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CONCEPTIONS OF JUDICIAL REVIEW: COMMENTARY ON DIXON

*James Stellios**

It is an understandable reflex that, in the face of doctrinal uncertainty and instability, the High Court would retreat to the text of the *Constitution*. That has been the case in relation to two controversial doctrines recognised over the last 25 years. In *Lange v Australian Broadcasting Corporation*,¹ a unanimous Court emphasised the need to ground the implied freedom of political communication in the text of the *Constitution*. This exceptional showing of unanimity followed a period of doctrinal instability and wide critique of the legitimacy of imposing this implied limitation on the political arms of government. Similarly, the *Kable*² limitation largely began its life as an implication from the general scheme in Chapter III for the exercise of Commonwealth judicial power. Its revival as an effective and workable doctrine³ has coincided with a common reformulation that anchors it in the essential characteristics of State ‘courts’ which can be, and have been, vested with federal jurisdiction to exercise Commonwealth judicial power.⁴

While grounding these limitations in the text might be seen as adding legitimacy to the interpretive technique, it comes at a cost. The text reveals very little to assist in determining the mechanics of how the limitations are to operate. This is not a new or surprising problem. Other implied limitations have long suffered from imprecision of definition, scope and purpose, including the federal separation of judicial power principles.

The anchoring of these doctrines in the text of the *Constitution* arguably disguised the real concern with these new limitations: that is, the greater role for the judiciary in protecting the liberty of the individual from an exercise of sovereign power. Traces of this residue can be seen in the continuing rejection of the idea that the implied freedom of political communication protects an individual right⁵ and the elevation of concerns for institutional integrity in the *Kable* doctrine over the protection of individual liberty.

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1 (1997) 189 CLR 520.

2 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

3 As to which see James Stellios, *Zines’s The High Court and the Constitution* (6th ed, Federation Press, 2015) 280–294.

4 See, eg, *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 426 [44].

5 See most recently *McCloy v New South Wales* [2015] HCA 34, [29] (French CJ, Kiefel, Bell and Keane JJ); [149]–[150] (Gageler J); [247] (Nettle J); [318] (Gordon J).

It is here that Professor Dixon's functionalism adds great value to the interpretive exercise. A functional approach to constitutional reasoning, with its search for constitutional values and consequences, provides enormous potential for transparent engagement with constitutional meaning. However, the exercise must be contained, otherwise it runs the risk of either permitting an undisciplined resort to a range of extra-constitutional values or forcing a retreat to the bare text for an answer.

In this comment, I suggest that Professor Dixon's methodology requires a conception of the role of the judiciary within the constitutional system. In particular, it needs a clear conception of the role of the judiciary to protect the individual against an exercise of sovereign power. Without such a conception (or conceptions), functionalism can easily slide into pragmatism or policy-oriented legal reasoning. The point can be illustrated in the context of two well-established constitutional values: federalism and separation of judicial power; and in their convergence in the *Kable* principle.

I FEDERALISM

It is, of course, well known that, prior to the *Engineers'* case,⁶ the High Court took a more active role in designing federalism in Australia. The early federalism doctrines – reserve powers in particular – allowed the Court considerable scope to determine which political process – federal or State – could pursue its policy agenda within particular areas of regulation. The intrusive role of the Court was radically transformed by the decision in *Engineers'* which placed federalism questions largely in the hands of the federal political process which remained continuously accountable to the federal electorate. *Engineers'* was much more than a case about conceptions of federalism: it was a fundamental statement about the relationship between the judiciary and the political arms of government. Well before his Honour's appointment to the High Court, Gageler J recognised this constitutional dynamic in an influential 1987 article:

'... the judgment [in *Engineers'*] is properly read as being consistent with the understanding that the central conception of responsible government – the political process acting as a mechanism of constitutional constraint – is capable of application to issues of federalism and that the political process should be given primacy in the Australian Constitution, judicial review playing a subsidiary role. In other words, it is the political process and not the judiciary which should be predominant'.⁷

In simple terms, and in marked contrast to the pre-*Engineers'* period, judicial review was now to take a back seat to the political process on questions of the appropriate federal balance.

