FIXING A SENTENCE: ARE THERE ANY CONSTITUTIONAL LIMITS?

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I. INTRODUCTION

I have a recurring nightmare. State Parliament has enacted the *Restoration of Confidence in Sentencing Act* 1999 (RECS). The effect of RECS is that, upon conviction, the prosecutor (who may be directed by the Attorney-General in sentencing matters) has three options: (i) allow the court to exercise the traditional judicial discretion in determining the sentence; (ii) instruct the court to impose a penalty of not less than half the maximum penalty prescribed by law; or (iii) instruct the court to refer the proceeding to the People's Tribunal (PT) for sentencing according to law. However, unlike decisions of lower courts, decisions of the PT may not be reviewed by the Supreme Court on the ground that the sentence is 'manifestly excessive'. The PT comprises three nominees of the Minister. The qualifications for membership include "demonstrated understanding of the right of every person to feel safe in their houses and on the streets (for example employment as a talk-back radio host)". The disqualifications for membership include "possession of a legal qualification".

In my nightmare I hold the brief to challenge the validity of RECS and am about to rise to my feet in Court Number 1 of the High Court. I look down at my notes ...

II. SEPARATION OF POWERS

A. Outline of Argument

The basis for my attack on RECS is that the *combined* effect of the power enjoyed by the prosecutor, the mandating of a minimum penalty to be imposed by the courts and the powers enjoyed by the PT is, in the language of the High Court in *Kable v DPP (NSW)*,[1] to undermine the exercise by the Supreme Court

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1 (1996) 189 CLR 51 at 135.

of the judicial power of the Commonwealth.[2] If RECS has the effect contended, it is invalid as a result of the operation of the separation of powers doctrine founded in the structure and text of the Commonwealth Constitution.

B. From *Boilermakers* to *Kable*

Sections 1, 61 and 71 of the Commonwealth Constitution respectively vest the legislative power of the Commonwealth in the Federal Parliament, the executive power of the Commonwealth in the Queen and the judicial power of the Commonwealth in the High Court, federal courts and State courts invested with federal jurisdiction (together known as "Chapter III courts"). In *Attorney-General (Cth) v R*,[3] (the *Boilermakers* case), the High Court concluded that two propositions flowed from the symmetrical structure of the Commonwealth Constitution in relation to the distribution of power. First, it is only Chapter III courts and no other entity that may exercise power characterised as "the judicial power of the Commonwealth". Secondly, Chapter III courts may not be vested with the legislative or executive power of the Commonwealth unless this is incidental to the exercise of judicial power. There are exceptions to this second proposition. A judge of a Chapter III court may be empowered by statute to exercise non-judicial power provided the exercise of such power is in a personal capacity (*persona designata*) and the judge will not be required to perform a non-judicial function of such a nature that public confidence in the integrity of the judiciary or the capacity of the judge will be diminished.[4]

RECS is not a Commonwealth statute. It is a State statute and the decision of the High Court in *Kable* deals with two relevant issues arising from this distinction.

First, does there exist a separation of powers doctrine, analogous to the *Boilermakers* doctrine, founded in the structure and text of the particular constitutional instruments of the *State* Parliament responsible for RECS? The six member bench in *Kable* unanimously held that neither the structure nor the text of the State constitutional instruments of NSW supported the existence of a separation of powers doctrine. The same conclusion had been reached by the Court of Criminal Appeal of WA with respect to the constitutional instruments of WA.[5]

Secondly, the majority in *Kable* imposed a qualification on the traditional view that the Commonwealth was obliged "to take a State court as it finds it"[6] whenever vesting the court with federal jurisdiction. Three members of the majority (Gaudron, McHugh and Gummow JJ) held that an 'integrated Australian judicial system' was contemplated by the recognition of State courts in Chapter III of the Commonwealth Constitution and that the integrity of the

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2 *Kable* is a complex case. For an excellent assessment of the ramifications of the case see P Johnson and R Hardcastle, "State Courts: The Limits of Kable" (1998) 20 *Syd LR* 214.

3 (1957) 95 CLR 529.

4 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 16 (the *Hindmarsh Island* case).

5 *Re S (A Child)* (1995) 12 WAR 392.

6 *Leeth v Commonwealth* (1992) 174 CLR 455 at 469.

system demanded that a State refrain from imposing on a court: "powers ... that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth";[7] or "an authority the exercise of which undermines and is antipathetic to the exercise by the Supreme Court of the judicial power of the Commonwealth".[8] McHugh J explained that a State Parliament could not confer upon a State court a non-judicial function where the effect was that an ordinary person would conclude that the court was not independent of the State.[9] The fourth member of the majority, Toohey J, would apply the criteria formulated in the *Hindmarsh Island* case to a State court exercising federal jurisdiction (for example as a result of constitutional issues being raised): the court may not be conferred with a non-judicial function of such a nature that public confidence in the integrity of the judiciary to discharge the judicial power of the Commonwealth is undermined.

