

SEPARATION OF POWERS AT STATE LEVEL – GOING THE WHOLE HOG INSTEAD OF MAKING THE DOG BARK MANY TIMES

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ABSTRACT

According to orthodox tenets of Australian constitutional law, the doctrine of separation of powers does not apply at State level. Nevertheless, the decision in *Kable v Director of Public Prosecutions (NSW)* had the effect of importing aspects of separation of powers into State law. This paper argues that the changes wrought by *Kable* and subsequent cases applying its rule have so attenuated the orthodox position that the time has come to abandon it. Furthermore, the paper argues that idea that separation of judicial power is not a feature of State Constitutions is at odds with the rule of law and democracy, and that fidelity to these values, as applied in decisions on separation of judicial power by the courts in the United Kingdom and elsewhere in the Commonwealth, provides an alternative basis upon which to find that separation of judicial power applies to the States.

I INTRODUCTION

Part II of this paper discusses the decision in *Kable v Director of Public Prosecutions (NSW)*¹ (hereafter referred to as *Kable*), and the cases that have applied the rule contained in it, identifying the characteristics of courts which State legislation may not undermine. Part III addresses the question of to what extent the rule that separation of judicial power does not exist at State level can be said to survive in the wake of *Kable* and its progeny. Part IV discusses the implication of separation of judicial power in Westminster-style constitutions in light of the doctrine which originated in *Liyana v R* and which has been significantly extended in subsequent cases by the courts in the United Kingdom. This part of the article argues that decisions by State Supreme Courts in Australia rejecting the applicability of separation of judicial power are open to question in light of these decisions. Part V concludes by arguing that the steady extension of *Kable* and the development in overseas case law since *Liyana* provide separate grounds for the High Court to find that the doctrine of separation of judicial power is part of State constitutional law.

II THE KABLE DOCTRINE AND ITS INCREMENTAL GROWTH

Constitutional orthodoxy is to the effect that whereas the Commonwealth Constitution embodies separation of powers between the judicial branch on the one hand and the legislative and executive branches on the other (the consequence of which is that only Chapter III courts may exercise the judicial power of the Commonwealth² and that Chapter III courts may not exercise non-judicial functions),³ in the States and Territories⁴ the rule is to the contrary. State Constitutions are held not embody separation of judicial power,⁵ and that State Parliaments

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¹ (1996) 189 CLR 51.

² As first held in *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54.

³ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁴ Territory courts are bound by the *Kable* doctrine, as held in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

⁵ See, for example *Mabo v Queensland (No. 1)* (1988) 166 CLR 186.

may vest judicial functions in non-judicial bodies⁶ and State courts may be vested with non-judicial functions.⁷ The Constitutions of New South Wales⁸ and Victoria⁹ contain entrenched provisions protecting the tenure of judges, but in all other respects, and in all other States, the protection of the judicial branch from legislative interference relies on unentrenched statutes.¹⁰ To the outside observer this anomaly of Australian constitutional law must seem bizarre, particularly given the fundamental importance of separation of judicial power to the rule of law, which is presumed to be respected in all Australian jurisdictions.

Although, as will be discussed below, the courts maintain that separation of powers does not operate at State (and Territory)¹¹ level, the survival of that rule has become all the more puzzling in light of the decision in *Kable v Director of Public Prosecutions (NSW)*¹² (hereafter referred to as *Kable*), which marked a dramatic shift in the law relating to separation of powers at State level. The doctrine established in that case is that because the existence of State Supreme Courts is presumed under s 73(ii) of the Commonwealth Constitution, and because State Courts are the repositories of the judicial power of the Commonwealth (in that from time to time they exercise the judicial power of the Commonwealth under cross-vesting legislation) under s 77(iii) of the Constitution, those courts cannot be required to perform tasks which are incompatible with the judicial function. This is because the exercise of such tasks was incompatible with the existence of an integrated court system established by Chapter III of the Constitution of which the State courts are a part. As McHugh J stated in *Kable*¹³

..in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts

A key aspect of the decision in *Kable* was that the Commonwealth Constitution does not permit 'differing grades of justice' at federal and State levels.¹⁴ Although in subsequent cases some members of the court held that this statement was limited in its application to State courts in the exercise of federal jurisdiction,¹⁵ by the time cases such as *South Australia v Totani*¹⁶ and *Wainohu v New South Wales*¹⁷ and were decided, it had become established, as Goldsworthy states,¹⁸ that

⁶ See for example s 85(8) of the *Constitution Act 1975* (Vic) and the decision in *Collingwood v Victoria [No. 2]* [1994] 1 VR 652.

⁷ See for example *Momcilovic v The Queen* (2011) 245 CLR 1.

⁸ *Constitution Act 1902* (NSW) s 7B as read with Part 9.

⁹ *Constitution Act 1975* (Vic) s 18(2AA) as read with Part III.

¹⁰ Brendan Gogarty and Benedict Bartl, 'Tying *Kable* down: The uncertainty about the independence and impartiality of State courts following *Kable v DPP (NSW)* and why it matters' (2009) 32 *University of New South Wales Law Journal* 75, 82-4.

¹¹ *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322. In this article, the argument that is made in relation to State courts should be read as applying to Territory courts as well.

¹² (1996) 189 CLR 51.

