Kable, preventative detention and the dilemmas of Chapter III

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The High Court's decision in New South Wales v Kable (2013) 87 ALJR 737; [2013] HCA 26 has significant implications for the way in which preventative detention is to be characterised in Australia. Although the High Court's decision in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 was generally regarded to have characterised preventative detention as non-judicial in nature, the court in the more recent Kable case appears to have reconsidered this understanding. This article explores the possible bases for this development and the implications of such a reconceptualisation for a range of Ch III dilemmas.

1. INTRODUCTION

Gregory Wayne Kable had been convicted of his wife's manslaughter and sentenced to a term of imprisonment. Prior to his release from prison, the New South Wales Parliament enacted the *Community Protection Act 1994* (NSW) (CP Act), which authorised the New South Wales Supreme Court, on application by the New South Wales Director of Public Prosecutions (DPP), to order that a person be detained in prison if more likely than not to commit a serious act of violence and if appropriate for the protection of the community (s 5). Although the operative provisions were expressed to apply to persons in general terms, it was clear that the legislation was enacted to target, and apply only to, Mr Kable (see s 3(1), (3)).

On application by the DPP, a detention order was made by Levine J of the Supreme Court requiring Mr Kable to be detained for six months. Mr Kable's appeal to the Court of Appeal was dismissed.[1] Before Levine J, and the Court of Appeal, he had argued, unsuccessfully, that the provisions of the CP Act authorising his detention were invalid. However, an appeal to the High Court was successful: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable* (No 1)). A majority of the High Court (Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting) held that the CP Act was invalid and, in doing so, recognised limitations on State Parliaments deriving from Ch III of the *Constitution*. The precise basis for, and scope of, these new Ch III limitations were not entirely clear from the four separate majority judgments.[2] Nevertheless, *Kable* (No 1) was generally accepted to have imposed restrictions preventing State Parliaments from conferring powers or functions on State courts which are incompatible or inconsistent with the exercise of Commonwealth judicial power.

Levine J's preventative detention order had expired prior to the High Court's decision, and Mr Kable was released from detention. Following the High Court's decision holding the CP Act to be invalid, Mr Kable instituted proceedings in the New South Wales Supreme Court claiming damages for false imprisonment. The basis for his argument was that, since the CP Act was invalid, he had been held in detention without legal authority. However, the primary judge rejected Mr Kable's argument, instead deciding that Levine J's preventative detention order was effective until set aside by the High Court on appeal and, accordingly, entered judgment for the defendant.[3]

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[1] *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374.

[2] In particular, Toohey J considered that the limitations applied only when a State court was exercising federal jurisdiction: such jurisdiction having been triggered before Levine J and the NSW Court of Appeal because of the constitutional claims made.

[3] See *Kable v New South Wales* (2010) 203 A Crim R 66; [2010] NSWSC 811.

Mr Kable's appeal to the Court of Appeal on this finding was allowed. In short, the Court of Appeal decided that the order of Levine J did not involve an exercise of *judicial power* and was not a *judicial order*. Accordingly, it was not *an order of a superior court of record* that remained valid until set aside and, thus, could not operate to protect New South Wales from the false imprisonment claim.[4] A key passage from the judgment of Allsop P will become important. Having observed that the High Court in *Kable* (No 1) held the provisions of the CP Act to be invalid, his Honour concluded that:

> The essential reasoning of the four justices for that conclusion of unconstitutionality included reliance upon the proposition that the Supreme Court *was not exercising judicial power* or authority and *was not acting, institutionally, as a superior court* but was acting, effectively, in an executive function … as an instrument of the Executive [emphasis added].[5]

The appeal by New South Wales to the High Court from the decision of the Court of Appeal was allowed: *New South Wales v Kable* (2013) 87 ALJR 737; [2013] HCA 26 (*Kable* (No 2)). The High Court concluded that Levine J's order was "a judicial order of a superior court of record" (at [41]) and, consequently, remained valid and effective until set aside on appeal. Accordingly, Levine J's order "provided the lawful authority for Mr Kable's detention" (at [11]). The orders of the Court of Appeal were set aside and orders were made in their place dismissing the appeal to the Court of Appeal from the primary judge's rejection of Mr Kable's unlawful detention claim.

This article explores the basis for these conclusions. In particular, it considers whether the High Court in *Kable* (No 2) has concluded that preventative detention involves an exercise of judicial power (at least when the power is given to a court), resulting in a reconceptualisation of the majority's view of such powers in *Kable* (No 1). As will be seen, whether the court reached this conclusion is not entirely clear, although there are very strong indications from the court suggesting that to be the case. The article offers possible justifications for such a conclusion, and identifies the various difficulties in the path of such justifications. Finally, the article considers the way in which *Kable* (No 2) impacts on a range of Ch III dilemmas faced by the High Court.

2. Preventative detention: judicial order, judicial power or both?

A. The plurality

In *Kable* (No 2) the High Court plurality's ultimate inquiry was whether the order of Levine J was *a judicial order of a superior court*. If so, on the court's analysis, the order would remain valid and effective until set aside on appeal. However, consideration of whether this involved the making of a *judicial order by a superior court* inevitably strayed into the question of whether the order involved an exercise of *judicial power*. The precise basis is important because a conclusion that it involved an exercise of judicial power will have implications for the design of State preventative detention regimes and whether the federal Parliament can enact similar preventative detention legislation. As will be seen, there is some uncertainty as to the plurality's conclusion in that respect, although such a conclusion seems likely as much of the analysis undertaken coupled the making of a *judicial order* with the exercise of *judicial power*.

There are four main points in the plurality's analysis at which their Honours reflect on the character of the *power* being exercised under the CP Act. The first was in the plurality's response to the Court of Appeal's conclusion that, in *Kable* (No 1), "the Supreme Court was not exercising judicial power or authority and was not acting, institutionally, as a superior court". The plurality acknowledged that there were statements by majority judges in *Kable* (No 1) to the effect that the "*function* which the CP Act required the Court to fulfil *was not judicial*" (*Kable* (No 2) at [16] (emphasis added)).

However, their Honours observed that "these … statements … *proceeded from the premise* that the CP Act *required the Supreme Court to act as a court* in performing the function prescribed by the

[4] *Kable v New South Wales* (2012) 268 FLR 1; [2012] NSWCA 243 at [17], [21] (Allsop P), [153] (Basten J) (Campbell JA, Meagher JA and McClellan CJ at CL agreed with the reasons of Allsop P on this question).

[5] *Kable v New South Wales* (2012) 268 FLR 1; [2012] NSWCA 243 at [3].

CP Act" (at [16] (emphasis added)). Their Honours continued that "[i]t is, therefore, to misstate the effect of the decision in *Kable* (No 1) to hold, as the Court of Appeal did, that in exercising power under the CP Act, the Supreme Court was not exercising judicial power or authority and was not acting, institutionally, as a superior court". Their Honours then concluded on *Kable* (No 1) in the following terms (at [17]):

> The majority in *Kable* (No 1) held that the CP Act was invalid because *it required the Supreme Court to exercise judicial power* and *act institutionally as a court*, but *to perform a task* that was inconsistent with the maintenance (which Ch III of the *Constitution* requires) of the Supreme Court's institutional integrity [emphasis added].

There are three propositions here that will eventually need to be disentangled. The first is that the Act "*required the Supreme Court to exercise judicial power*"; secondly, that it was required to "*act institutionally as a court*" and, thirdly, that there was a "*task*" to be performed that was inconsistent with the Supreme Court's institutional integrity.

For the moment I will concentrate on the *first* and *second* of these propositions: that the preventative detention provisions "*required the Supreme Court to exercise judicial power*" and to "*act institutionally as a court*". The Court of Appeal had reached opposite conclusions in relation to both propositions. As indicated, the plurality in *Kable* (No 2) considered that the Court of Appeal had reasoned to its conclusions from the wrong starting point: in the plurality's view, the majority judges in *Kable* (No 1) had "*proceeded from the premise*" that the Supreme Court was "*to act as a court*". Consequently, the plurality said that the Court of Appeal's conclusions on both propositions had "misstated" the effect of *Kable* (No 1).

