GILBERT & TOBIN PAPER

JUDICIAL INDEPENDENCE: *BRADLEY*, *FARDON* AND *BAKER*

A. INTRODUCTION

In his dissenting judgment in *Baker v The Queen*, Justice Kirby said that the decisions of the majority in *Baker* and *Fardon* demonstrated that the implication identified by the High Court in *Kable's* case was now a 'dead letter'.[1]

His Honour may well be correct in so far as the *Kable* implication limits the power of States to involve their Supreme Courts in the preventive detention of people considered to be a danger to the community – the factual context in which *Kable* was decided. In light of the decision in *Fardon*, if a State or Territory wishes to introduce preventive detention it need only adopt a model based on the Queensland legislation upheld in that case in order to avoid constitutional difficulties.

Nevertheless, in this paper I will argue that it is premature to write the *Kable* principle off entirely. Instead, it may well assume increasing importance in areas unrelated to preventive detention. Justice McHugh provided an indication of those areas in *Fardon*, when he stated:

> The *Kable* principle, if required to be applied in future, is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges or in circumstances where State judges are used to carry out non-judicial functions, rather than in the context of *Kable*-type legislation.[2]

This paper takes two parts. The second part takes up Justice McHugh's invitation and explores the implications that the *Kable* principle might have for the appointment of acting judges in the States and Territories.

---

1 *Baker v The Queen* (2004) 78 ALJR 1483 at [142]; Cf *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [104] per Gummow J.

2 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [43] (emphasis added).

In order to set the scene for that topic, however, I will first provide an overview of decisions in *Bradley* and *Fardon*. Constraints of time mean that I will not summarise *Baker*, which is of less relevance to the discussion that follows.

B. THE CASES

i) BRADLEY

The first case, *Bradley*, involved a challenge to the validity of the appointment of the Chief Magistrate of the Northern Territory. The *Magistrates Act* of the Territory provided that the Chief Magistrate 'holds office until he attains the age of 65 years'. Mr Bradley was 54 when he assumed office, meaning he could have served for 11 years. At the time of his appointment, however, his remuneration was set for a period of just 2 years.

The Northern Australian Aboriginal Legal Aid Service sought a declaration that Mr Bradley had not been validly appointed, relying in part upon the *Kable* principle. The High Court unanimously upheld Mr Bradley's appointment. In reasoning to that conclusion, however, the Court accepted two of the three steps in the argument advanced by Legal Aid Service.

The first step was that a court of the Territory may exercise the judicial power of the Commonwealth. No party disputed that step. It was, however, important to the argument because it provided the foundation for the application of the *Kable* principle within the Territories.

The second, and most important step, was that it is implicit in the terms of Chapter III of the Constitution that a court capable of exercising the judicial power of the Commonwealth must both **be** and **appear to be** an independent and impartial tribunal. In a joint judgment judgment of the six Justices other than Chief Justice Gleeson, their Honours approved a passage in Justice Gaudron's judgment in *Ebner v Official Trustee in Bankruptcy*, where her Honour had observed as follows:

> Because State courts are part of the Australian judicial system created by Ch III of the Constitution and may be invested with the judicial power of the Commonwealth, the Constitution also requires, in accordance with *Kable* … that, for the maintenance

> of public confidence, they be constituted by persons who **are impartial and who appear to be impartial** **even when exercising non-federal jurisdiction**….[3]

The endorsement of that passage in *Bradley* strongly suggests that there is now a constitutional requirement that **all** Australian courts, whether exercising federal or non-federal jurisdiction, must be constituted by persons who are both impartial in fact, and who appear to be impartial. In other words, Australian constitutional law now contains an implicit guarantee of judicial independence that appears equivalent to express guarantees found in foreign constitutions and human rights instruments.

It seems that the critical issue in future cases will not be the **existence** of this requirement, but its **content**. It was at this point, the third step, that the Legal Aid Service failed, because the Court held that the Territory legislation did not contravene the 'the relevant minimum characteristic of an independent and impartial tribunal' exercising jurisdiction of the relevant kind.[4]

The task of discerning the relevant minimum characteristic of an independent and impartial tribunal may be a complex one, as the Court has acknowledged that 'No exhaustive statement of what constitutes that minimum in all cases is possible'.[5] As Chief Justice Gleeson indicated in his separate judgment, however, international instruments and the constitutional jurisprudence in other countries may assist in identifying the minimum requirements.[6]

Ultimately, *Bradley* was decided upon a point of statutory interpretation rather than constitutional law. The Court held that the *Magistrates Act* imposed an enforceable duty on the Administrator to make determinations from time to time in relation to a judge's remuneration that either continued or enhanced the judge's remuneration.[7] The existence of that duty meant that Mr Bradley was not 'inappropriately dependent on the legislature or executive of the Territory in a way incompatible with requirements of independence and impartiality'.[8]

---

3 (2000) 205 CLR 337, 363 [81] (emphasis added).
4 At [30]
5 At [30].
6 At [3].
7 At [56]-[57] (emphasis added).
8 At [65]. See also at [14] per Gleeson CJ.