¹³ *Ibid* 118.

¹⁴ (1996) 189 CLR 51, 103 (Gaudron J). See also 111-15 (McHugh J) and 137-9 (Gummow J).

¹⁵ See, for example, *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 598-9 [37] (McHugh J)

¹⁶ (2010) 242 CLR 1, 48 [70] (French CJ).

¹⁷ (2011) 243 CLR 181, 228-9 [105] (Gummow, Hayne, Crennan and Bell JJ).

¹⁸ Jeremy Goldsworthy 'Kable, Kirk and Judicial Statesmanship' (2014) 40 *Monash Law Review* 75,93.

The 'institutional integrity' of a state court has become the touchstone for validity, without any need to show an adverse effect on the court's exercise of federal jurisdiction.

In passing it can be noted that an interesting aspect of *Kable* is that when the New South Wales Supreme Court was seized of the case, it related wholly to State law, and did not involve the court exercising the judicial power of the Commonwealth. It was only because counsel raised the argument that State courts might (in *other* cases) be required to exercise the judicial power of the Commonwealth that the High Court considered the question of whether the legislation involved in *Kable* impermissibly diminished the integrity of the Supreme Court. Some have argued that counsel thereby artificially recited the case into federal jurisdiction.¹⁹ However, it should be noted that the principal argument advanced on appeal was that separation of powers was part of the New South Wales Constitution, and that the argument about States exercising federal jurisdiction was a subsidiary argument, advanced in case the principal argument should be rejected by the court, as indeed it was.

Despite its radical nature, the *Kable* decision initially appeared to be confined to its particular facts, and led to only one successful challenge of a State law during the ten years after it was made.²⁰ This led Kirby J to suggest that it had been treated as 'a constitutional guard-dog that would bark but once'.²¹ Yet a decade after the decision, a line of cases saw State laws successfully challenged through an application of the *Kable* doctrine.²²

In *International Finance Trust Company Ltd v New South Wales Crime Commission*²³ the court invalidated a provision requiring the New South Wales Supreme Court to hear *ex parte* an application for an order for indefinite sequestration of property on mere suspicion of wrongdoing, which was able to be lifted only on proof that the property was lawfully acquired. The High Court held that the court had been vested with 'a function that was repugnant to a fundamental degree to the judicial process as understood and conducted throughout Australia'.²⁴

In *Kirk v Industrial Court of New South Wales*²⁵ the court invalidated a provision removing the power of the New South Wales courts to review decisions of lower tribunals on grounds of jurisdictional error.²⁶ The High Court held that Chapter III prohibits State Parliaments from legislating so as to alter their Supreme Courts in such a way that those courts no longer meet the description of a 'Supreme Court' as that term is understood in the Commonwealth Constitution. Because a defining characteristic of State Supreme Courts is their capacity to review the decisions of inferior courts and tribunals on grounds of jurisdictional error,

¹⁹ Ibid, 78-9, particularly footnote 21.

²⁰ In *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 Qd R 40.

²¹ In *Baker v R* (2004) 223 CLR 513, 535 [54].

²² For a recent survey of these cases see Suri Ratnapala and Jonathan Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175.

²³ *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

²⁴ Ibid 367 (Gummow and Bell JJ).

²⁵ *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

²⁶ It should be noted that while the decision in *Kirk* was not based on *Kable* itself, it applied a finding in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) to the effect that State Supreme Courts had to retain the essential characteristics of a court (see *Kirk* 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)).

legislation removing the power to review on that ground would deprive a State Supreme Court of one of its essential elements.

In *South Australia v Totani*²⁷ a statute requiring a court to issue control orders against a person simply because they were a member of a prescribed organisation without having themselves committed an offence was struck down. This case is notable in that it related to Magistrates Courts which, unlike Supreme Courts, are not mentioned in the Commonwealth Constitution. Nevertheless, the High Court invalidated the provision on the ground that Chapter III requires institutional integrity and independence of *all* State courts. In this case curial independence was undermined because the Magistrates Court was effectively being required to act as a rubber stamp and interfere with a person's freedom at the behest of the executive simply because that person belonged to an organisation, rather than because they were proved to have engaged in wrongdoing as individuals.

Most recently, a statute requiring that judges of the New South Wales Supreme Court, acting as *persona designata*, issue control orders against organisations simply on the basis of suspicions alleged by the police, resulting in the freezing of the organisation's assets and the prohibition of its members associating with each other, was invalidated in *Wainohu v New South Wales*.²⁸ The High Court held that the bounds of the *persona designata* doctrine had been exceeded. The function conferred on the judge was incompatible with the institutional integrity of the Supreme Court, as it involved giving orders curtailing individual liberty simply on the basis of allegations made by the executive; and in the absence of reasons, there was no way in which a person subject to an order could challenge it. The High Court emphasised that the foundation of the *Kable* principle was that the Commonwealth Constitution does not permit differing grades of justice at federal and State levels, which is why federal or State legislation which undermines the institutional integrity of courts will be held invalid.