However, the incorrect *premise* identified by the plurality goes to the first proposition *only* if one assumes that a court, "acting institutionally as a court", *is limited to exercising judicial power*. As discussed further below, this is clearly not the case at the State level. Consequently, it is unclear whether their Honours intended their statement to be a firm conclusion about the character of the *power* being exercised or, alternatively, whether it was a generalised response to the Court of Appeal's conclusions. We might, therefore, interrogate the judgment further.

The second point at which the plurality reflected on the character of the *power* was when their Honours responded directly to the argument that no *judicial order* was involved because there was no exercise of *judicial power*. The plurality contrasted the power in *Kable* (No 1) with the power to issue a surveillance warrant conferred on the New South Wales Supreme Court. In *Love v Attorney-General (NSW)* (1990) 169 CLR 307, the High Court held that the exercise of the power to issue a surveillance warrant involved an exercise of non-judicial power. The court said that it "is not a judicial act in the same sense as is an adjudication to determine the rights of parties" (at 321),[6] nor is it "an order inter partes from which a party whose conversations may be heard has a right to appeal" (at 321). When issuing the warrant, the judge "makes no order and nothing that he or she does is enforced as an order of the court" (at 321).

By contrast, it was said by the plurality in *Kable* (No 2) (at [27]) that the order of Levine J:

> was the result of an adjudication determining the rights of Mr Kable and the order both authorised and required his detention for a fixed term. The order was made following proceedings which were made inter partes. Subject to some exceptions, the rules of evidence applied. Witnesses were examined and cross-examined and the opposing parties made submissions. The order was enforced as a court order. Mr Kable could and did appeal against the order. All of these features of the proceedings and the order that was made disposing of the proceedings point to the order being made by a judge of the Supreme Court in his judicial capacity … The order made by Levine J was a judicial order.

It is not clear whether their Honours were concluding here that the preventative detention order involved an exercise of *judicial power*, or merely that it was a *judicial order*. The analysis did seem to couple *judicial order* and *judicial power*, and the correspondence of their Honours' points with their analysis of *Love* appears to confirm their earlier statement that the preventative detention power given to the Supreme Court was judicial in character. In particular, the "determination of rights" is a central

[6] Citing *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39 (Windeyer J).

characteristic of whether a power is judicial (I assess below whether there is a persuasive basis for concluding that preventative detention orders have this core feature).

What can be said for certain, when drawing from *Love*, is that an exercise of some non-judicial powers (like issuing warrants) does not produce a judicial order that remains valid and effective until set aside. However, since State courts can exercise non-judicial powers, and because the court's ultimate focus was on whether there was a judicial order, it is unclear whether it is only the exercise of judicial power that can produce judicial orders which remain valid and effective. This point is taken up further below.

The third point at which the plurality reflected on the character of the *power* conferred by the CP Act was when their Honours sought to justify the rule that judicial orders of superior courts of record are effective until set aside. Their Honours commenced the analysis by saying (at [33]):

> The roots of the doctrine, that the orders of a superior court of record are valid until set aside even if made in excess of jurisdiction lie in the nature of *judicial power* [emphasis added].

Their Honours then explored the characteristics of a superior court, one of which is that a court of record can make a "binding determination on the question whether or not is has jurisdiction in a matter",[7] and continued (at [34]):

> And giving these characteristics to the orders of a court by designating it to be a superior court of record reflects the distinction between the exercise of *judicial power* (by the final quelling of controversies according to law) and the exercise of *executive power* (subject to law) [emphasis added].

As Levine J was a judge of a *superior court of record*, the juridical effect to be given to his Honour's order came, not from the invalid law, but "from the status or nature of the court making the order (as a superior court of record)". As a court capable of determining the scope of its jurisdiction, its orders remain valid until set aside on appeal, at which time "the order is spent" (at [36]).

What can we glean from this analysis about the character of the power exercised by Levine J? Two things may be said, neither of which is conclusive of the character of the power being exercised. First, the analysis is focused on identifying the character of the court *order* – not the character of the *power* being exercised. Levine J's order is effective until set aside because the order was made by a *superior court of record*.

Secondly, the "roots of the doctrine", which emphasised the distinction between *judicial power* and *executive power*, were explored by reference to cases concerning *federal* superior courts of record. Federal superior courts of record are limited to exercising judicial power (and incidental non-judicial power).[8] State courts are not so limited. Consequently, the plurality's analysis has no necessary impact on whether the order by Levine J, a judge of a *State* Supreme Court, was judicial or non-judicial.

The final point at which the plurality reflected on the character of the power exercised is where their Honours justify their conclusions by reference (at [38]) to "fundamental considerations about the operation of any developed legal system". A point must be reached "where decisions made in the exercise of judicial power are given effect despite the particular decision later being set aside or reversed". "That point may be marked in a number of ways", and one of them in Australian law "is by treating the orders of a superior court of record as valid until set aside". Their Honours continued (at [39]):

> Were this not so, the exercise of judicial power could yield no adjudication of rights and liabilities to which immediate effect could be given. An order made by a superior court of record would have no more than provisional effect until either the time for appeal or review had elapsed or final appeal or review had occurred.

If this were not so, individuals and governments alike would be left in a state of chaos, trying to guess whether to obey the court's order. If they chose to disobey the order on the basis of a view that it was without legal effect, they would run the risk of contempt proceedings: if the government chose

[7] Citing *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 185 (Gaudron J).

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

to obey the order, it ran the risk of tortious liability (at [39]). Their Honours concluded that Levine J's order "[a]s a *judicial order of a superior court of record* … was valid until set aside" (at [41] (emphasis added)).

Again the analysis couples *judicial power* with the making of a *judicial order by a superior court of record*, and identifies, in general terms, the way that "Australian law" would meet the hallmarks of "a developed legal system". However, again, State courts are not limited to the exercise of judicial power and, consequently, this analysis does not necessarily say anything about the character of the power exercised by Levine J.

In summary, it is unclear whether the plurality meant to identify Levine J's order as involving an exercise of judicial power. Because the plurality was focused on the question of whether the order of Levine J was a *judicial order made by a superior court of record*, it did not need clearly to pin down whether the order involved an exercise of *judicial power*. Certainly, since much of the analysis coupled judicial power and judicial order, there are very strong indications, including an express statement to that effect, that their Honours considered Levine J's order to involve an exercise of judicial power. However, because of the nature of the ultimate inquiry before the court, that conclusion was not stated in the clearest terms.

B. The judgment of Gageler J

Gageler J reached the same conclusion, but in clearer terms. His Honour also acknowledged that "[t]here are certainly passages in the reasons for judgment of members of the majority in *Kable* (No 1) which strongly support the view taken by the Court of Appeal" that non-judicial power was being exercised by Levine J. However, his Honour said, "that case must be interpreted in the context of what was done in that case" (*Kable* (No 2) at [69]).

Kable (No 1) was an appeal to the High Court under s 73(ii). It is well accepted that appeals to the High Court under s 73(ii) can only be taken from a decision made in the exercise of judicial power. His Honour noted that, in making its orders on the appeal, the High Court was limited to standing in the shoes of the Court of Appeal. Having allowed the appeal, the High Court: (a) set aside the order of the Court of Appeal dismissing the appeal from Levine J's order; (b) allowed the appeal to the Court of Appeal; (c) set aside the order of Levine J; and (d) ordered that the application by the DPP for a preventative detention order be dismissed. His Honour concluded that such a series of orders could have been made by the High Court only on the basis that the order of Levine J involved an exercise of judicial power. Accordingly, "[w]hat the High Court did in *Kable* (No 1) is therefore consistent with the jurisdiction to make a preventative detention order … being judicial in character" (*Kable* (No 2) at [74]).

This reasoning requires some elaboration. One of the complications in the lower court proceedings in *Kable* (No 1), both before Levine J and the Court of Appeal, was that a constitutional challenge had been made to the preventative detention order. That claim triggered the court's federal jurisdiction in both proceedings, sourced in s 76(i) of the *Constitution* and vested in the New South Wales Supreme Court by s 39(2) of the *Judiciary Act 1903* (Cth).[9] Thus, in determining the controversy about the constitutional validity of the CP Act, the Supreme Court was exercising Commonwealth judicial power.

