decision, it may be instructive to pause for a moment and consider the persuasiveness of the distinction between the facts in that decision and those in the *BLF* case. If the Parliament could dictate the outcome of pending litigation, why could it not effectively incarcerate a person on any grounds it saw fit? It is true the *BLF* case concerned a legislative usurpation of judicial power and the Community Protection Act involved the judiciary in activities outside its normal role. However, this distinction may be a little too fine for many people's liking. Both cases can be seen as involving the legislature using the judiciary as an instrument of its own specific ends in an individual case, for in both cases the ultimate order issued from the judiciary. In both cases, then, the government (through Parliament) was in effect using the judiciary to "do its dirty work". The impermissibility of such use is exactly what lies at the heart of the constitutional doctrine of separation of judicial power. In the oft-quoted words of the United States Supreme Court: "[The Judicial Branch's] reputation [for impartiality and nonpartisanship] may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action".[10] Thus the distinction between *Kable* and the *BLF case* is by no means cut-and-dried; moreover, if there is such a distinction, it is possible to argue that the legislation challenged in the *BLF* case provided an even clearer example of parliamentary use of the judiciary, for that legislation left the judiciary with less discretion. It dictated the outcome of an individual case rather than simply conferring a power and laying down criteria and a procedure for its exercise. The only role left for the judiciary was to declare the result; under the Community Protection Act, on the other hand, the judge was left to determine the result. Therefore, at least to the extent that both cases raised issues relating to governmental (mis)use of the judiciary, there is room for debate as to whether the High Court has impliedly overruled the earlier case, statements to the contrary by some members of the *Kable* court notwithstanding. At the same time, there is no reason to conclude that the State Parliament's capacity to exercise judicial power on its own account has been disturbed. It is not doubted that the Parliament itself could have ordered, and still could order, the detention of any person on any ground it saw fit — or indeed on no ground at all. The implications of this proposition are discussed below.

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9 Amendments since then have introduced a measure of protection to judicial tenure, but this protection has been entrenched only since April 1995 — after the events in question in this case. It is not entirely clear whether such protection would have made a difference to the views of the two dissenting judges in *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

10 *Mistretta v United States* 488 US 361 at 407 (1989). Quoted in *Grollo v Palmer* (1995) 184 CLR 348 at 366 per Brennan CJ and Deane, Dawson and Toohey JJ; *Kable* (1996) 138 ALR 577 at 636 per Gummow J; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220 at 225 per Brennan CJ and Dawson, Toohey, Gummow and McHugh JJ.

The incompatibility doctrine

Turning now to the precedential basis on which the *Kable* decision did rest, this consisted of the principles laid down in the *Boilermakers'* case[11] as elaborated in *Grollo v Palmer*, decided in 1995. The former case expounded the doctrine of separation between judicial and other governmental powers under the Commonwealth Constitution, which requires not only that the legislative and executive branches not exercise judicial power, but also that members of the judicial branch not exercise any governmental power that is not judicial. The latter aspect of the doctrine has been refined in later cases to establish that individual federal judges may on isolated occasions exercise legislative or executive power as *personae designatae*,[12] provided that the exercise of such powers is not inconsistent with the judge's exercise of judicial power. According to the majority in *Grollo*, such incompatibility may arise in three ways: (1) as a result of "so permanent and complete a commitment to the performance of non-judicial functions by a Judge that the further performance of substantial judicial functions by that Judge is not practicable"[13] (overcommitment situations); (2) as a result of "the performance of non-judicial functions of such a nature that the capacity of the Judge to perform his or her judicial functions with integrity is compromised or impaired"[14] (compromised integrity situations); or (3) as a result of "the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual Judge to perform his or her judicial functions with integrity is diminished"[15] (diminished public confidence situations).

This analysis did not lead to what one might have thought was the obvious conclusion on the facts in *Grollo*. That case involved a challenge to legislation granting to some Federal Court judges the (executive) power to issue warrants for the use of listening devices in the course of criminal investigations.[16] A majority upheld the legislation, even though the judges' functions under it were exercised in secret and there was a real chance that any judge who issued a warrant could potentially be called on to preside over judicial proceedings in the same case. Rather than recognise this legislation as a very clear instance of the government attempting to avoid responsibility for the controversial aspects of the subject-matter by using judicial officers, the majority instead applauded the introduction of independent decision-makers into this area. The use of the judiciary was interpreted as an attempt to safeguard civil liberties, rather than an attempt to disguise their violation.[17]

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11 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

12 *Hilton v Wells* (1985) 175 CLR 57.

13 (1995) 184 CLR 348 at 365 (footnote omitted).