A difficulty in analysing cases applying the *Kable* doctrine is, as Gummow, Hayne and Crennan JJ stated in *Forge v Australian Securities and Investments Commission*,²⁹ that the courts have not enunciated a definitive, all-embracing statement of the defining characteristics of a court from which legislation may not constitutionally detract. Yet one can say that the cases discussed above have at a minimum established³⁰ that the *Kable* doctrine requires that the existence of State Supreme Courts must be maintained,³¹ that courts (Supreme Courts as well as lower courts)³² must be independent and impartial,³³ must exercise their powers in

²⁷ *South Australia v Totani* (2010) 242 CLR 1.

²⁸ *Wainohu v New South Wales* (2011) 243 CLR 181.

²⁹ (2006) 228 CLR 45 at 76 [64].

³⁰ For a general discussion of these features see Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia – History, Principle and Interpretation* (Cambridge University Press, 2015) 602-05.

³¹ This is because their existence is contemplated by s 73(ii) of the Commonwealth Constitution, which provides for appeals from State Supreme Courts to the High Court – see *Kable* 103 (Gaudron J), 111 (McHugh J) and 139 (Gummow J), *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³² In *Totani* the requirements of independence and impartiality were held to apply to the Magistrates Court of South Australia.

³³ *South Australia v Totani* (2010) 242 CLR 1, 43 [62] (French CJ) and 157 [427] (Crennan and Bell JJ). *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J).

accordance with the principles of procedural fairness³⁴ and open justice,³⁵ cannot be deprived of the defining features of a court³⁶ and cannot be given non-judicial functions (including via the *persona designata* device) which are incompatible with the role of a court.³⁷

III TO WHAT EXTENT DOES THE ABSENCE OF SEPARATION OF POWERS SURVIVE AT STATE LEVEL?

Given the breadth of the rules discussed in the previous paragraph, the question which must now be answered is whether the rule that separation of judicial power does not exist at State level has become so attenuated through incremental development of the *Kable* doctrine that the time has now come to abandon it.

One way to approach this is to ask to whether those aspects of separation of power (that only courts may exercise judicial powers³⁸ and that courts may not exercise non-judicial powers³⁹) which exist at Commonwealth level, but which *appear* still to exist at State level (even after the decisions discussed in Part II of this article) would survive review under the *Kable* principles if they came before the High Court. In other words, would the remaining differences which still appear to exist between separation of powers at State and Commonwealth level be eliminated if the *Kable* doctrine was applied to them?

In *Fardon v Attorney-General (Queensland)*⁴⁰ Callinan and Heydon JJ stated that

Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the Constitution, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the Constitution, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the Constitution.

This statement was subsequently adopted by French CJ in *South Australia v Totani*.⁴¹ Yet looking at the terminology used by the High Court in *Kable* and subsequent cases in which *Kable* has successfully been used to invalidate State laws, would State laws which did things

³⁴ *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 355 [56] (Gleeson CJ), 366 [97] (Gummow and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1, 43 [62] (French CJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J).

³⁵ *South Australia v Totani* (2010) 242 CLR 1, 43 [62] (French CJ), *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J).

³⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ); *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 580-1 [98]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁷ *Wainohu v New South Wales* (2011) 243 CLR 181, 210-13 [46]-[53] (French CJ and Kiefel) and 228-9 [105] – [109] (Gummow, Hayne, Crennan and Bell JJ).

³⁸ As first held in *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54.

³⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

⁴⁰ (2004) 223 CLR 575, 655-6 [219]. The same point was also made at 614 [87] (Gummow J) and 629 [144] (Kirby J).

⁴¹ *South Australia v Totani* (2010) 242 CLR 1, 66 [145].

which would be found invalid if done to a Commonwealth court survive review if done to a State court?

Consider first the aspect of separation of judicial power at Commonwealth level which prohibits the vesting of judicial power on a body other than a court.⁴² Although the High Court has yet to hear a challenge against a State law vesting judicial power in a body other than a court, given the requirement enunciated in *Kable* that the Constitution presumes the existence of State Supreme Courts I would argue that it is highly unlikely that a law which vested judicial power in a body other than a court would be upheld. What point would there be in maintaining the existence of courts if they could be left as empty shells as a result of a State Parliament transferring their powers being transferred to non-judicial bodies? If the Constitution presumes the existence of State Supreme Courts, that must mean courts which cannot have judicial power removed from them. Having a 'State court system' where judicial powers were in reality exercised by bodies other than courts would amount to mere formal compliance with the rule laid down in *Kable* and would therefore be held invalid.

Next, if a State Parliament was to enact *ad hominem* legislation declaring a person guilty of an offence, which the High Court said in *Polyukhovich v Commonwealth*⁴³ would be a breach of separation of judicial power under Chapter III, how could such a law, in which the State Parliament would be doing directly what it was unable to do indirectly in *Kable*, be found to be constitutional?⁴⁴ That would surely not be reconcilable with the decision in *Kirk*, where it was held that deprivation of an essential function of a court (in that case common law judicial review) was inconsistent with *Kable*.

Turning now to the second dimension of separation of judicial power – the impermissibility of vesting courts with non-judicial functions – in their summary of the effect of *Kable* on State courts, Joseph and Castan state⁴⁵

..States cannot vest those courts and judges with powers that undermine, or otherwise enact legislation which undermines, the institutional integrity of those courts if those courts are capable of being vested with federal jurisdiction under Chapter III.