Without this conception of judicial review, a functionalist lens might lead us astray, losing us in a quagmire of centripetal and centrifugal federalism debates. Local experimentation or democracy, having government closer to local communities, or accommodating pluralism might, for example, support an argument that same sex marriage falls outside federal power. Contrastingly, arguments directed to uniform outcomes for all personal relationships might be accepted, and indeed were accepted by the Court in the *Marriage Equality Act case*,⁸ as justifying an expansive reading of the

⁶ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁷ Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 164.

⁸ *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

word ‘marriage’ in s 51(xxi) of the *Constitution*.⁹ Similar competing federalism arguments might be advanced in relation to the word ‘benefit’ in s 51(xxiiiA), the meaning of which, as Professor Dixon explains, was addressed by the Court in *Williams v Commonwealth (No 2)*¹⁰ without any functional lens at all. These federalism debates are very engaging but arguably, following *Engineers*, are largely for federal political design rather than for judicial review.

More problematic would be a functionalist view of federalism that saw it as a mechanism for diffusing or disbursing power to protect the individual against arbitrary exercises of sovereign power. Such a conception of federalism has a long history in political theory and the constitutional context of other federal systems. While there has been no strong tradition of this conception of federalism in High Court jurisprudence, it is not unknown,¹¹ and an unconstrained functionalist approach might open the door for such analysis. Such concerns, however, would not arise if the exercise were conditioned by an *Engineers*’ conception of judicial review.

II SEPARATION OF JUDICIAL POWER

The separation of powers jurisprudence presents significant constitutional problems. While the *Constitution* contains an allocation of powers across Chapters I, II and III, there is no clear evidence that the framers thought very much about the idea of separating power. As French CJ recognised in *South Australia v Totani*,¹² ‘[t]he historical record does not indicate that the members of the Convention expressly adverted to the broader concept of the separation of judicial power in their debates.’ Nor has the separate identification of *legislative* and *executive* power across Chapters I and II been thought to withstand the competing historical and constitutional imperative of responsible government.¹³ Yet, in the face of this history and competing constitutional principle, the strength of the separation of judicial power principles remains. However, finding consensus on a clear function to be performed by the separation of judicial power principles remains elusive. Is it needed as a check on power, to protect the federal compact, the rule of law, the liberty of the individual or, perhaps, a combination of these objectives? If it is the protection of the individual, how is this protection achieved? Is it through ensuring the proper working of representative and responsible government as a mechanism for protecting rights; the power-dispersing effects of a separation of powers; or the entrenchment of an Anglo-Australian conception of judicial power being exercised by an independent judiciary to determine disputes between individuals or individuals and the state?

These are important questions which have enormous doctrinal implications. The division in the Court on indefinite detention¹⁴ and the use of courts for preventative

⁹ Although the need for uniform regulation was seen in limited terms as required by the demands of private international law: see *Stellios*, above n 3, 28.

¹⁰ (2014) 252 CLR 416.

¹¹ See *New South Wales v Commonwealth* (2006) 229 CLR 1, 245 [612]–[613] (Kirby J) (*Work Choices* case).

¹² (2010) 242 CLR 1, 44 [63].

¹³ See *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 279–80 (*Boilermakers’ case*).

¹⁴ See *Stellios*, above n 3, 315–19.

detention¹⁵ reflect underlying uncertainties about the function performed by a separation of judicial power. While the Court and commentators (including myself) have been largely content to rest the judicial separation principles on the baseline imperative of maintaining judicial independence, much closing probing is required. Professor Dixon's call for a functionalist approach accentuates the shortcomings of High Court jurisprudence in this context. However, again, functionalism debates cannot be undertaken in a vacuum. They necessarily require a conception of the role of judicial review, in particular, the role of the court in the constitutional system for protecting the individual.

III *KABLE*

To turn to one of the key areas considered in Professor Dixon's article, the *Kable* principle lies at the interface between the separation of powers and federalism. It is a 'doctrine of federalism'¹⁶ – it exists only by virtue of the integrated federal judicial system. However, its core justification draws from the exercise or potential exercise of Commonwealth judicial power by State courts, with the concept of Commonwealth judicial power having already been disciplined by separation of judicial power principles. Thus, we see indecision in the *Kable* cases as to what drives its operation: is it institutional integrity to protect the federal system, protection of liberty or something else? Professor Dixon's functionalism might assist here to expose these imponderables. Again, however, such an exercise necessarily requires a conception of judicial review.