That gave rise to an interesting question, in making the preventative detention order, was Levine J still exercising federal jurisdiction? In other words, did the resolution of the question of whether the preventative detention order should be issued fall within the federal "matter" involving the resolution of the constitutional question of validity, or was it a separate question falling outside the federal "matter" to be determined in State jurisdiction? As the recent decision of the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1 emphasised, in rejecting the possibility of a declaration of inconsistent interpretation being made by the Victorian Supreme Court in federal jurisdiction, the preventative detention question could only fall within the federal "matter" if it involved an exercise of judicial power. Basten JA had concluded, in *Kable* (No 2), that the preventative detention power was

[9] With an exercise of power under s 77(iii) of the *Constitution*.

non-judicial and fell outside the federal matter. Nevertheless, it could be exercised in the same proceeding as the exercise of *Commonwealth judicial power* to determine validity. Although exercised in the same proceeding, the "incompatible non-judicial function [was] not thereby incorporated into a single exercise of federal jurisdiction".[10]

Gageler J disagreed. He drew (*Kable* (No 2) at [76]) from the comments of Gummow J in *Kable* (No 1) that the jurisdiction exercised by Levine J and the Court of Appeal "was wholly federal".[11] If it were wholly federal, then the view must have been taken that the preventative detention order question fell within the federal "matter" before the court. Gageler J concluded (at [77]):

> The better view of *Kable* (No 1) is that there was a single matter before the Supreme Court constituted by the disputed entitlement of the DPP to a preventive detention order under the CP Act. That matter encompassed but was not confined to whether the Supreme Court had jurisdiction and whether the CP Act was invalid as incompatible with Ch III of the *Constitution*. The matter extended to whether the preventive detention order applied for by the DPP, if it could be made, should be made. The order made by Levine J, upheld in the Court of Appeal, resolved the whole of that matter in the exercise of judicial power within federal jurisdiction. The order was "an adjudication to determine the rights of parties".

Thus, it is clear that Gageler J concluded that the power exercised by Levine J was *judicial* in nature.

However, there are difficulties with this position. Despite Gummow J's comment in *Kable* (No 1) that the jurisdiction was "wholly federal", his Honour went on to make it clear that, if federal jurisdiction (having its source in s 76(i)) had not been triggered by the constitutional claim before Levine J and the Court of Appeal, there could have been no appeal to the High Court under s 73(ii) from the preventative detention order. As his Honour said, "[i]n those circumstances, there would have been no exercise of judicial power at the State level so as to found an appeal to this Court".[12]

3. Did the majority in Kable (No 1) consider the power to be non-judicial?

If the High Court in *Kable* (No 2) is to be read, and it seems that it can be, as concluding that Levine J's order was not only a *judicial order*, but also involved an exercise of *judicial power*, is this consistent with what was decided in *Kable* (No 1)? The court acknowledged that there were passages in *Kable* (No 1) that gave the impression that the function was *not* judicial in nature, but considered those impressions to be wrongly founded. The brief acknowledgment of the passages from *Kable* (No 1), however, does not reveal the various layers of the discussion in *Kable* (No 1), nor the important developments in the subsequent case of *Fardon v Attorney-General (Qld)* (2004) 233 CLR 575.

The question asked by the majority judges in *Kable* (No 1) was whether the conferral of the power of preventative detention in that case was *incompatible with an exercise of Commonwealth judicial power*. As the court in *Kable* (No 2) acknowledged, there are clear comments by the majority judges in *Kable* (No 1) that the power to make the order involved an exercise of *non-judicial power*, all of which added weight to the conclusion that the power was incompatible with the exercise of Commonwealth judicial power (a breach of *institutional integrity* was not, at that point, the clearly established criterion for determining whether there was incompatibility with an exercise of judicial power). Gaudron J said that "[i]t is not a power that is properly characterised as a judicial function" (*Kable* (No 1) at 107). Gummow J similarly said that it was "non-judicial in nature" (at 132). And, McHugh J said that the provision invested "the Supreme Court with a jurisdiction that is purely executive in nature" (at 122). Toohey J, the fourth majority judge, clearly assumed that the power was non-judicial in character (at 98).

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[10] *Kable v New South Wales* (2012) 268 FLR 1 [151]; [2012] NSWCA 243. An alternative suggestion by Basten J (at [152]) was that the invalid non-judicial preventative detention power could not be picked up by s 79 or s 80 of the *Judiciary Act 1903* (Cth) in federal jurisdiction and thus, the order of Levine J could not constitute a judicial order.

[11] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 136.

[12] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 142. The plurality in *Kable* (No 2) declined to comment on whether there was one or more than one "matter" (at [37]).

What was unclear about *Kable* (No 1) was the reasoning process that supported this conclusion. For present purposes, there were at least two problematic features[13] of the power conferred on the Supreme Court: the first went to the *effect* or *impact* of the exercise of power on rights and duties; the second went to the *process* through which the power was exercised and the *procedure* adopted for its exercise. There were elements of both problems to be found in each of the majority judgments in *Kable* (No 1).

As for the first problem, Gaudron J said that the proceedings for an exercise of power did "not involve the resolution of a dispute between contesting parties as to their respective legal rights and obligations … Instead, the proceedings are directed to the making of a guess – perhaps an educated guess, but a guess nonetheless – whether, on the balance of probabilities, the appellant will commit an offence of the kind specified" (at 106; see also at 106-107). McHugh J similarly said that the proceedings "do not involve any contest as to whether the appellant has breached any law or any legal obligation. They 'are not directed to any determination or order which resolves an actual or potential controversy as to existing rights or obligations' which is the benchmark of an exercise of judicial power" (at 122). Gummow J also pointed to the absence of a determination of existing rights and duties: "The Act requires the Supreme Court to inflict punishment without any anterior finding of guilt by application of the law to past events, being the facts as found" (at 134). Toohey J made similar comments (at 96-97). Thus, it was clear that one problematic feature for the power's characterisation as *judicial* in nature was that there was an absence of a determination of a dispute about pre-existing rights and duties. Instead, the order itself created (or altered) rights and duties.

The second relevant problem went to the *process* or *procedure* to be followed. The process (indeed, the whole Act) did not have a general application: the Act put in place "unique procedures" (at 108 per Gaudron J) designed only for Mr Kable. The "ordinary protections inherent in the judicial process" had been removed (at 122 per McHugh J). The standard of proof had been lowered and the rules of evidence relaxed (at 121). And, of course, for each of the majority judges, the *process* could not be easily disentangled from the *effect* of the orders. The fact that the order would result in a *deprivation of liberty*, otherwise than through the *ordinary judicial process* of determining whether a criminal offence had been committed, was an important factor for each of the judges when concluding that the power was *non-judicial* in character (at 98-99; 106-107; 121-122; 131-132).

It was a combination of all these matters that led to the conclusion (to use the test we now have) that the provisions undermined the institutional integrity of the Supreme Court, or in Gummow J's words in *Kable* (No 1), were "repugnant to the judicial process in a fundamental degree" (at 132).[14] Either way, the power was incompatible with an exercise of judicial power.

However, *Kable* (No 1) was not the only case to tackle these difficult questions. In *Fardon*, the High Court considered a similar scheme of preventative detention and, in holding that this differently designed scheme was valid, fundamental differences started to emerge about the basic propositions underlying the *Kable* (No 1) conclusions. In *Fardon*, the court considered a *Kable* challenge to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which authorises the Supreme Court of Queensland to order the continuing detention of a prisoner serving imprisonment for a serious sexual offence if the court forms the view that the person is a serious danger to the community. The drafters had obviously learnt lessons from *Kable* (No 1) and drafted a generally applicable legislative scheme that replicated more closely the usual procedures applied by a court, and giving the court greater discretion in relation to the order to be made. For McHugh J, this was enough to avoid the conclusion that the institutional integrity of the Supreme Court had been undermined. A lengthy passage from his Honour's judgment is worth quoting in full:

[13] The others were public confidence and institutional integrity, but we are concerned here with whether it is judicial power.