FARDON V ATTORNEY-GENERAL (QLD)

The second relevant case is *Fardon*,[9] which concerned a challenge to the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

That Act provided for the Queensland Attorney-General to apply to the Supreme Court for an order for the continued detention of a person who had been sentence to imprisonment for a serious sexual offence. An order could be sought only in the last 6 months of the period of imprisonment.

The Court could make an order only if satisfied that a person would constitute a serious danger to the community, the danger taking the form of 'an unacceptable risk that the prisoner [would] commit a serious sexual offence' (s 13(2)). The onus of establishing the serious danger rested on the Attorney-General, and it could be discharged only by cogent evidence which satisfied the Court to a high degree of probability (s 13(3)). Hearings were required to be conducted in public, reasons were required to be given (s 17), and there was provision for an appeal to the Court of Appeal. Finally, continuing detention orders were subject to periodic review, and could be renewed only if the same criteria that were required to make the original order were satisfied.

Shortly after the Act came into force, the Queensland Attorney-General sought an order that Mr Fardon be detained under it. Interim and final orders were eventually made, both of which were challenged in the High Court.

The majority of the High Court (Justice Kirby dissenting) held that the Queensland Act was valid. It rejected the argument that the function of making orders for preventative detention could never be given to State courts. It emphasised, instead, that the purpose of the Queensland Act was not to punish people for past conduct, but to use a past conviction as the criterion for the applicability of preventative detention orders.[10] The majority distinguished *Kable* on two bases. They were:

- First, that the Queensland Act was a general law that applied to a class of dangerous sex offenders, rather than to a specific individual (as in *Kable*); and

---

9 [2004] HCA 45.

10 At [74] per Gummow J (Hayne J agreeing), [219] per Callinan and Heydon JJ.

- Second, that the Queensland Act preserved many of the usual features of a judicial process.[11]

It appears that the fact that regular review of a serious kind was required of orders under the Act was vital to the validity of the Act,[12] as was the fact that the Act operated upon someone who was already a 'prisoner' and who had therefore been subjected to the ordinary criminal process.[13]

Fardon plays down the significance of the strand of reasoning in *Kable* that was based upon the importance of maintaining public confidence in the judiciary.[14] The Chief Justice, for example, said that it 'cannot be a serious objection to the validity of the Act that the law which the Supreme Court … is required to administer relates to a subject that is, or may be, politically divisive or sensitive'.[15] His Honour emphasised that the Court's opinion of its own standing is not a criterion of validity.[16]

Justice Gummow, with whom Justice Hayne relevantly agreed, explained that if the exercise of a power or function is likely to undermine public confidence in the courts then that is an important <u>indicator</u> that the law is incompatible with the institutional integrity of State courts.[17] Justice Gummow specifically pointed out, however, that (quote):

> although in some of the cases considering the application of *Kable*, institutional integrity and public confidence perhaps may have appeared as distinct and separately sufficient considerations, that is not so. **Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns <u>institutional integrity</u>**.[18]

---

11 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [19] per Gleeson CJ, [34], [44] per McHugh J, Gummow J (with whom Hayne J agreed) at [113]-[116], and [219], [233] per Callinan and Heydon JJ.

12 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [113].

13 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [114].

14 *Kable* (1996) 189 CLR 51 at 108 per Gaudron J, 118-119 per McHugh J, 133 per Gummow J. See also *Mann v O'Neill* (1997) 191 CLR 204 at 245 per Gummow J. See the summary of the various tests used in *Kable* in *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [213] per Callinan and Heydon JJ. The majority in *Kable* comprised Toohey, Gaudron, McHugh and Gummow JJ, Brennan CJ and Dawson J dissenting.

15 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [21].

16 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [21], [23]; *Baker v The Queen* (2004) 78 ALJR 1483 at [6].

17 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [102].