C. The Power of State Parliament to Fix a Sentence

One outcome of the RECS is to eliminate the judicial discretion historically exercised by the court when sentencing persons found guilty of a criminal offence and to compel the court, on the request of the prosecutor, to impose the sentence fixed by the Parliament, namely one half of the maximum penalty.

The characteristics of the power to impose a sentence were considered by the High Court in *Palling v Corfield*.[10] Section 49(2) of the *National Service Act* 1951 (Cth) (NSA) provided, in effect, that a person convicted of the offence of failing to respond to a notice relating to national service was liable to a fine of between $40 and $200 *and*, on the request of the prosecutor, a further mandatory sentence of seven days imprisonment *if* the defendant continued to refuse to comply with the requirements of the national service scheme. The defendant maintained that the Act infringed the *Boilermakers* separation of powers doctrine. The High Court unanimously rejected the argument. Barwick CJ stated that it is "beyond question" that Parliament may fix a penalty for an offence it creates without invading the judicial function.[11] The exercise of the power to determine the penalty regime was held not to be distinguishable from the exercise of legislative power to fix the elements of the offence.

Re S (A Child)[12] involved a challenge to the provisions of the *Crime (Serious and Repeat Offenders) Sentencing Act* 1992 (WA) which compelled the Children's Court to impose on a juvenile convicted of certain "violent offences" (as defined) and who was a "repeat offender" (as defined) a sentence that involved detention or imprisonment for a fixed period to be followed by an indefinite period that only ended upon an order for release being made by the Supreme Court. Kennedy J (with whom Rowland J agreed) doubted that the

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7 *Kable*, note 1 *supra*, per Gaudron J at 104; see also McHugh J at 115-16.
8 *Ibid*, per Gummow J at 135.
9 *Ibid* at 117.
10 (1970) 123 CLR 52.
11 *Ibid* at 58.
12 Note 5 *supra*.

exercise of powers conferred by the Act would compromise the independent functioning of the Supreme Court.

The reasoning in *Palling v Corfield* and *Re S* suggests that the removal of judicial discretion in relation to sentencing will not, of itself, infringe the principles in *Kable*, either because "judicial power" is not infringed or the power of the State court to exercise the judicial power of the Commonwealth has not been compromised. Subsequently, however, in the *Hindmarsh Island* case, the majority of the High Court saw a real danger to the standing of a court if a judge undertook a task that was integral to the executive function and exposed the judge to the direction of the executive.[13]

Is there any less danger to the standing of the integrated Australian judicial system if a State court is compelled to do the bidding of the legislature and impose a sentence that is manifestly unjust under the guise of a function that, historically, has been an integral part of the judicial branch of government? This argument was put in an application for special leave to the High Court from the decision of the Northern Territory Supreme Court in *Wynbyne v Marshall*.[14] The appellant, a 23 year old Aboriginal woman from the remote Northern Territory community of Kalkaringi with no prior offences, pleaded guilty to two offences covered by the Northern Territory mandatory sentencing scheme contained in the *Sentencing Act* 1995 (NT), namely, stealing (one can of beer) and unlawful entry. She was sentenced to the mandatory period of 14 days imprisonment after the sentencing Magistrate commented that a non-custodial sentence would otherwise have been imposed. The High Court refused an application for special leave to appeal on the basis that the appeal did not enjoy sufficient prospects of success.[15]

Judicial discretion in relation to sentencing for certain offences has recently been curtailed, if not eliminated, in Western Australia[16] and the Northern Territory.[17] More recently, the Sentencing Legislation Amendment and Repeal Bill 1998 (WA) (SLAR) compels the court to determine a sentence in accordance with a method prescribed by regulations *unless* the court considers the resulting sentence to be unjust. Although details of the proposed 'method' are sparse, it seems likely that judicial discretion will be limited to a particular sentencing option within a defined range based on the presence (or absence) of certain aggravating and mitigating factors. It remains to be seen whether a particular sentence imposed by courts as a result of this kind of legislation will

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13 Note 4 *supra* at 17.

14 (1997) 117 NTR 11. In *Kruger, Bray v The Commonwealth* (1997) 190 CLR 1, the High Court divided 3-3 on the question of whether, as a result of s 122 of the Constitution ("The Parliament may make laws for the government of any territory ..."), the exercise of judicial power by courts of the Northern Territory was subject to Chapter III of the Constitution. If the High Court were to determine that the *Boilermakers* separation of powers doctrine applies to the Northern Territory, then a statute of the Northern Territory Parliament would be invalid to the extent that it provided for an invasion of the judicial function.

15 See the transcript of *Wynbyne v Marshall* D174/1997 (High Court of Australia, Gaudron and Hayne JJ, 21 May 1998) on the web at <http://www.austlii.edu.au/au/other/hca/transcripts/1997/D174/1.html>.