Yet surely that would be an equally accurate summary of the rationale for the decision in cases such as *R v Kirby*; *Ex parte Boilermakers' Society of Australia*,⁴⁶ *Grollo v Palmer*⁴⁷ and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁴⁸? There is no relevant difference between the law on the *persona designata* device as stated in *Wainohu* and that which exists in the federal sphere, so although Joseph and Castan note that the starting points are different, in that States can confer non-judicial powers on State courts, whereas the Commonwealth can

⁴² Found to be offensive to the doctrine of separation of powers in *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 and *Australian Communist Party v Commonwealth* (1985) 83 CLR 1, to name but a few.

⁴³ (1991) 172 CLR 501.

⁴⁴ This issue was raised by counsel in *Duncan v New South Wales* [2015] HCA 13, but the court unanimously held at [4] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ) that the legislation being challenged did not amount to an exercise of a judicial power by the New South Wales Parliament and that therefore the issue of separation of powers did not arise.

⁴⁵ Sarah Joseph and Melissa Castan, *Federal Constitutional Law – A Contemporary View* (Lawbook, 4th ed, 2014) 244.

⁴⁶ (1956) 94 CLR 254.

⁴⁷ (1995) 184 CLR 348.

⁴⁸ (1996) 189 CLR 1.

confer such powers only if an exception applies,⁴⁹ is not the same result being reached (albeit from different starting points) simply because the rationale – preservation of the integrity of the courts – is the same under the Chapter III cases as well as under *Kable*?

Next, consider the following summary of the law relating to State judicial power given by French CJ *Totani*:⁵⁰

The consequences of the constitutional placement of State courts in the integrated system include the following:

1. A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction.
2. State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.
3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality.
4. The principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the *Kable* doctrine is invoked will require consideration of the impugned legislation... (Footnotes within quote omitted)

If one was instead to evaluate the first three points for their adequacy as an explanation of the law relating to separation of judicial power at Commonwealth level, would they be found incomplete? I would suggest not. There is no difference between separation of judicial power on the one hand and the preservation of the independence and impartiality of the courts, their exercise of their powers in accordance with procedural fairness and not making them do things which are incompatible with their functions as a court on the other. These factors – required of State courts by *Kable* – are constituent elements of the doctrine of the separation of judicial power which applies to Commonwealth courts. So if all these things must now be complied with, what is left of the lack of separation of judicial power at State level? Or, to state it positively, does not compliance with the *Kable* doctrine in fact require the same judicial independence as is enjoyed by Chapter III courts? Similarly, if, as established in *Kable* itself, it was not permissible to vest the New South Wales Supreme Court with the function of rubber-stamping a decision of the executive because that would have impaired the institutional integrity of the court, then surely any other examples of vesting with functions which had the same effect would also be unconstitutional – just as it would be in the case of Chapter III courts? In which case, why not say that the doctrine of separation of judicial power now applies at State level?

⁴⁹ Joseph and Castan, above n 45, 245.

⁵⁰ *South Australia v Totani* (2010) 242 CLR 1, 47-8 [69].

It is indeed true that justices of the High Court continue to state that the established doctrine remains in force. Thus, in *Baker v The Queen*⁵¹ it was held that the restrictions imposed on State courts by *Kable* are 'less stringent' than those imposed on Chapter III courts by the doctrine of separation of judicial power, and in *Assistant Commissioner Condon v Pompano Pty Ltd*,⁵² the court emphasised that notwithstanding the development of the *Kable* doctrine, separation of judicial power did not apply at State level. Similarly, in *South Australia v Totani*,⁵³ French CJ said

The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.

With respect, there are two problems with this. First, the court has failed to enunciate a principle or test which is to be used to distinguish between 'full' separation of judicial power at Commonwealth level and the 'light', or less stringent, restrictions at State level. More fundamentally, however, the problem with these statements is that they cannot be reconciled with the statement in *Kable*⁵⁴ to the effect that the Commonwealth Constitution does not permit 'differing grades of justice' at federal and State levels - a statement which was re-affirmed *South Australia v Totani*⁵⁵ and *Wainohu v New South Wales*.⁵⁶ If none of the aspects of separation of judicial power at it applies to Commonwealth courts is dispensable - in other words, if all of them are required in order to protect the institutional integrity of the courts - then why are they all not equally required at State level? If the doctrine of separation of judicial power exists to protect the independence and integrity of Chapter III courts, how can its incomplete application to State courts as repositories of Chapter III courts be justified in light of the statement that there are not differing grades of justice in the integrated system of courts? If the absence of full separation of judicial power at State level means that there is a lower standard of institutional integrity at that level, then surely that *does* amount to a differing grade of justice? Why should people, in so far as they are subject to State law, be any less entitled to the protection of a judicial system which enjoys less than complete protection?

I would argue that the position has been reached where despite the fact that justices of the High Court continue to state that the doctrine of separation of judicial power does not apply to State courts, the decisions that the court makes are no longer consistent with that mantra, because the applications of *Kable* indicate separation in all but name. Surely it is now timely to recognise that if followed to their logical conclusion, the principles contained in *Kable* and the cases which have followed it require that the court take the final step of formally stating that separation of judicial power exists at State level. *Kable* began a process whereby the rule that separation of judicial power does not exist at State level was hollowed out like a Swiss cheese, to the extent that there is now a great deal of air and very little cheese.