18 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [102]. See also Kirby J at [144](3). See also *Silbert* (2004) 78 ALJR 464 at 468-469 [26]; 205 ALR 43 at 49-50.

Consequently, following *Fardon* the focus of the *Kable* principle is very much upon the protection of the institutional integrity of State and Territory courts.[19] It is no doubt for that reason that Justice McHugh suggested that the future application of the doctrine most likely related to the terms and conditions of appointments to state courts. It is to that topic that I now turn.

C. KABLE AND THE COMPOSITION OF STATE COURTS

Prior to the decisions in *Bradley* and *Fardon*, it would have seemed unlikely that the primary application of *Kable* would have been in relation to the composition of State courts. Indeed, it could have been predicted with some confidence that *Kable* would not have any operation in this area.

In *Kable* itself, Justice Gaudron reasoned that the fact that State courts are creatures of the States meant that:

> **it is for the States and for the States alone to determine the appointment, tenure and remuneration of State judges** …. In that sense, it is correct to say, as it often is, that the Commonwealth must take State courts as it finds them.[20]

Justice McHugh was similarly forthright, stating:

> **the Constitution does not protect the appointment, remuneration and tenure of the judges of State courts** invested with federal jurisdiction although it protects the judges of federal courts in respect of those matters.[21]

Those comments may explain why, in *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman*, leading counsel on all sides apparently assumed that, unless s 72 of the Constitution applied to Territory courts, there was no constitutional basis upon which the validity of the appointment of the acting judge who presided over Mr Eastman's murder trial could be impugned. [22]

In light of *Bradley*, that assumption requires re-examination, because it is now clear (although it was far from clear when *Eastman* was argued) that all courts –

---

19 *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [219] per Callinan and Heydon JJ.

20 *Kable* (1996) 189 CLR 51 at 102. See also at 67 per Brennan CJ, at 96 per Toohey J. At least in that sense, the Commonwealth must take the State court 'as it finds it': *R v Moffatt* [1998] 2 VR 229 at 249 (Hayne JA).

21 *Kable* (1996) 189 CLR 51 at 115. See also at 110.

Commonwealth, State and Territory – whether or not exercising federal jurisdiction – must conform to minimum standards of independence and impartiality.

One question that arises in working through the ramifications of that implication is whether **acting** judicial appointments conform to that minimum standard. Each State and Territory has legislation that permits such appointments, although in most jurisdictions these provisions have been little used in recent years other than to appoint retired judges as acting judges. That, of course, that has not always been the case. As recently as the late 1990s, the NSW government pursued a policy of making large numbers of acting appointments, particularly to its District Court.

This issue is once again topical, as there is now before the Victorian Parliament the *Courts Legislation (Judicial Appointments and Other Amendments) Bill*. If enacted, that Bill would insert new provisions into the Victorian Constitution, the most important of which would provide that:

> 'The Governor in Council may appoint as many acting Judges of the Court as are necessary for transacting the business of the Court'.[23]

It seems from a discussion paper issued by the State Government that it is envisaged that the Attorney-General would use the power to make acting appointments frequently, in an endeavour to broaden the diversity of the people appointed to the Supreme Court and to test the suitability of candidates for full judicial appointments.

It might be thought that *Ex parte Eastman*[24] establishes that there is nothing inherently unconstitutional about an acting judicial appointment, given that in *Eastman* the High Court dismissed a challenge to a criminal conviction based upon the fact that the trial had been conducted by an acting judge. It is therefore perhaps not surprising that, in *Bradley*, the joint judgment treated *Eastman* as authority that established that, quote, 'the absence of a full commission to the trial judge did not gainsay the appearance of impartiality'.[25]

---

22 *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [18].
23 Section 80D(1).
24 (1999) 200 CLR 322.
25 At [32].

With respect, *Eastman* should not be treated as authority for that proposition, because it seems clear from the judgments and report of that case that the only issue debated in *Eastman* was whether the earlier decisions of the Court that held that s 72 did not apply in the Territories should be overruled.[26] The argument was that, if s 72 applied, then the acting appointment was plainly invalid. If s 72 did not apply, however, it was **assumed** that the acting appointment was valid.