[14] The repugnancy with the judicial process test appears to have fallen out of favour with the current majority: see *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458; [2013] HCA 7, despite three judges (Gummow and Bell JJ, and Heydon J) having applied the test in *International Finance Trust Co v New South Wales Crimes Commission* (2009) 240 CLR 319.

> The differences between the legislation considered in *Kable* and the [*Fardon*] Act are substantial. First, the latter Act is not directed at a particular person but at all persons who are serving a period of imprisonment for "a serious sexual offence". Second, when determining an application under the Act, the Supreme Court is exercising *judicial power*. It has to determine whether, on application by the Attorney-General, the Court is satisfied that "there is an unacceptable risk that the prisoner will commit a serious sexual offence" if the prisoner is released from custody. That issue must be determined in accordance with the rules of evidence. It is true that in form the Act does not require the Court to determine "an actual or potential controversy as to existing rights or obligations". But that does not mean that the Court is not exercising judicial power. The exercise of judicial power often involves the making of orders upon determining that a particular fact or status exists. It does so, for example, in the cases of matrimonial causes, bankruptcy, probate and the winding up of companies. The powers exercised and orders made by the Court under this Act are of the same jurisprudential character as in those cases. The Court must first determine whether there is "an unacceptable risk that the prisoner will commit a serious sexual offence". That is a standard sufficiently precise to engage the exercise of State judicial power. Indeed, it would seem sufficiently precise to constitute a "matter" that could be conferred on or invested in a court exercising federal jurisdiction. Third, if the Court finds that the Attorney-General has satisfied that standard, the Court has a discretion as to whether it should make an order under the Act and, if so, what kind of order. The Court is not required or expected to make an order for continued detention in custody. The Court has three discretionary choices open to it if it finds that the Attorney-General has satisfied the "unacceptable risk" standard. It may make a "continuing detention order", a "supervision order" or no order. Fourth, the Court must be satisfied of the "unacceptable risk" standard "to a high degree of probability". The Attorney-General bears the onus of proof. Fifth, the Act is not designed to punish the prisoner. It is designed to protect the community against certain classes of convicted sexual offenders who have not been rehabilitated during their period of imprisonment … Sixth, nothing in the Act or the surrounding circumstances suggests that the jurisdiction conferred is a disguised substitute for an ordinary legislative or executive function. Nor is there anything in the Act or those circumstances that might lead to the perception that the Supreme Court, in exercising its jurisdiction under the Act, is acting in conjunction with, and not independently of, the Queensland legislature or executive government [emphasis added].[15]

Thus, in contrast to his Honour's conclusion in *Kable* (No 1), the power was *judicial* in nature and, indeed, was now a judicial power that could be given to a court by the federal Parliament. However, it seems that the different conclusion was based primarily, if not entirely, on the *process* adopted for the hearing of the application. As his Honour accepted, the exercise of power in *Fardon*, like in *Kable* (No 1), did not determine a dispute about pre-existing rights and duties. But, without the problematic *procedural* features of the *Kable* legislation in the way, the exercise of power creating rights could be considered judicial because it had the same "jurisprudential character" as a set of other powers traditionally exercised by courts.

The other remaining judge from *Kable* (No 1), Gummow J, agreed that the improved procedures in the *Fardon* legislation assisted in avoiding the conclusion that the institutional integrity of the Supreme Court had been undermined (at 617). However, unlike McHugh J, Gummow J considered that the exercise of power was still *non-judicial* in character. The preventative detention of a person did not involve an exercise of judicial power: "detention by reason of apprehended conduct, even by judicial determination on a *quiatimet* basis, is of a different character and is at odds with the central constitutional conception of detention as a consequence of judicial determination of engagement in past conduct" (at 613). Thus, contrary to the Commonwealth's submission in *Fardon*, his Honour held that the federal Parliament could not pass similar legislation (at 614):

> The vice for a Ch III court and for the federal laws postulated in submissions would be in the nature of the *outcome*, not the *means* by which it was obtained [emphasis added].

Consequently, for Gummow J, although the improved *process* meant that the institutional integrity of the Supreme Court had not been undermined, the power remained non-judicial in character because the *effect* of the exercise of power did not involve the resolution of a dispute about pre-existing rights and duties. Indeed, his Honour's commitment to the *effect* of the power as an indicator of judicial

[15] *Fardon v Attorney-General (Qld)* (2004) 233 CLR 575 at 596-597.

character seemed so strong that he was willing to invalidate the State legislation impugned in *Fardon* if the preventative detention order did not have a close connection with a prior exercise of judicial power by the Supreme Court to determine a dispute about rights. His Honour said:

> the factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a "prisoner" … who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be unacceptable risk of commission if the appellant be released from custody. To this degree there remains a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled the validity of [the Act].

As for the views of the other judges in *Fardon* on whether the federal Parliament could enact such a law, Kirby J agreed (at 631) with Gummow J. However, while generally agreeing with the reasons of Gummow J, Hayne J reserved this question for further consideration (647-648).

Thus, *Fardon* represented a fundamental split between the two remaining judges from *Kable* (No 1) on the character of a preventative detention order, with no majority view emerging as to whether a preventative detention power could be given to a court by the federal Parliament. However, it is clear that those differing understandings of the character of the power in *Fardon* reinforced the point *that the power was considered to be non-judicial in character in Kable* (No 1).

In summary, it would seem that the High Court in *Kable* (No 2) has reconceptualised its understanding of the power exercised by Levine J in *Kable* (No 1). Although the court in *Kable* (No 2) attempted to explain that the power was seen as *judicial* in *Kable* (No 1), in light of the clear statements to the contrary in *Kable* (No 1) and *Fardon*, those attempts are not persuasive. That raises the question: if we were to revisit the conclusion reached by the majority judges in *Kable* (No 1), is there any basis to support the conclusion that the exercise of power by Levine J was *judicial* in nature?

Before addressing that question, it is important to return to the *Kable* (No 2) plurality's conclusion that the Supreme Court had been given a task inconsistent with its institutional integrity. It is unclear what is meant by the word "task". When considering the exercise of government power – particularly judicial power – the courts have often talked about the *powers* or *functions* to be exercised. "Task" introduces an unfamiliar concept into the equation. If the *Kable* (No 2) court has indeed concluded that the exercise of power to make a preventative detention order is judicial in character, it may be a shorthand way of capturing the *process* or *procedure* problems that were of concern to the majority judges in *Kable* (No 1). If so, it would be a way for the plurality to justify its conclusion that the power was *judicial*, but continue to uphold the ultimate result in *Kable* (No 1) that the preventative detention provisions were invalid. That would, however, have the consequence of disconnecting the *process* or *procedural* aspects from the definition of judicial power. Such an attempt would be inconsistent with recent statements of the court emphasising the *process* dimensions of judicial power.[16] This also raises a broader question of the relationship between ideas of institutional integrity (which have been explored primarily in relation to State courts) and attempts to define judicial power (which have been undertaken for Commonwealth judicial power) – a question that the High Court is yet to squarely address.[17] If the use of the word "task" were not intended to operate in that way, it is hard to see what function it performs in an area already crowded by terminological imprecision.

4. Is there any basis to support the conclusion that the exercise of power by Levine J was judicial in nature?

There are three possible justifications for concluding that, despite the views expressed in *Kable* (No 1), the order made by Levine J was judicial in nature. However, each possibility has its difficulties.

[16] See, eg, *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [27]; [2013] HCA 5 (French CJ and Gageler J).

[17] See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410; [2013] HCA 5. See also Bateman W, "Procedural Due Process under the Australian Constitution" (2009) 31 Syd LR 411.

A. Expanded conception of rights-determination

In contrasting preventative detention orders with the warrant power in *Love*, the plurality referred to the order of Levine J involving an "adjudication determining the rights of Mr Kable". An "adjudication to determine the rights of parties", as referred to by the court in *Love*, was seen by the Court in *Kable* (No 2) as a key ingredient of judicial power.