⁵¹ *Baker v R* (2004) 223 CLR 513, 534-5 [51] (McHugh, Gummow, Hayne and Heydon JJ).

⁵² (2013) 252 CLR 38 per Hayne, Crennan, Kiefel and Bell JJ at [125-6].

⁵³ *South Australia v Totani* (2010) 242 CLR 1, 45 [66].

⁵⁴ (1996) 189 CLR 51, 103 (Gaudron J). See also 111-15 (McHugh J) and 137-9 (Gummow J).

⁵⁵ (2010) 242 CLR 1, 48 [70] (French CJ).

⁵⁶ (2011) 243 CLR 181, 228-9 [105] (Gummow, Hayne, Crennan and Bell JJ).

IV FEDERALISM VERSUS THE RULE OF LAW AND DEMOCRACY

There is no doubt that were the High Court to take the step advocated in this article it would be seen as radical. Academic commentary on *Kable* and the cases which have followed it has been divided. According to Carney, the cases leave unclear the precise difference between the restrictions placed by Chapter III on federal and State courts respectively.⁵⁷ Aroney notes that *Kable* has led to convergence between the law governing the judicial branch at Commonwealth and at State levels to the extent that a 'miniature' version of separation of judicial power at State level.⁵⁸ Other commentators, such as Twomey, McLeish and Irvine see an expansion of *Kable*, and the trend towards convergence, as being subversive both of federalism and the legislative authority of State parliaments.⁵⁹

Two responses can be made to this. First, as stated by Hayne J in *South Australia v Totani*,⁶⁰

Kable dealt with one respect in which the Constitutions of the States are affected by the federal *Constitution*: The legislative powers of the States are not unlimited. The relevant limitation is not one which follows from any separation of judicial and legislative functions under the Constitutions of the States. Rather, it is a consequence that follows from Ch III establishing, in Australia, 'an integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth'.

In other words, one can treat *Kable* and its extensions not as a challenge to federalism, but rather as a necessary implication of it – that if a federation has an integrated system of justice then, irrespective of the absence of separation of judicial power in State constitutions, it is a logical consequence of that integration for there to be a rule that only bodies meeting the description of 'courts' and adhering to certain requirements relating to how courts operate should be vested with judicial power, and that those courts should not be vested with such non-judicial functions as are incompatible with their role as courts. Subjecting the States to such a rule would be no more subversive of federalism than it was, for example, for the High Court to find that since federal, State and local politics are intertwined, the implied freedom of political communication bound State Parliaments.⁶¹

The second response is that, assuming that, contrary to the argument advanced in the preceding paragraph, one *accepts* the proposition advanced by opponents of the extension of *Kable* that convergence is antithetical to federalism, why should federalism trump the extension of the doctrine of separation of judicial power? No doubt the answer that would be given to this is

⁵⁷ Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 351.

⁵⁸ Aroney et al, above n 30, 605.

⁵⁹ See for example Anne Twomey 'The Limitation of State Legislative Power' (2002) 4 *Constitutional Law Review* 13, 19, Stephen McLeish 'The Nationalisation of the State Court System' (2013) 24 *Public Law Review* 252, 255-61, Helen Irvine 'State Jurisdictional Residue: What Remains to a State Court When Its Chapter III Functions Are Exhausted' (2014) 42 *Federal Law Review* 121, 136-40 and Gabrielle Appleby 'The High Court and *Kable*: A Study in Federalism and Rights Protection' (2014) 40 *Monash Law Review* 673, 686-90.

⁶⁰ *South Australia v Totani* (2010) 242 CLR 1, 81 [201].

⁶¹ See *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104, *Stephens v West Australian Newspapers Ltd* (1994) 211, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Unions New South Wales v New South Wales* (2013) 252 CLR 530.

that it is required by fidelity to the text of State constitutions which, as a line of cases⁶² have confirmed, do not incorporate separation of judicial power, as well as to the principle of the preservation of State autonomy under federalism. But if this issue is to be characterised as a clash between textual fidelity and federalism on the one hand versus the principles underpinning separation of judicial power on the other, then I would argue that the latter should trump the former.⁶³

When distilled to its fundamentals, the doctrine of separation of judicial power and the principles that flow from it serve the rule of law, a doctrine which, as Dixon J stated in *Australian Communist Party v Commonwealth*,⁶⁴ is an assumption upon which the Constitution ought to be interpreted – a statement which has been reaffirmed in several High Court decisions.⁶⁵ Federalism is a mechanism devoid of any value content – a just legal order can exist in the absence of federalism. By contrast, the rule of law is a value without which a just legal system certainly cannot exist, and it is for that reason that I would argue it should be given priority over adherence to federalism in this contest.⁶⁶

It is true that the rule of law is an elastic concept, occupying a continuum which ranges from what Tamanaha refers to as 'thin' conceptions requiring only legality to 'thick' conceptions requiring that the content of the law conform to some concept of justice.⁶⁷ Nevertheless, even thin conceptions of the rule of law require separation of powers which, as Hunter-Schulz has argued,⁶⁸ means the (full) separation of powers found in Chapter III of the Commonwealth Constitution. Furthermore, I would argue that the capacity which, in the absence of full separation of powers, State Parliaments apparently have (in the absence of a contrary finding applying the *Kable* principles) to vest judicial power on a body other than a court, and to enact *ad hominem* legislation declaring someone guilty of an offence, is incompatible with the rule of law, however narrowly that concept may be defined. This is particularly the case given that the Commonwealth Constitution protects only a few individual rights, and the State Constitutions none at all. Thus, as is argued by Fearis,⁶⁹ the major part of the burden of protecting process rights thus falls upon the rule of law, of which the existence of a judicial branch protected by separation of judicial power is a vital component.