IV CONCEPTIONS OF JUDICIAL REVIEW

The central point emphasised so far is that Professor Dixon's functionalism has great value. It presses us – courts and commentators – to think more precisely about the function performed by constitutional provisions, structures and implications. However, I have also emphasised that such an approach needs to be contained and conditioned by conceptions of the role of judicial review, in particular, in terms of rights-protection.

Gageler J has recently sought to provide a broad, coherent vision of the place of judicial review within the federal constitutional system. In *McCloy v New South Wales*,¹⁷ his Honour sought to justify the role, and calibrate the intensity, of judicial review according to the demands and shortcomings of the federal political process. 'Electoral choice', his Honour said, 'constitutes the principal constraint on the constitutional exercise by the Parliament of the legislative power of the Commonwealth, and on the lawful exercise by Ministers and officers within their departments of the executive power of the Commonwealth'.¹⁸ His Honour then justifies the role of the Court in protecting the system of representative and responsible government because of the inherent risks posed by the majoritarian character of the system itself.¹⁹

¹⁵ See James Stellios, 'Kable, Preventative Detention and the Dilemmas of Chapter III' (2014) 88 *Australian Law Journal* 52, esp 66.

¹⁶ Brendan Lim, 'Attributes and Attribution of State Courts – Federalism and the Kable Principle' (2012) 40 *Federal Law Review* 31, 32.

¹⁷ [2015] HCA 34.

¹⁸ Ibid [111].

¹⁹ Ibid [114].

Gageler J's exposition appears to build on his Honour's earlier thinking prior to his appointment to the Court.²⁰ That earlier work is referred to by Professor Dixon as a way of understanding the drawing of implications from the *Constitution*. Whether an implication should be drawn from the text or structure, Professor Dixon says that 'a functionalist approach would need to include an account of the underlying approach to judicial, versus legislative, power under a particular constitutional order'. It would thus be 'necessary to develop a more general account of the basic role or function of judicial review itself under the Constitution'.

I agree, but I do not think it is limited to the drawing of implications. Although Gageler J in *McCloy* applied this framework to justify the judiciary's role in protecting representative and responsible government, it was not limited to implications in his Honour's earlier academic writings: it also justified the expansive approach to federal heads of legislative power and the operation of express limitations like s 92. Even if it were limited to the drawing of implications, the need for a conception of judicial review has a wide compass: the implied freedom of political communication, the separation of judicial power principles and the *Kable* limitation.

A strict application of Gageler J's conception of judicial review would seem to allow little role for judicial protection of the individual from the exercise of sovereign power. The primacy of the federal political process would apply to questions of rights-protection as much as to questions of federalism. Drawing from the observations of Professor Harrison Moore, Gageler J noted in *McCloy*²¹ that '[t]he great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.²² Responsible government, not judicial review, is the primary constitutional point of traction between the individual and the state. Gageler J's conception of judicial review would certainly support limitations that protect the Court's role in exercising judicial review to control federal power, but those limitations would be targeted at preserving the judiciary's insulation from the other arms of government in order to perform that function: that is, the separation of judicial power and *Kable* baseline.

That, however, does not necessarily rule out other, overlapping conceptions of judicial review. The constitutional entrenchment of a separated and insulated judicial power might not just be seen as important for policing federal power. In *Al-Kateb v Godwin*,²³ Gummow J pointed to the statement by Scalia J in *Hamdi v Rumsfeld*, that '[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive'.²⁴ In other words, it is the very essence of judicial power, according to British constitutional tradition, to protect liberty by resolving disputes between the individual and the state, and that role has been entrenched within our constitutional system. Such a conception of judicial review would give greater support to the emphasis within separation of judicial power and *Kable* jurisprudence to the judiciary's role in protecting liberty. Yet, given the Court's

²⁰ Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138; Gageler, above n 8.

²¹ [2015] HCA 34, [110].

²² W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Legal Books, 1902) 329.

²³ (2004) 219 CLR 562.

²⁴ *Ibid* 612 [137].

jurisprudence on indefinite detention and court ordered preventative detention, it is far from clear that such a conception would enjoy majority support.

The great value in Professor Dixon's functionalist approach is that it presses the Court and commentators to flush out these underlying disagreements and uncertainties.