Consequently, the Court in *Eastman* did not address whether the statutory provisions pursuant to which the acting judge was appointed satisfied the requirement that the judge be, and appear to be, independent and impartial. Had the Court considered that issue, it would have been taken into a whole new area of inquiry which may well have led to the conclusion that, while the acting judge in *Eastman* was no doubt 'impartial', he was not 'independent' because the legislation pursuant to which he was appointed did not contain any structural guarantees of independence.[27]

Before developing that argument, I should point out that, despite its endorsement of *Eastman*, the joint judgment in *Bradley* went out of its way to sound a note of caution in relation to the appointment of acting Judges. Six members of the Court stated, in what was plainly intended as a warning shot in relation to the appointment of acting judges, that (quote):

> No question arose in *Eastman* respecting the effect upon that appearance of impartiality and the application of *Kable* to **a series of acting rather than full appointments which is so extensive as to distort the character of the court concerned**.[28]

That passage is curious in two respects.

First, it does not make it clear whether it would be the legislation that authorises acting appointments that might be invalid, or whether instead the implication would invalidate particular acting appointments. If the former, then a difficulty arises because that would suggest that legislation such as the Victorian Bill might be valid when enacted, but invalid if the appointments made pursuant to it were 'so extensive

---

26 Spratt v Hermes; Falconer.

27 The relevant legislation is set out in *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at [46]. The relevant acting judge had been appointed for a period of less than 8 months, pursuant to legislation that on its face allowed the appointment of an unlimited number of acting judges, with the only qualification for appointment being that the person had been enrolled as a legal practitioner for not less than 5 years

as to distort the character of the court'. The validity of the law would therefore turn upon the steps taken by the executive pursuant to it, which raises obvious difficulties of principle. [29]

If, on the other hand, their Honours were suggesting that the *Kable* principle might operated to invalidate particular acting appointments, the Court would be drawn into a line drawing exercise that would be both arbitrary and uncertain (and therefore difficult for Governments who wish to make acting appointments to predict). Further, a focus upon the effect of individual appointments on the appearance of impartiality would deny the central role to legislative guarantees of independence that, I will shortly argue, lie at the heart of the international jurisprudence concerning independent and impartial tribunals.

The second curious feature of the passage quoted from *Bradley* is that it suggests that the point at which numerous acting appointments would lead to the invalidity depends upon the **appearance** of impartiality. If, as *Fardon* suggests, the emphasis is now upon 'institutional integrity' rather than public perception, then the suggestion that invalidity will arise only if there are a sufficiently large number of acting appointments to distort the character of the court and undermine public confidence in it, is difficult to understand. Of course, widespread acting appointments would be one way in which institutional integrity could be undermined, but it is by no means the only way that could occur. The existence of even a single Supreme Court judge who was reasonably thought to be beholden to the executive would have the potential to cause serious damage to the integrity of an entire court.

Consequently, I would argue that the test should not be whether acting appointments are so widespread as to distort the character of the Court. Instead, the test identified earlier in the judgment in *Bradley* should be employed, which is to ask whether the Tribunal satisfies the requisite minimum standards for independence and impartiality.

---

[28] At [32].

[29] As ordinarily the validity of an Act can be assessed by reference to the character of the law: *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 561 [12]. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 352-353, 371-372; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ; *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J. See also *Kable* (1996) 189 CLR 51 at 116 per McHugh J; *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50 at [159] per Kirby J.

The case law of the European Court of Human Rights and the Supreme Court of Canada may provide useful guidance in ascertaining the minimum requirements for an 'independent and impartial tribunal'. Decisions of both courts suggests that the focus in deciding whether a particular tribunal is independent and impartial should be upon whether there are sufficient **guarantees** of independence in the relevant legislation, rather than whether the court is **in fact** impartial. As Chief Justice Lamer of the Supreme Court of Canada put it (quote):

> the independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitution and proceedings, irrespective of the actual good faith of the adjudicator.[30]

In the Canadian jurisprudence, the perception of independence is important, but the relevant perception is the 'perception of whether the tribunal enjoys the essential objective conditions or <u>guarantees</u> of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees'.[31] The objective guarantees are necessary to ensure an <u>appearance</u> of independence. That approach is not dissimilar to the role attributed to public perception in *Fardon*.

A similar approach has been taken by the European Court of Human Rights, which has held there must be both:

- a manner and term of appointment that presents an **appearance** of independence (which ordinarily requires at least fairly long-term appointments - renewable four years terms having been criticised);[32] and also

- sufficient **guarantees** against outside pressures to exclude any legitimate doubt about the impartiality of the tribunal.[33]

---

30 *R v Genereux* [1992] 1 SCR 259, 304.