16 *Young Offenders Act* 1994 (WA), s 126; *Criminal Code* 1913 (WA), s 401(4).

17 *Sentencing Act* 1995 (NT), s 78A.

ever be regarded by the High Court as sufficiently oppressive to prompt the reconsideration of the argument put in *Wynbyne* and the conclusion expressed in *Re S.*[18]

D. *Criminal Procedure Amendment (Sentencing Guidelines) Act* 1998 (NSW)

The Criminal Procedure Amendment (Sentencing Guidelines) Act 1998 (NSW) (CPASG) enables the Attorney-General of NSW to make an application to the Court of Criminal Appeal to issue sentencing guidelines with respect to a particular offence or category of indictable offence notwithstanding that there is no pending proceeding before the Court. As a result of *Kable*, the relevant question is whether the legislative function conferred on the Court by the CPASG is incompatible with the exercise by the Court of the judicial power of the Commonwealth. A similar question was posed by the Supreme Court of the United States in *Mistretta v United States*[19] when considering the legislation that appointed federal judges to the US Sentencing Commission whose function was the promulgation of sentencing guidelines. The Supreme Court held that the preparation of guidelines was incidental to the judicial function *and* analogous to functions already performed by the courts. The 'balance' between the three arms of government was not unduly disturbed. I suggest that an analysis of the CPASG by an Australian court would reach the same conclusion.

E. The Power of the State Executive in Sentencing

One outcome of the RECS is to empower the Attorney-General to directly influence a sentence by choosing between the three options. In *Palling v Corfield*, the defendant argued that the judicial power of the court was invaded when, in this instance, it was the *prosecutor* who 'effectively' imposed the sentence. Barwick CJ could see no distinction between (i) the discretion of the prosecutor to choose between proceeding on indictment or summarily; and (ii) the discretion of the prosecutor to choose whether to not to ask the court to invoke the mandatory sentencing powers in s 49(2) of the NSA. I agree that the exercise of the power in (i) is an instance of executive power. The prosecutor's decision does not exhibit a key element of judicial power because there is no final determination of rights. The exercise of the power in (ii) was not a final determination in the sense that *after* the exercise of the power the defendant could elect to participate in the national service scheme and avoid the mandatory sentence. A comparison may be made with s 126 of the *Young Offenders Act* 1994 (WA) (YOA), which applies a particular sentencing regime to young persons on being sentenced, for the third time, to a custodial term. Section 126 of the YOA empowers the Children's Court, *on the request of the Director of Public Prosecutions*, to make a 'special order' consisting of a fixed custodial

18 See also the decision of the Court of Appeal of Victoria in *Moffatt* (1997) 91 A Crim R 557 which held that a State may confer power on a court to impose, in appropriate defined circumstances, indefinite detention without coming into conflict with *Kable*.

19 488 US 361 (1989).

term of 18 months to be served *in addition* to the normal custodial term. The court retains the discretion *not* to make the special order. There is no final determination of the rights of the defendant and there is no infringement of the principles in *Kable*.

However, I suggest that the RECS does involve the prosecutor in the final determination of rights of the defendant. If so, it becomes necessary to determine whether the *Kable* principles are infringed. In this regard, it is relevant to note that the Supreme Court of California has determined that it would be an invasion of the judicial function of State courts for the Californian Parliament to confer on a prosecutor an *exclusive* power to waive prior convictions for the purposes of the 'three strikes' sentencing legislation.[20] If the executive branch is to enjoy that power, then the judicial branch must enjoy a coextensive power to waive prior convictions.

F. The Power of the State to Create a People's Tribunal

The People's Tribunal created by the RECS has not been vested with federal jurisdiction by the *Judiciary Act* 1903 (Cth) or any other Commonwealth legislation and accordingly it will never exercise the judicial power of the Commonwealth. There is nothing in the reasoning of the majority in *Kable* that would extend the principles of that case to a State court or tribunal that does not exercise the judicial power of the Commonwealth.

However, there is a link between the PT and a Chapter III court in that the RECS provides that the court must refer the proceeding to the PT. In *Palling v Corfield*, Barwick CJ conceded that "there may be limits to the choice of the Parliament"[21] in respect of events which condition the exercise of the judicial power to impose a sentence. I submit that an unacceptable undermining of the authority of the State court to exercise the judicial power of the Commonwealth (per *Kable*) would occur as a result of the link with the PT having regard to the composition *and* powers of the PT.

III. CONCLUSION

How does the nightmare end? Immediately before my submissions concerning the People's Tribunal, the judges of the High Court had called for the court fire hose in order to deal with my submissions and me. However, as soon as I raised the spectre of John Laws, Alan Jones or Howard Sattler exercising the power to fix a sentence, a silence descended over the court and the hose was turned upon my learned friend, the Attorney-General.

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20 *People v Superior Court (Romero)* 13 Cal 4th 497 (1996).

21 Note 10 *supra* at 59.