It is a well-accepted proposition that the determination of a dispute about pre-existing rights and duties is a core characteristic of judicial power. This proposition was applied most recently by the High Court in *Momcilovic* to conclude that a declaration of inconsistent interpretation under the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) did not involve an exercise of judicial power because it lacked that core characteristic.[18]

If the High Court in *Kable* (No 2) is suggesting that the exercise of power by Levine J determined rights and duties, there are some difficulties with that proposition that need to be overcome. Conceptualising the power of preventative detention as a determination of rights and duties is not consistent with how this core criterion has been understood. Levine J's order did not determine that Mr Kable had breached any existing legal standards: there was no determination of whether he had contravened a criminal provision. As it was understood by all the majority judges in *Kable* (No 1), Levine J determined a factum (that is, whether there was the requisite future threat) upon which the State statutory scheme operated to impose obligations on him. The newly created obligation required Mr Kable to remain in detention beyond the sentence imposed by an exercise of judicial power to adjudge and punish criminal guilt for the manslaughter of his wife.

Ever since, at least, the decision of the High Court in *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434, it has been accepted that the *adjudication* of a dispute between parties that *affects* the parties' rights and duties is not sufficient to attract a judicial character.[19] Conciliation and arbitration, for example, involves an *adjudicatory* process between *disputing* parties. Furthermore, the determination of the arbitrator *affects* the rights and duties of the parties. Yet, conciliation and arbitration does not involve an exercise of judicial power. Something more than affectation is required. To fall within the conception of rights determination, the exercise of power must involve the resolution of a dispute about pre-existing rights and duties. The determination of a factum upon which the legislation operates to create rights is not conventionally considered an exercise of judicial power. Thus, this possibility cannot be adopted without a substantial reconfiguration of existing principles.

B. The same "jurisprudential character"

Secondly, as suggested by McHugh J in *Fardon*, although the power might not involve a resolution of a dispute about existing rights and obligations, perhaps the preventative detention power might fall into a category that is considered to be judicial despite not having the core characteristic of rights determination. McHugh J referred to the power being of the same "jurisprudential character" as powers exercised in cases of matrimonial causes, bankruptcy, probate and the winding up of companies. Various powers exercised in those contexts – for example, on the voluntary application for bankruptcy – do not involve the resolution of a dispute about rights and duties. They create or alter rights for the future. But why does the preventative detention power have the same "jurisprudential character" as these powers? There are two possibilities.

(i) Historical analogy

The first possibility is that there might be a historical analogy. The High Court has accepted that powers can be characterised as judicial if there is a sufficiently close historical analogy or practice even though they do not have the core characteristic of determining a dispute about rights and

[18] See Bateman W and Stellios J, "Chapter III of the Constitution, Federal Jurisdiction and Dialogue Models of Human Rights" (2012) 26 MULR 1.

[19] See also *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530 at 544, where the Privy Council emphasised that a power may be non-judicial even though there are two or more contending parties and the decision will affect their rights.

duties.[20] Indeed, the matrimonial causes, bankruptcy, probate and winding up contexts were identified by Dixon CJ and McTiernan J in *R v Davison* (1954) 90 CLR 353 as areas in which the courts have traditionally created or altered rights and duties, rather than determining a dispute about rights and duties. Perhaps McHugh J in *Fardon* had the comments in *Davison* in mind.

If this conceptual category is to be relied upon, some effort would need to be made to establish the historical analogy for preventative detention orders. The control orders context might be one that potentially offers support. In *Thomas v Mowbray* (2007) 233 CLR 307, the High Court considered the validity of federal provisions conferring control order powers on federal courts, and the primary question was whether that arrangement was consistent with the federal separation of powers principle from *Boilermakers*[21] that Parliament cannot confer non-judicial powers on courts (unless incidental to judicial power). The court concluded that the control order provisions could be seen as conferring judicial power. Gleeson CJ recognised that, *like preventative detention orders*, control orders do not involve the determination of a dispute about rights and duties. Instead, they create new obligations. Having referred to McHugh J's passage from *Fardon*, Gleeson CJ proceeded to find a historical analogy, for control orders, to ancient powers of the courts to bind persons over to keep the peace (*Thomas* at 329). Gummow and Crennan JJ also considered control orders to be analogous to binding over orders and the power of Chancery to grant a writ of supplicavit requiring a party to be taken into custody where there were threats or abuse to the other party (at 356). Although the analogies were inexact, they were close enough for control orders to be held to be *judicial* in character, at least when given to a court.

However, preventative detention orders are not control orders. As Gummow and Crennan JJ said in *Thomas* (at 356), when distinguishing the control order regime from the preventative detention regime in *Fardon*, "[d]etention in the custody of the State differs significantly in degree and quality from what may be entailed by the observance of an interim control order". In fact, trying to find an analogy to support preventative detention orders at the federal level would run straight into an unresolved debate within the High Court as to whether, subject to exceptions, the deprivation of liberty requires an exclusive exercise of judicial power according to the usual curial function of adjudging and punishing criminal guilt. In *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28-29, Brennan, Deane and Dawson JJ had said that, subject to a limited set of exceptions, "the citizens of this country enjoy, at least in times of peace … a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth". However, in a series of cases heard in 2004[22] involving the detention of unlawful non-citizens, that proposition seemed to lose majority support, with McHugh J directly commenting that it "cannot stand".[23] On the other hand, Gummow and Kirby JJ strongly defended the *Lim* position in *Fardon*, although with a reformulated scope.[24] The issue is yet to be clearly resolved.[25]

Consequently, there are a number of difficulties with trying to put preventative detention powers into the "judicial" basket based on a historical analogy.

(ii) A "double function provision"

A second possible way of finding the "jurisprudential" analogy is by seeing the preventative detention power as a "double function provision". Double function provisions are curious drafting devices that operate to simultaneously create rights and obligations *and* vest jurisdiction in a court for their

[20] Recently in *Saraceni v Jones* (2012) 246 CLR 251.

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

[22] *Re Woolley; Ex parte Applicants M276/2000* (2004) 225 CLR 1; *Al Kateb v Godwin* (2004) 219 CLR 562; *Behrooz v Secretary Department of Immigration & Multicultural & Indigenous Affairs* (2004) 219 CLR 486; *Minister for Immigration & Multicultural & Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

[23] *Re Woolley; Ex parte Applicants M276/2000* (2004) 225 CLR 1 at 24.

[24] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612.

[25] See Stellios J, *The Federal Judicature: Chapter III of the Constitution* (2010) pp 221-32.

determination.[26] Although, on their face, these provisions look like they are conferring power on the court to create rights, they are taken to be a statutory creation of rights *and* the conferral of jurisdiction on the court to enforce the rights. As Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ explained in *Hooper v Hooper* (1955) 91 CLR 529, the preferable approach to drafting would be to have separate provisions creating rights and then conferring jurisdiction on a court to grant a remedy. However, their Honours continued, "this is not invariably the simplest or easiest course to follow, and it is by no means uncommon for an Act to be drafted in such a way that the two things are done … by providing that in certain specified circumstances a person may take proceedings in a particular court to obtain a specified remedy".

Dixon J had earlier given examples of such provisions in *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 167: the power to order a patentee to grant compulsory licences; the power to declare that a patent had not been sufficiently exercised; the power to order the removal of a trademark from the register for non-use; the power to remove a master of a ship and appoint another; the power to deal with application and investment of compensation money; and the power to order the sale of an estate to pay estate duty. A modern example was accepted by the High Court in *Baker v The Queen* (2004) 223 CLR 513, where the court considered the validity of State provisions allowing a person serving an existing life sentence to apply to the New South Wales Supreme Court for the determination of a non-parole period. The exercise of judicial power – in a conventional sense – to determine rights and duties had ended with the adjudgment and punishment of criminal guilt and the imposition of a life sentence. The exercise of the power to set a non-parole period would not, on its face, determine any rights. The court would be determining a factum upon which the legislation would operate to create new (or at least alter) rights and duties. However, the High Court accepted that this was an example of a double function provision that simultaneously created rights and conferred jurisdiction on the court to determine them (at 529).