14 Ibid.

15 Ibid.

16 Telecommunications (Interception) Act 1979 (Cth), ss 6D, 6H, Pt VI Div 3, and Pt VI Div 4.

17 On the other hand, in another decision handed down only days before *Kable*, the High Court found that the use of a federal judge to investigate a matter of Aboriginal heritage and report to the Minister was incompatible on the ground that the judge's functions were too closely linked to those of the Minister: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220. The judge's function did not involve the making of any decision but only the collection of information and the making of recommendations, apparently the logic of *Grollo* (where judges were in fact making administrative decisions

Application of the doctrine in *Kable*

In *Kable*, a 4:2 majority of the High Court extended the incompatibility rule to State courts, striking down the Act on the ground that it fell into the third category — that is, that the involvement of the judiciary in ordering the continued incarceration of Mr Kable constituted a diminished public confidence situation.[18] In the view of the majority, the Australian people could not have confidence in State courts when exercising the judicial power of the Commonwealth if those courts have been party to the exercise of the kinds of powers the Act conferred. Previously one might have thought that the well-accepted proposition that when the Commonwealth confers its judicial power on State courts it takes them as it finds them[19] meant that it takes them without the protections and entrenched separation of power enjoyed by federal courts. That is, if the Commonwealth wishes to confer its judicial power on State courts, it needs to recognise and accept that those courts are subject to having their processes interfered with by the relevant State legislature or executive. It is one thing to say that in the exercise of the judicial power of the Commonwealth they are not so subject, for such interference would surely amount to an inconsistent law[20] or an occasion for the application of the doctrine of inter-governmental immunities. What the majority said in *Kable*, however, was that the Constitution requires that State courts remain in existence and remain able to accept the judicial power of the Commonwealth; and that such acceptance is impossible if the State government or parliament has put the court in a position of acting in a manner incompatible with the exercise of federal judicial power, *even in the exercise of its powers under state law.*

Critique of the incompatibility doctrine and the assumptions on which it is based

The incompatibility rule has some serious problems. The invalidation of legislation under the rule involves four assumptions: (1) the judiciary needs public confidence in order to fulfil its functions effectively; (2) the judiciary currently enjoys public confidence; (3) the public perceives the judiciary as independent of the political branches of government; (4) there is a causal connection between (2) and (3) — that is, public confidence in the judiciary is caused by the perception of its independence. All of these assumptions are open to challenge, yet none of the majority judgments anticipates, let alone attempts to address, such potential challenges.

To say that the first assumption is open to challenge is not to say that the Australian judiciary does not enjoy public confidence, but it is not difficult to postulate a plausible alternative theory for the success of the judiciary in Australian society. If such a theory could be proven, we could conclude that the effectiveness of the judiciary does not depend on public confidence. For example, the judiciary's effectiveness might be grounded in the success of the legal profession in mystifying the law, so that lay-people believe they cannot possibly ever understand the law and so they do not have the tools or the raw materials to construct an informed critique of the work of the judiciary (and so they might as well not try). On such a theory, confidence in the judiciary does not

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did not extend to situations where the use of an independent party such as a judge could help to ensure that fair procedures were followed and full information obtained.

18 (1996) 138 ALR 577 at 608 per Toohey J; at 616 per Gaudron J; at 622-29 per McHugh J; at 636 per Gummow J.

19 *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308.

20 That is, invalid under s 109 of the Constitution.

derive from perceptions of its impartiality and integrity but rather (perceived) lack of capacity on the part of observers to reach an understanding of the nature of judicial work. Before the majority's judgments in *Kable* can be convincing, they need to test their theory, and ideally they should do that testing against such other plausible theories as might be identified. There is no such attempt in the majority judgments.

It is difficult to see how conclusions can be reached about the existence of public confidence in the courts, much less about the effect of any particular judicial activity on that confidence, without actually seeking the views and impressions of members of the community. The majority judgments in *Kable* fail to do so, and lack persuasiveness for this reason. This is all the more so given the fact that an alternative basis for the judiciary's effectiveness can be suggested:[21] if that effectiveness can be based only on public confidence, it provides evidence of that confidence, but if there is another plausible explanation for the judiciary's effectiveness, that effectiveness does not tell us anything about the existence or otherwise of public confidence in the institution. Nor is there a sufficient basis on which to conclude that the public believe that the judiciary is independent of the government. It is not outlandish to suggest that a large section of the population sees the legal system — including parliament, the executive, the police and the judiciary — as a monumental edifice, or even a conspiracy.