⁶² See *Clyne v East* (1967) 68 SR (NSW) 385, *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, *Nicholas v Western Australia* [1972] WAR 168, *Gilbertson v South Australia* (1976) 15 SASR 66 and *Collingwood v Victoria* [No. 2] (1994) 1 VR 652.

⁶³ For discussions critical of this view see James Stellios, 'The Centralisation of Judicial Power Within the Australian Federal System' (2014) 42 *Federal Law Review* 357, 384-6 and Goldsworthy, above 18, 104-114.

⁶⁴ (1951) 83 CLR 1, 193.

⁶⁵ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 540; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J), 441 [350] (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 91 [232] (Hayne J), 155 [423] (Crennan and Bell); *Momcilovic v The Queen* (2011) 280 ALR 221, 383 [563] (Crennan and Kiefel JJ).

⁶⁶ This view is supported in T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 4-5, 235-8.

⁶⁷ Brian Tamanaha. *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 91-2.

⁶⁸ Tina Hunter-Schulz 'Rule of Law, Separation of Powers and Judicial Decision Making in Australia' (2005) 11 *The National Legal Eagle* 12, 14-16.

⁶⁹ Edward Fearis, 'Kirk's New Mission: Upholding the Rule of Law at State Level' (2012) 3 *The Western Australian Jurist* 61, 77-87, 99-101.

Support for the principle that the rule of law requires separation of judicial power, is provided by a number of decisions from several common law jurisdictions, which have found that separation of judicial power is a fundamental principle of Westminster Constitutions. Little attention has been focussed on these in Australia, and none of the academic critique of rule of law as an argument supporting *Kable* and its extension has addressed them. This is doubtless due to the fact that when cases were brought before Australian courts arguing that separation of judicial power was implicit in State Constitutions using *Liyanage v The Queen*⁷⁰ as precedent, all were unsuccessful, with *Liyanage* being distinguished either on the ground that the Constitution of Sri Lanka to which it related was entrenched, whereas this was not true (either wholly or in relation to the judiciary) in the case of some of the Australian States, or on the ground that in Sri Lanka the *Charter of Justice 1833* (UK) expressly conferred *exclusive* judicial power on the courts, which was also not true of any of the State Constitutions.⁷¹

Yet I would argue that neither of these facts provide relevant points of distinction from *Liyanage*: The fact that a Constitution, or those parts relating to the judiciary, is not entrenched does not mean that an implication that separation of the judicial power cannot be read into it as it stands, even if that implication could be over-riden by subsequent constitutional amendment (with, it might be added, all the attendant political cost that would be borne by a government enacting such an amendment). Furthermore, the decision in *Liyanage* itself was not reached on the basis that the laws under challenge, which interfered with the independence of the courts, had not been enacted in compliance with the entrenchment provisions in the Constitution. The decision was based squarely on the fact that the allocation of powers to the judiciary in a separate chapter meant that separation of judicial power was implied in the Constitution.⁷² So far as the argument relating to the express conferral of judicial power exclusively on the courts is concerned, this fact was relied upon by the court in *Liyanage* as evidence of the fact that it had not been necessary to mention the exclusivity of judicial power in the Constitution – but, as will be demonstrated in the discussion of cases subsequent to *Liyanage*, the absence of any exclusive conferral (either in the Constitution or in any other statute) is not a necessary precondition for a finding that separation of judicial power is implicit in Westminster-style Constitutions.

The first of the cases which followed *Liyanage* is *Hinds v The Queen*,⁷³ in which the Privy Council held that the doctrine of separation of judicial power was implied in the *Jamaica (Constitution) Order in Council 1962* as a Constitution following the Westminster model.⁷⁴ The Council further held that an implication was to be read into the Constitution *despite the absence* of express wording establishing separation of powers,⁷⁵ although the fact that the judiciary was mentioned in a separate Chapter of the Constitution strengthened the implication of the doctrine.⁷⁶ Accordingly the Council held that that only courts staffed by judges enjoying security of tenure could exercise judicial power⁷⁷ and that legislation purporting to transfer their jurisdiction to lower courts staffed by judicial officers who did not enjoy the same security of tenure was invalid. The Council also held invalid a provision in the legislation which mandated a sentence of imprisonment during the pleasure of the Governor-General, on the

⁷⁰ [1967] 1 AC 259.

⁷¹ These cases and the grounds upon which they failed are summarised in Carney, above n 57, 344-8.

⁷² *Liyanage v The Queen* [1967] 1 AC 259, 287-8 (Pearce LJ).

⁷³ [1977] AC 195.

⁷⁴ *Ibid* 212D, 213C-D (Diplock LJ).

⁷⁵ *Ibid* 212F.

⁷⁶ *Ibid* 213A.