Could a preventative detention power be a double function provision that creates obligations (albeit with the assistance of judicial discretion) and, simultaneously, confers jurisdiction on the court to grant a remedy? Gageler J in *Kable* (No 2) mentioned the double function idea and appeared to have relied on it in reaching his conclusion. His Honour identified four points from Gummow J's judgment in *Kable* (No 1), one of them being that the preventative detention provision performed "the 'double function' of imposing substantive liabilities and conferring on the Supreme Court jurisdiction with respect to those substantive liabilities" (*Kable* (No 2) at [75]). Gageler J then concluded that the "better view" of *Kable* (No 1) was that "there was a single matter before the Supreme Court constituted by the *disputed entitlement* of the DPP to a preventative detention order under the CP Act" (at [77] (emphasis added)). On one view, there could only be a *disputed entitlement* if the provision was seen as a double function provision that both created a right and conferred jurisdiction on the court to determine a dispute about its existence.[27] In that way, the State-based claim of the DPP for a detention order was consumed by the broader federal matter constituted by the constitutional claim, and the decision by Levine J to make the order resolved both claims in federal jurisdiction. As Gageler J concluded, the order of Levine J was "an adjudication to determine the rights of the parties" (at [77]).[28]

However, Gummow J in *Kable* (No 1) (at [131]) went on to say that, although in the civil law such provisions are not unknown, the law in *Kable* spoke "only ad hominem, applie[d] proleptically the criminal law, determine[d] the case by a civil standard, and provide[d] directly for detention in prison". His Honour continued (at [131]):

> There is, before imprisonment, no determination of guilt solely by application of the law to past events being the facts as found. The consequence is that the legislature employs the Supreme Court to execute,

[26] See the acceptance of such a technique in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191.

[27] Another view might be that it was disputed because of the claim that the provisions were constitutionally invalid. On that view, the provisions need not be seen as a double function provision.

[28] Citing *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39 (in turn quoted in *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 321-322).

> to carry into effect, the legislature's determination that the appellant be dealt with in a particular fashion, with deprivation of his liberty, if he answers specified criteria.

Thus, at least for Gummow J, the preventative detention context was not an opportunity for expanding the operation of this difficult double function concept.

C. Commonwealth judicial power vs State judicial power

One final possibility should be mentioned, although it is unlikely. It has already be noted that, when discussing the jurisdiction of the High Court under s 73(ii) of the *Constitution* to hear an appeal in *Kable* (No 1), Gummow J considered that the appeal was possible because the lower New South Wales courts had been exercising federal judicial power to resolve the constitutional claim (that is, the federal "matter") that had been made challenging the validity of the provisions. If the constitutional claim had not been made, then the court would not have been exercising Commonwealth judicial power to resolve a "matter" and, consequently, no appeal would have been possible under s 73(ii). In doing so, his Honour placed particular emphasis on the use of the word "matter" in the second paragraph of s 73. If there was no dispute constituting a "matter" in the court below, then there was no possibility of triggering the High Court's appellate jurisdiction.

His Honour then went on to identify the possibility that a lower State court might be vested with jurisdiction to exercise *judicial power*, but which nonetheless did not constitute a "matter". In other words, a power might involve an exercise of *judicial power*, yet not present a "matter" for resolution. His Honour considered that s 73(ii) would not be attracted to an exercise of judicial power which did not resolve a dispute satisfying the definition of "matter".

This requires some further explanation. For Commonwealth judicial power to be exercised, there needs to be a "matter" of federal jurisdiction presented for resolution. The High Court has held that "there can be no matter … unless there is some immediate right, duty or liability to be established by the determination of the Court".[29] Gummow J's comment in *Kable* (No 1) suggests that there might be an exercise of (State) judicial power which does not meet this definition. The differentiation of judicial power and *Commonwealth* judicial power in this way has been noted on other occasions by High Court judges. McHugh J in *Fardon*, in the quote set out earlier, also contemplated that State courts might exercise judicial power which might not involve the determination of a "matter". In the context of the military justice cases, a distinction has been drawn between *judicial power* and *Commonwealth judicial power* for the purpose of justifying the exercise of military jurisdiction by a tribunal lying outside the Ch III framework for the exercise of Commonwealth judicial power.[30] Might it be the case that the High Court in *Kable* (No 2) considered a preventative detention order to involve an exercise of State judicial power, although not involving the resolution of a "matter"? If so, perhaps on a broad view of the words "judgments, decrees, orders and sentences" in s 73 (extending to cover appeals from exercises of *State* judicial power of this different kind), the appeal could have been taken from the order of Levine J to the High Court.[31]

There are a number comments that might be made about this possibility. First, it is clear that Gummow J in *Kable* (No 1) did not consider that the order of Levine J involved this different type of judicial power.[32] Secondly, nor was McHugh J in *Fardon* of this view. As mentioned earlier, his Honour considered that it presented a "matter" that was capable of resolution with an exercise of Commonwealth judicial power if federal jurisdiction were involved. Thirdly, it is clear that Gageler J in *Kable* (No 2) would not have seen it in this way. As explained earlier, his Honour considered that it fell within the federal "matter" before Levine J and the Court of Appeal. Such a conclusion could not be reached if his Honour had taken the view that the preventative detention order by Levine J involved judicial power of this different type. Fourthly, although it is not clear, the plurality's association of the

[29] *In re Judiciary & Navigations Acts* (1921) 29 CLR 257 at 264.

[30] *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 594-598 (Gummow, Hayne and Crennan JJ).

[31] See the analysis in Stellios J, "State/Territory Human Rights Legislation in a Federal Judicial System" (2008) 19 PLR 52 at 73-74.

[32] In any event, his Honour considered that s 73 applied to exercises of power by courts below which constituted "matters".

order with an "adjudication determining the rights of Mr Kable" (*Kable* (No 2) at [27]) would tend to suggest, as McHugh J did in *Fardon*, that the exercise of a preventative detention power would involve a dispute capable of constituting a "matter".

Thus, this does not appear to be how preventative detention orders have been conceptualised by the court in *Kable* (No 1), *Fardon* or *Kable* (No 2). However, even if it were, there would be further difficulties in trying to identify the parameters of this different type of judicial power. We would need a theory for why and how we distinguish *judicial power* from "matters" capable of resolution with an exercise of *Commonwealth judicial power*. That is not to say that such distinctions cannot be made. State courts are not limited by separation of judicial power principles, or by understandings of judicial power prevailing at 1900. It seems possible then for State courts to exercise power which does not involve the resolution of a "matter". In theory, there is no reason why this power cannot be called "judicial power", at least in some circumstances. However, it does not appear that this different kind of State judicial power can explain the reconceptualisation of the preventative detention power in *Kable* (No 1).

In summary, there are difficulties in trying to support the view that preventative detention involves an exercise of judicial power – at least on a conventional understanding of Ch III principles. The most persuasive basis might be the double function reasoning suggested by Gageler J, but it too suffers from difficulties.

5. KABLE AND THE DILEMMAS OF CH III

It is well recognised that the Australian *Constitution* reflects in different ways and to different extents a range of constitutional traditions, principles and ideas. The adoption (a) within a British constitutional tradition of parliamentary sovereignty and responsible government, (b) of a written federal Constitution, (c) that allocates government powers across three arms of government, and (d) that contemplated for an independent judiciary the function of constitutional enforcement against the executive and legislature; was, inevitably, going to lead to interpretive difficulties. To those difficulties we can add the uncertainty of interpretive techniques[33] and judicial perceptions of the place and role of the judiciary within the constitutional system.

Chapter III, perhaps more so than any other part of the *Constitution*, has required an accommodation of this smorgasbord of constitutional traditions, principles and ideas, and their translation into manageable and workable constitutional doctrines. In attempting to make these accommodations and translations, the High Court has faced a range of dilemmas. *Kable* (No 2) has implications for existing dilemmas and presents new ones to be tackled.