Moreover, the judges in the majority do not offer any kind of evidence that public confidence in the judiciary was in fact undermined by the Supreme Court's involvement in exercising jurisdiction under the Act. There is no reference to the amount of publicity the passage of the Act received or the amount of detail contained in such publicity, so we cannot even be sure just how broad a cross-section of the community would have known of the Act's existence, much less known and understood its precise content. The prospect of confidence being undermined begins to look remote given the uncertainty as to the existence of the knowledge and understanding which would form the basis for such undermining.

It is not a sufficient answer to these observations to say that the real concern is the possibility of confidence in the judiciary being undermined, rather than whether it was actually undermined. The two issues cannot be so neatly separated out. The majority judges' repeated claim that the basis of the incompatibility doctrine is the necessity of public confidence to the effective exercise of the judicial power is a very concrete one, so it is not unreasonable to expect some concrete evidence to back it up. Even if it cannot be questioned whether public confidence is necessary to the effective exercise of judicial power, the High Court should be willing to offer some clear evidence of the effect its doctrine seeks to avoid before it strikes down legislation which is otherwise within power. Of course there are severe doubts as to whether the High Court has the resources needed to gather such information. However, the answer to this observation is not to dispense with the information but to dispense with the doctrine. A doctrine which requires the production of information which the High Court is institutionally incapable of gathering simply has no place in the High Court's arsenal.

A further difficulty with the decision in *Kable* is the very notion that members of the public were likely to see the Supreme Court as doing the bidding of the executive government when exercising its power under the Act. Grove J's refusal of the second application would surely be quite persuasive evidence against such a conclusion, but

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21 For example, the bases suggested above, that people see no point in opposing the judiciary or do not believe they can ever reach a fully informed opinion about the work of the judiciary.

perhaps we cannot credit the public with the capacity to appreciate such subtleties. On the other hand, if they could not appreciate those subtleties, one must wonder how they could appreciate the subtle difference between an application by the Director of Public Prosecutions for a person's incarceration for past violence (a criminal trial by any other name) and an application by the same officer for a person's incarceration for expected violence. The majority judges were on shaky ground not just in assuming that the exercise of the Supreme Court's powers under the Act would detract from community perceptions of the Court's independence, but more fundamentally in assuming that such perceptions would have been affected in any way at all, or indeed that such perceptions existed in the first place, at all events at a sufficiently sophisticated level for the relevant distinctions to be drawn.

Kable establishes a semi-separate State judiciary, with adverse implications for civil liberties

Perhaps the most troubling aspect of the case, however, is the fact that the semi-separate judiciary which it establishes may leave individuals even worse off than they were before we knew that the incompatibility doctrine acts as a constraint on State legislative power. I say "semi-separate" because the separation doctrine, as usually understood, has a reciprocal aspect: it limits the powers that can be exercised by both the parliament and the judiciary. *Kable* operates only on the judicial side, meaning that it leaves intact the parliament's capacity to exercise judicial power. As has already been noted, the parliament could have ordered Mr Kable's incarceration on its own account, without involving the Supreme Court. Therefore, the true effect of the decision in *Kable* is to encourage State parliaments facing similar temptations in the future to dispense with procedural safeguards.

The semi-separation established by *Kable* might have a salutary effect if it prevented the parliament from escaping political responsibility for its policies and actions. Indeed, this goal is probably the most important one of the independence/ incompatibility doctrine, for it grounds the principle discussed above, that the government cannot use the judiciary to "do its dirty work", in the imperatives of the integrity of the democratic process. However, there are real doubts as to whether this was the Act's real effect or even its intention, for the policy underlying the Act was one which could expect a warm reception from the electorate, in these days of "law and order" hysteria. The electorate are not notorious for insisting upon the importance of a fair trial for the criminally accused; they are far more likely to place a premium on just such a matter as "community protection". In other words, it is hard to believe that the government's electoral fortunes suffered as a result of the Act, much less that those fortunes would have suffered even more if the Act had not placed ultimate power in the hands of the Supreme Court.

On this analysis, might we not say that the government was exercising considerable *restraint* by involving the judiciary in the decision-making process under the Act? That involvement represents not an attempt by the government to shelter behind the "neutral colors of judicial action" but rather an attempt by the government to give Mr Kable a fighting chance while still allowing the government to reap the political rewards of being "tough on crime". A cynic might suggest that the court's role merely represents an attempt to appease the civil liberties lobby in the run-up to an election, but it is doubtful that that lobby would have been seen as sufficiently influential in New South Wales to make such a difference. Either way, the Act can be seen as a

compromise between the government's vote-grabbing intentions and solicitude for the rights of Mr Kable, rather than an attempt by the government to use the judiciary as a shield against electoral fallout from the government's policies.