⁷⁷ *Ibid* 213C-H, 220G.

basis that the imposition of an indeterminate sentence, the duration of which was to be determined by the executive, amounted to an impermissible conferral of the judicial power of sentencing upon the executive.⁷⁸

Hinds was applied in *Ali v The Queen*,⁷⁹ in which the Privy Council held that where a Mauritian statute conferred on the executive the power to choose before which court to prosecute an offence and required that the court impose a mandatory sentence, the combined effect of these provisions was to confer on the executive the judicial function of determining sentence, which was incompatible with the doctrine of separation of judicial power implied in the Mauritian Constitution.⁸⁰

The next two cases are important because of the broadening of the theory upon which the doctrine of separation of judicial power was based. In *Director of Public Prosecutions of Jamaica v Mollison*,⁸¹ the Privy Council held invalid a statute which provided that commission of a certain offence was punishable by detention at the Governor-General's pleasure, on the ground that the judicial function of sentencing could not be conferred on the executive under the Westminster model.⁸² What is most significant about this case however is that Bingham LJ based his reasoning not only on the allocation of powers to three branches in the text of the Constitution, but on the broader ground that separation of judicial power was required in order to uphold the rule of law.⁸³

This shift in reasoning became even more pronounced in *R (Anderson) v Secretary of State for the Home Department*,⁸⁴ which was a case originating in the United Kingdom, and thus not based on a written constitution. In this case the House of Lords declared incompatible with Article 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (which forms Schedule I of the *Human Rights Act 1998* (UK)) s 29 of the *Crime (Sentences) Act 1997* (UK), which vested in the Attorney-General the power to determine the minimum tariff to be served by a person sentenced to life imprisonment. Article 6(1) protects the right to a fair hearing by an independent and impartial tribunal, and the court found that it was incompatible with that right for a member of the executive to determine the duration of sentences, as that was a judicial function.⁸⁵ Of particular note was then statement by Steyn LJ⁸⁶ that the concept of separation of judicial power 'based on the rule of law, is a characteristic feature of democracies'. This is important because separation of judicial power was justified not only by reference to the rule of law, but also by reference to democracy. In other words, contrary to academic critique of *Kable* in Australia, which has been based on that decision's erosion of State legislative competence, 'democracy' was seen as something broader than just the ability of voters to elect a legislature which then has *carte blanche* to exercise law-making

⁷⁸ Ibid 226C-227B.

⁷⁹ [1992] 2 AC 93 (PC).

⁸⁰ Ibid 104E-H (Keith LJ). That separation of judicial power is implied in Mauritius' Westminster-style Constitution was re-affirmed in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 303 (Steyn LJ).

⁸¹ [2003] 2 AC 411.

⁸² Ibid 424 (Bingham LJ). One should also note that the same conclusion was reached by Supreme Court in Ireland, which although not a member of the Commonwealth has a Constitution embodying the Westminster system – see *Deaton v Attorney-General and the Revenue Commissioners* [1963] IR 170, 182-4 (O'Dalaigh CJ) and *The State v O'Brien* [1973] IR 50, 59-61 (O'Dalaigh CJ), 67-75 at 59-64 (Walsh J).

⁸³ *Director of Public Prosecutions Jamaica v Mollinson* [2003] 2 AC 411, 424.

⁸⁴ [2003] 1 AC 837.

⁸⁵ Ibid 880-3 (Bingham LJ), 890-3 (Steyn LJ) and 900 (Hutton LJ).

⁸⁶ Ibid 891D.

powers, and instead was held to include a *restraint* on legislative power, at least in so far as separation of judicial power is concerned.

This innovative approach was again applied in *State of Mauritius v Khoyratty*.⁸⁷ In this case, the Privy Council heard a challenge against the constitutional validity of legislation which had purported to amend the Constitution in such a way as to remove from the courts the power to grant bail in cases involving drug-dealing. The section which had been amended was not entrenched. However, the appellant's argument was that because s 1 of the Constitution of Mauritius stated that Mauritius was 'a democratic state', the constitutional amendment relating to bail was invalid because separation of judicial power was required in a democracy, and the amendment had not complied with the entrenched procedures required for amendment of s 1. The Privy Council upheld the appeal on the ground that separation of judicial power was a requirement of democracy, and that since the removal of the bail jurisdiction of the courts constituted a legislative derogation from judicial power in breach of the separation doctrine, it should have been enacted in compliance with the entrenched procedures for amendment of s 1, and that since those procedures had not been complied with, the provisions were invalid.⁸⁸ In his decision, Steyn LJ stated⁸⁹

The idea of democracy involves a number of different concepts. The first is that the people must decide who is to govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

Steyn LJ went on to say that that approach could be 'treated as settled law in the United Kingdom' – in other words, that because the United Kingdom was a democracy, separation of judicial power would apply there too. In so doing, Steyn LJ quoted the statement by Bingham LJ in *A v Secretary of State for the Home Department*,⁹⁰ that

It is of course true that judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to protect and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General is fully entitled to insist on proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.

In similar vein in *Khoyratty* Rodger LJ stated⁹¹

..it is a hallmark of the modern idea of the democratic state that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary on the other.

⁸⁷ [2007] 1 AC 80.