A. Chapter III and legal formalism

One of the notable features of Ch III jurisprudence has been the High Court's commitment to *legal formalism*.[34] The High Court has adopted strict separation of judicial power principles that prevent the federal Parliament from conferring judicial power on bodies other than courts referred to in s 71 of the *Constitution* and non-judicial power on courts exercising Commonwealth judicial power.[35] Despite widespread concern about the utility and effectiveness of, and justification for, those strict principles,[36] the High Court has continued to adhere to a strict formalist approach. That strict separation of judicial power is reinforced by a narrow conception of Commonwealth judicial power, largely limiting courts exercising federal judicial power to the function of resolving disputes about pre-existing rights and obligations. Limiting the courts to this narrow function is further achieved by the correspondingly narrow definition of the jurisdictional "matter" that must exist before Commonwealth judicial power

[33] See Stone A, "Australia's Constitutional Rights and the Problem of Interpretive Disagreement" (2005) 27 Syd LR 29.

[34] See Gerangelos P, "Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate" (2005) 8(1) *Constitutional Law and Policy* 1.

[35] *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1915) 20 CLR 54; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[36] See, eg, Zines L, *The High Court and the Constitution* (2008) p 299; Mason A, "A New Perspective on Separation of Powers" (1996) 82 *Canberra Bulletin of Public Administration* 1 at 5-6.

can be exercised by a court. To ease the rigidity of these formalistic approaches, the High Court has developed various qualifications and techniques, including historical analogies and the double function provision, to allow greater flexibility and workability in the allocation of powers across the arms of government.

In *Kable* (No 2) we see these formalist approaches put under further strain. Even the core conception of judicial power – that is, the determination of a dispute about pre-existing rights and duties – is no longer clear. Preventative detention, once seen as a clear example of a power that creates or alters rights and duties, rather than determining a dispute about rights and duties, appears to have been reconceptualised as a judicial power. However, the basis for that reconceptualisation is unclear. As explained, the double function technique – as suggested by Gageler J – might be the most persuasive basis for characterising preventative detention as judicial. However, if preventative detention can be placed into the judicial basket on that basis – then surely there is little point in having the strict separation principles in the first place. It is not surprising that these conceptual difficulties have arisen in the context of the *Kable* principle, a context in which the High Court has struggled to find a firm constitutional basis for limitations on State Parliaments.

B. Underlying justifications

There has also been uncertainty about the *rationale* or *justification* for the separation of judicial power principles. The leading conception that underlies the core separation cases draws from the need to maintain an independent judiciary to police the federal system.[37] However, other ideas about separating power have also found strong recognition in High Court cases. The checks and balances role of the judiciary to keep the other arms of government within their powers has emerged more recently as an explanation for the strict separation principles.[38] And, importantly, there are strong statements by the High Court that we need a strict separation of judicial power in order to protect liberty.[39]

This liberty-protecting value of separating judicial power makes it much easier to say, as Brennan, Deane and Dawson JJ did in *Lim*, and Gummow J and Kirby J maintained in *Fardon*, that (subject to exceptions) a deprivation of liberty requires an exclusive exercise of judicial power. However, if preventative detention by courts when authorised by the federal Parliament is now permissible following *Kable* (No 2) (without the prior adjudgment and punishment of criminal guilt), then serious questions have to be asked about the continuing viability of that liberty-protecting rationale (or at least the version(s) that have been presented by the court).

C. Conceptions of judicial federalism

One of the under-analysed aspects of the decision in *Kable* (No 1) was the impact it had on *federalism*. Most obviously, the court imposed new limits on what State Parliaments could do with their courts, frustrating experimentation with judicial design at the State level. The majority judgments also emphasised the integrated character of the federal judicial system, and placed firm support on the role of the High Court at the apex of that integrated system.

However, there was conceptual (and procedural) untidiness with the appellate role of the High Court in that case. As indicated earlier, the lower courts in *Kable* (No 1) had been exercising federal judicial power because a constitutional claim had been made challenging the validity of the preventative detention power. As Gummow J explained in *Kable* (No 1), the orders of the Court of Appeal triggered the appellate jurisdiction because a "matter" had been determined. However, the position would have been different if no constitutional claim had been made in *Kable* (No 1). As Gummow J explained in that case, no appeal could have been taken to the High Court if Levine J's

[37] See *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1915) 20 CLR 54 at 469-470; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 276; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 540-541.

[38] See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at [104]; [2013] HCA 5; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11.

[39] See eg, *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 at 17.

order were considered to have arisen from an exercise of non-judicial power. If that view were accepted, the High Court's supervisory jurisdiction over such exercises of power by State Supreme Courts would be dependent on the fortuitous (or otherwise) invocation of federal jurisdiction in the courts below. Thus, a conclusion in *Kable* (No 2) that the preventative detention power in *Kable* (No 1) was judicial in nature facilitates the integration of the judicial system within Australia and the ultimate position of the High Court to control[40] exercises of power by State courts.[41]

This is not the first time we have seen concerns to protect the supervisory appellate role of the High Court. Prior to the decision in *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, the High Court had taken a very narrow view of what kinds of orders by lower courts could give rise to an appeal under s 73(ii). The order had to "finally determine the rights of parties before it [would] qualify as an order within the meaning of s 73 of the *Constitution*".[42] Thus, the answering by State Supreme Courts of referred questions or cases stated by lower courts could not, when not made binding on the lower court by the legislative scheme in question, constitute an order for the purposes of triggering the appellate jurisdiction of the High Court. Those answers did not "finally determine the rights of the parties". It was well recognised that this approach had significant consequences for the role of the High Court "as the final appellate court of the nation".[43] These concerns were addressed in *Mellifont* with the relaxation of these rigid requirements allowing a greater range of State Supreme Court orders to go on appeal to the High Court.

In summary, the reconceptualisation of preventative detention as judicial at the State level brings such a function within the Ch III fold and the supervisory jurisdiction of the High Court, further enhancing the integration of the federal judicial system. This, however, comes at the expense of a distinctive role for State courts beyond High Court supervision. While we have become unaccustomed to mourning the growing extent of judicial integration, the centralising tendencies come at a clear cost to State distinctiveness within Australian federalism.

D. The place and role of the judiciary

Finally, *Kable* (No 2) presents us with a narrative about *the place and role of the judiciary within the constitutional system*. It is now beyond controversy that it is the role of the judiciary "to say what the law is".[44] Of course, this extends to determining what laws are constitutionally valid, and what legal rules and principles (whether common law or by interpretation of statute) are to be binding. In *Kable* (No 2) we see the court elaborating on another feature of the place and role of courts in our constitutional system – the legal validity and effectiveness of judicial orders of superior courts until set aside.

As an exercise in marking out the constitutional authority of the judiciary, there is of course a very strong rule of law claim that the decisions of courts should be valid until set aside. As the plurality points out, chaotic results would be produced if governments and citizens alike could not rely upon the validity and effectiveness of court orders. All concerned are entitled to expect some degree of

[40] This is particularly because an exercise of non-judicial power by a State court judge does not fall within the original jurisdiction of the High Court under s 75(v) of the *Constitution*.

[41] This conclusion also assisted to mop up a perceived procedural irregularity with the High Court's order in *Kable* (No 1) to set aside the order of Levine J. In their analysis of *Kable* (No 1), the plurality in *Kable* (No 2) sought to emphasise that the proceedings were conducted on the premise "that the order made by the Court of Appeal (and the order made by Levine J) engaged this Court's appellate jurisdiction conferred by s 73 of the *Constitution*" (at [18]). Gageler J made the same point (at [75]), by quoting the following passage from Gummow J's judgment in *Kable* (No 1) (at 142-143): "'if a State court be invested with … a non-judicial power, no exercise of that power can found an appeal to this Court' because 'this Court has no power to make a non-judicial order in place of any non-judicial order which the State court ought to have made at first instance'". Thus, it appears that the court in *Kable (No 2)* was suggesting that the preventative detention power must have been judicial in nature, otherwise the court would not have had appellate jurisdiction to set it aside.

[42] *Swiss Aluminium Australia Ltd v Federal Commissioner of Taxation* (1987) 163 CLR 421 at 425 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

[43] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 268 (Brennan J); see also 283-284 (Deane, Gaudron and McHugh JJ).