The government had not two but three possible courses: to allow Mr Kable to go free, to order his continued incarceration, or to empower the judiciary to order his incarceration. The majority's decision in *Kable* would have addressed the problematic aspects of the Act if only the first and third options had been open — but the existence of the second option means that the Act probably placed Mr Kable in a better position than he would otherwise have been in, and the decision represents merely an invitation to State parliaments to dispense with procedural safeguards when they face a temptation to infringe civil liberties. Therefore, from a civil liberties point of view, unless the Parliament could be prevented from exercising the second option, the Act represented not the second best but the "least worst" alternative. Mr Kable did have a fighting chance under the Act, and this is amply illustrated by the fact that the second application for his preventive detention was refused. The striking-down of the Act removed that fighting chance, and therefore can hardly be considered a triumph for civil liberties.

The fate of the Community Protection Act — indeed the incompatibility doctrine itself — ultimately provides another stone in the edifice of the argument against the development by the judiciary of implied rights and freedoms. The High Court as we have known it since 1904 is simply not an appropriate institution to perform the relevant tasks: its incremental, case-by-case procedure does not provide it with the opportunity to cover all potential aspects when identifying rights and freedoms for protection,[22] and the adversarial system (albeit tempered by provision for intervention by governments and other interested parties) does not necessarily provide it with all the information it needs. Whether or not one of the judicial intentions behind the decision in *Kable* was the protection of the rights of an individual against the state, the same arguments apply. Even the noblest of intentions cannot excuse the development of a doctrine for the proper application of which the Court simply does not have the necessary information.

The incompatibility doctrine is limited in its ability to achieve its stated aims

Finally, it is worth noting that there has not been any indication that the incompatibility doctrine might also cover exercises of *judicial* power which might nevertheless tend to diminish public confidence in the judiciary. The judiciary is allowed to bring itself into disrepute, provided it has no help from the legislature or the executive in doing so. This observation throws into question the stated basis of the incompatibility doctrine, which is that the exercise of non-judicial functions in the situations listed "prejudice[s] the capacity either of the individual judge or of the judiciary as an institution to *discharge effectively* the responsibilities of exercising the judicial power of the Commonwealth".[23] If the avoidance of such prejudice is as important as the judgments suggest, it is not immediately clear why the law does not provide a comprehensive

22 See P Alston, "An Australian Bill of Rights: By Design or Default?" in P Alston (ed) *Towards an Australian Bill of Rights* (1994) 1.

23 *Grollo* (1995) 184 CLR 348 at 365 (emphasis added); see also *Mistretta v United States* 488 US 361 at 407 (1989), approved in *Grollo* by McHugh J ((1995) 184 CLR 348 at 377) and Gummow J (at 392) (suggesting the maintenance of "[t]he legitimacy of the Judicial Branch" as the goal of the doctrine). In *Kable*, see (1996) 138 ALR 577 at 612 per Gaudron J.

scheme for the maintenance of public confidence in the judiciary, in the name of the effective discharge of judicial power — that is, a scheme which covers matters such as individual emotional, financial, political or gender bias. This point is not an abstract one, since it is arguable that nothing in recent years has been so effective in bringing the judiciary into disrepute in the public mind as certain statements by State judges which gave rise to a public perception of bias against women.[24] The incompatibility doctrine, though grounded in a recognition of the importance of maintaining public confidence in the judiciary, has no parallel in the area of addressing other causes of diminution in that confidence. It might be answered that such causes involve no legislation for the Court to strike down — but surely the better conclusion is that the incompatibility doctrine is not about maintaining public confidence in the judiciary at all. It is about limiting legislative and executive power, by preventing those branches from avoiding political responsibility for their actions. This is a worthy enough goal, but it is disappointing to see it "cloaked" in the "neutral colors" of judicial independence.

CONCLUSION

The Community Protection Act was a hard law, both in the sense that it was the act of a government which had been placed in a hard situation and in the sense that it was quite hard on Mr Kable. Ultimately, however, the passage of the Act is not to be regretted as deeply as the High Court decision which struck it down. The case of *Kable* is a bad one in that it represents the further entrenchment of a doctrine which rests on doubtful assumptions which the High Court is both unwilling and unable to defend, and it prevents the use of the State judiciaries for the salutary purpose of protecting the rights of those who would otherwise be (and now are) at the mercy of the majoritarian whims of sovereign parliaments. In this situation at least, then, a hard law has in fact made a bad case.

24 See Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and the Judiciary* (1994); Barbara Ann Hocking, "The Presumption not in Keeping with *Any* Times: Judicial Re-appraisal of Justice Bollen's Comments Concerning Marital Rape" (1993) 1 *Aus Fem LJ* 152.