⁸⁸ Ibid 92-94 (Steyn LJ), 96-7 (Rodger LJ) and 99 (Mance LJ).

⁸⁹ Ibid 91-2 (Steyn LJ).

⁹⁰ [2005] 2 AC 68, 110.

⁹¹ *State of Mauritius v Khoyratty* [2007] 1 AC 80, 97.

while Mance LJ referred to⁹²

...the basic democratic principles of the rule of law and the separation of judicial and executive powers which serve as primary protection of individual liberty...

To summarise the above, the post-*Liyanage* cases saw an evolution in the theoretical basis underpinning the doctrine of separation of judicial power: In *Hinds* and *Ali* the Privy Council based an implication of separation of judicial power simply upon the fact that distinct parts of the constitutions of the jurisdictions from which the cases came allocated powers to three branches of government. In *Mollinson* the basis for the implication was broadened to cover both textual structure and the rule of law. In *Khoyratty, A* and *Anderson* the justification was broadened still further, so that the doctrine now no longer relies on textual implications but is founded simply on the idea that separation of judicial power is a fundamental feature of the democratic state.

When compared to these cases, the state of the law in Australia as reflected in the cases on the issue of separation of judicial power at State level appears archaic. The same is true of academic comment critical of *Kable* and its extension, which unduly prioritises federal theory and plenitude of State legislative power, devalues the rule of law and is founded on an unsophisticated and narrow view of democracy. All State constitutions in Australia are based on democracy – or, as the High Court refers to it, on representative government.⁹³ If, as has been held in the cases discussed above, separation of powers is to be seen as a fundamental feature of the democratic state, then these cases could be used as the basis for a finding by the High Court that separation of judicial power is implicit in State constitutions.

While it is true that to do this would be effectively to impose a restriction on the legislative competence of polities which have unentrenched constitutions, this is nothing novel in Australian constitutional history: The subjection of the States to the implied right to political communication,⁹⁴ and potentially the implied right to vote⁹⁵ as well, of course, as the limits already placed on them by *Kable* and its progeny, all stand as precedents for that. There is therefore no reason in principle for the High Court not to extend the *Kable* doctrine in the manner suggested.

I would therefore argue that it is open to the High Court, when a suitable case arises, to draw on developments elsewhere in the Commonwealth and declare that the preservation of the rule of law requires that the *Kable* doctrine be extended so as to provide that State and territory legislatures may not legislate inconsistently with the doctrine of separation of judicial power.⁹⁶ This could be done either as an implication arising from a State Constitution considered on its own or, in order to immunise such a finding from express amendment of that Constitution to

⁹² Ibid 99.

⁹³ See for example *Australian Capital Television v Commonwealth (No. 2)* (1992) 177 CLR 106, *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, *McGinty v Western Australia* (1996) 186 CLR 140 and *Roach v Electoral Commissioner* (2007) 233 CLR 162.

⁹⁴ See *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104, *Stephens v West Australian Newspapers Ltd* (1994) 211, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Unions New South Wales v New South Wales* (2013) 252 CLR 530.

⁹⁵ As argued in Anthony Gray, 'The Guaranteed Right to Vote in Australia' (2007) 7 *Queensland University of Technology Law and Justice Journal* 178, 194-7.

⁹⁶ That this is the logical conclusion of the *Kable* doctrine is supported by Matthew Groves and Janina Boughey, 'Administrative Law in the Australian Environment' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 3, 21.

the contrary (although one hopes that a State Parliament would not take a step so offensive to the rule of law), then as an extension of the *Kable* principle. The latter approach would be based upon the fact that State courts are components of an integrated justice system within the framework of representative government, and that modern conceptions of the rule of law within such a framework require that the doctrine of separation of judicial power should apply to all courts. Since the State Parliaments cannot legislate contrary to the requirements of Chapter III, they would not be able to over-ride such a finding.

Annian-Welsh and Williams have pointed to the unrealised potential in the incompatibility standard in *Kable*,⁹⁷ stating that it provides 'a basis for potentially far-reaching and substantive restrictions on government's capacities to usurp, control or improperly influence the decision-making powers of state and territory courts.'⁹⁸ Whether the High Court as currently constituted would take the step proposed in this article is a different question - but that is no reason not to make the argument.

V CONCLUSION

The arguments advanced in this article can be summarised as follows:

First, *Kable* and the cases which have followed it have imported into State law a set of principles which in aggregate cover the same ground as those which underpin the doctrine of separation of judicial power at Commonwealth level. I have argued that the High Court ought to take the final step of declaring that it is a requirement of the operation of an integrated system of courts that separation of judicial power applies at State and Territory level. To refer to the analogy in the title of this article, the dog has barked so many times that there is no need to make it bark any further.

Second, I have argued that objections to the extension of the *Kable* principle based on federal considerations and notions of State legislative autonomy ought to give way to the theory that the rule of law and democracy - both of which are fundamental concepts of Australian constitutions at all levels - mandate separation of judicial power. Authority from the United Kingdom provides justification for the High Court to extend the *Kable* doctrine in this way.

⁹⁷ Rebecca Annian-Welsh and George Williams, 'Judicial Independence from the Executive: A first-principles review of the Australian cases' (2014) 40 *Monash University Law Review* 593, 626.

⁹⁸ *Ibid* 623.