[44] To use the famous words of the US Supreme Court in *Marbury v Madison* 1 Cranch 137; 5 US 87 111 (1803).

certainty from (at least) one arm of government and, as the arm of government with the role of impartial arbiter of disputes, there is good reason for treating judicial decisions with this level of finality, at least where the court involved is a superior court of record. However, does this translate into a question about the validity and effectiveness of *judicial orders* or the exercise of *judicial power*?

As explained, much of the analysis supporting the *Kable* (No 2) plurality's conclusions coupled judicial orders with judicial power. That coupling of orders with power is entirely appropriate when dealing with federal courts because federal *judicial power* exercised by those courts is, almost entirely, coterminous with their *judicial orders*. However, that is not the case with State superior courts, and in trying to translate these ideas to the State court level, we again have a *federalism* problem. It continues to be accepted that there is no legally entrenched separation of powers at the State level. Consequently, provided there is compliance with the *Kable* limitations, State superior courts can exercise power that could not be characterised as federal judicial power. The inclusion of State courts within the federal judicial system in Ch III of the *Constitution* has had the consequence that, for many purposes, power given to State courts has to be characterised as judicial or non-judicial.[45] However, leaving those instances to one side, assessments as to what power is appropriate to be exercised by State courts is a matter for the State legislature in question. Thus, the character of the power as judicial or non-judicial does not seem to be the correct focal point for determining the legal effectiveness of judicial orders. Indeed, as the principles currently stand at the State level, judicial power can be exercised by non-judicial bodies. It is unlikely to be accepted that a non-judicial body's decision would be valid until set aside simply because the non-judicial body is exercising judicial power.

That does not mean that *any* power conferred on a State superior court would result in an order that has continuing operation until set aside. This seems to be supported by the way in which the court in *Love* dealt with the warrant power in that case. The court in *Love* considered a surveillance device warrant issued under New South Wales legislation purporting to authorise Australian Federal Police officers to install and use surveillance devices. The use of such devices would otherwise have been prohibited by federal legislation. Unlike other legislative schemes that confer the power on a judge in his or her personal capacity,[46] the legislation in *Love* conferred the power on the Supreme Court. In determining whether s 109 inconsistency arose between the State warrant and the federal provisions, the court considered the character of the "act of issuing" the warrant. The character was important for the effect of the warrant. If administrative in character, the ambit of the warrant had to be determined from "the scope of the power conferred upon the court by the statute", and a question of severance might arise to overcome any s 109 inconsistency if the warrant had been issued in overly broad terms. However, "if the act of issuing a warrant is judicial in nature, then the warrant takes on the attributes of a judicial order" and, it had been argued, that the orders could not be severed or read down.[47]

There are some uncertainties with the way in which the court in *Love* identified the question to be addressed, as it identified the issues by reference to the arguments presented by the parties. However, it is reasonably clear that the court was inquiring whether the warrant was a "judicial order".[48] In answering this question, the court first explored whether the *power* was judicial in character: if it was, then the *order* would be a judicial one. The court proceeded to reject the argument that the power was judicial simply because it had been conferred on a court. Although the identity of the repository of a power is a factor sometimes taken into account in determining the character of the power, it was not

[45] For example, when a State court is exercising federal jurisdiction, only State provisions conferring judicial powers (and incidental non-judicial powers) can be picked up and applied by *Judiciary Act 1903* (Cth), ss 68(1), 79(1).

[46] For example the federal scheme for telecommunication interception warrants considered by the High Court in *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

[47] *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 318.

[48] *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 318-319.

determinative.[49] The fact that the affected person would not be notified of the application, and the fact that there would be no judicial determination of the rights of the parties, was enough to conclude that the power was non-judicial in nature.[50]

However, although their Honours concluded that the power was non-judicial in nature, it did not necessarily follow that the warrant was a non-judicial order:

> The conclusion that the power to issue warrants … is not judicial is not decisive of the question whether or not the act of issuing a warrant is itself judicial.[51]

It is quite clear from this statement that the court in *Love* did not, as the plurality did in *Kable* (No 2), couple the nature of the power with the nature of the court order. On the contrary, their Honours in *Love* clearly contemplated that there may still be a judicial order even if the power is non-judicial in character.

In *Love*, the court concluded that the warrant (that is, the order) was not judicial in nature. Despite the power to grant a warrant having been given to a court, it was more like a power given to a judge in his or her personal capacity, as was the case in the legislative scheme considered in *Hilton v Wells* (1985) 157 CLR 57. Thus, the court concluded that it was neither judicial power nor a judicial order. As a non-judicial order, "its effect depended[ed] entirely upon the State Act" and, as such, could be read down so as not to authorise a breach of the federal statute.[52]

From *Love*, we can draw the following propositions about the effectiveness of judicial orders at the State level: first, if a power given to a State superior court of record is judicial in character, then that will produce a judicial order. Secondly, some (perhaps many) non-judicial powers given to State superior courts of record will not produce judicial orders (including the issuing of a warrant). Thirdly, it is clearly contemplated that some exercises of non-judicial power by State superior courts of record might still produce judicial orders. Consequently, it is not necessarily the case, as the court appeared to do in *Kable* (No 2), that the character of a power and the character of the court's order following an exercise of the power, have to be coupled.

Of course, the third proposition would require further thought and the development of principles that would differentiate non-judicial powers that give rise to non-judicial orders and those that give rise to judicial orders. However, we are already in the territory of developing principles, and such a development would allow for greater recognition of the fundamental differences between federal and State judiciaries within the federal constitutional system.

6. Conclusion

This analysis of the decision in *Kable* (No 2) has been undertaken with some hesitation because it is not entirely clear that the plurality concluded that the preventative detention *power* exercised by Levine J in *Kable* (No 1) was *judicial* in character. Ultimately, the question for the court was whether the order made by Levine J was the *judicial order of a superior court of record*. As I have suggested, it was possible for the court to reach that conclusion without also concluding that the power was judicial in character. However, because of the way the plurality judges coupled the character of the power and the character of the order throughout their analysis, it appears that the court did indeed conclude that the preventative detention order was judicial in character. Since the majority judgments in *Kable* (No 1) and the judgments in *Fardon* clearly identify the order of Levine J as being non-judicial in character, the court in *Kable* (No 2) appears to have reconceptualised preventative detention, effectively adopting the view of McHugh J in *Fardon* over that of Gummow J.

If that is correct, there are significant consequences for the enactment of preventative detention regimes in Australia. *Fardon* established that preventative detention regimes could, if designed and drafted correctly, be enacted by State Parliaments. However, Gummow J's judgment in *Fardon* had

[49] *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320-321.

[50] *Love v Attorney-General (NSW* (1990) 169 CLR 307 at 321.

[51] *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 321.

[52] *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 322-323.

expressed reservations about preventative detention regimes that authorised detention in circumstances where there was no connection to conduct that had been previously the subject of adjudgment and punishment of criminal guilt by a court. It would appear that the High Court has now adopted the more relaxed view of McHugh J from that case, although, as explained in this article, the basis for such a conclusion is not self-evident. The reconceptualisation in *Kable* (No 2) also opens the door for federal preventative detention regimes provided they are drafted in a way to preserve the judicial process. This position was unclear following the court's decision in *Fardon*. Again, however, the view of McHugh J appears to have been endorsed, although there is no mention in *Kable* (No 2) of the difference of opinion from the earlier cases.

One might be tempted to see *Kable* (No 1) and *Kable* (No 2) as book-ends to a period during which the High Court navigated its way through difficult questions about the nature of preventative detention, and how conceptions of that power might sit alongside established constitutional principles about the assertion of judicial power against the other federal arms of government and developing principles about the exercise of judicial power within a federal judicial system. The period also marked significant movement in the underlying rationale for the separation of judicial power principles that have been accepted by the court. This rugged Ch III terrain has made the task of accommodating constitutional traditions, principles and ideas very difficult. If it is correct that the High Court in *Kable* (No 2) has shifted its view on the character of preventative detention, the decision raises a range of questions about how that shift is to be explained and what impact it has on the fabric of Ch III principles.