31 *Valente v The Queen* (1985) 24 DLR 161, 172-173 (Le Dain J, for the Court); see also [1985] 2 SCR 673. *Valente* has been followed by the Supreme Court of Canada in a series of cases: see *R v Beauregard* (1986) 30 DLR (4th) 481; *Attorney-General of Quebec v Lippé* [1991] 2 SCR 114, 139-140; *R v Généreux* (1992) 88 DLR (4th) 110 and *Reference Re: Public Sector Pay Reduction Act (Prince Edward Island), s 10*; *Attorney General of Canada et al, Intervenors* (1997) 150 DLR (4th) 577, 629 per Lamer CJ.

32 *Çiraklar v Turkey*, 28 October 1998, 1998-VII, at [39]; cf *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165, where 3 years voluntary terms were upheld, as otherwise it may have been difficult to convince people to accept appointment.

The European and Canadian authorities were applied in the specific context of acting judges by the Scottish High Court of Justiciary in *Starrs v Ruxton*.[34] In that case, which led to changes to the recorder system in England,[35] two trials conducted before temporary sheriffs were held to be invalid because the temporary sheriffs were not 'an independent and impartial tribunal'. The features of the regime that led to invalidity included that the appointment of a temporary sheriff could be recalled by the Executive at any time;[36] that the appointment was for a limited period of time;[37] and that elements of the policy for the reappointment of temporary sheriffs tended 'to encourage the perception that temporary sheriffs who were interested in their advancement might be influenced in their decision-making to avoid unpopularity with the Lord Advocate'.[38]

D. CONCLUSION

In conclusion, I return briefly to the Victorian Bill. That Bill is less susceptible to attack than was the Scottish temporary sheriff system, as it contains better guarantees in relation to independence. For example, under the Bill an acting judge holds office for a fixed period of 5 years (unless he or she first attains the age of 70). In that respect, the Victorian Bill contains a better guarantee than most of State and Territory legislation, which ordinarily contemplate 6-12 month appointments).[39] Further, while the Attorney-General may require an acting Judge to undertake the duties of a Judge on a full-time or sessional basis,[40] the Attorney does not have the power to revoke or amend such a notice once it has been given.[41] Finally, an acting judge can be

---

33 *Findlay v United Kingdom* (1997) 24 EHRR 221, [73]. See also *Cooper v United Kingdom* (2004) 39 EHRR 8, [104]; *Bryan v United Kingdom* (1995) 21 EHRR 342, [3]. This approach was adopted in *Starrs v Ruxton* (2000) SLT 42, [18] per Lord Reed.

34 (2000) SLT 42. This case is cited with approval by Drummond J (dissenting) in *North Australian Aboriginal Legal Aid Service Inc v Bradley and Northern Territory of Australia* [2002] FCAFC 297, [194]-[198].

35 The reforms included the introduction of automatic renewal of appointments, a guaranteed number of sitting days, and the vesting of the power to dismiss in a judge appointed by the Lord Chancellor See Jeremy Croft, 'Whitehall and the Human Rights Act 1998', The Constitution Unit, School of Public Policy, University College London, September 2000, p 54.

36 *Starrs v Ruxton* (2000) SLT 42, [39], [42], [49] per Lord Justice Clerk, [5] per Lord Prosser and [32]-[33] per Lord Reed.

37 *Starrs v Ruxton* (2000) SLT 42, [40], [43]-[44], [49] per Lord Justice Clerk, [6]-[7] per Lord Prosser and [23] per Lord Reed.

38 *Starrs v Ruxton* (2000) SLT 42, [46] per Lord Justice Clerk.

39 s 80D(6)(c).

40 S 80D(4).

41 S 80D(5).

removed from office only in the same way and on the same grounds a permanent judge.[42]

Despite those safeguards, however, there are areas of concern. First, the Bill does not limit the possible number of acting appointments, or the circumstances in which such appointments can be made. At least theoretically, it would authorise appointments that would radically undermine the security of tenure of a substantial proportion of the members of the Court.

Secondly, acting judges can be re-appointed, but they are not entitled to reappointment.[43] As a result, there are real incentives for acting judges to seek re-appointment or permanent appointment. The Judicial Conference of Australia has suggested that those incentives include superannuation benefits potentially valued at hundreds of thousands of dollars if a temporary appointee receives a permanent appointment before his or her temporary appointment expires.

Finally, the Bill provides that an acting judge must not engage in legal practice 'while undertaking the duties of a Judge' except with the approval of the Attorney-General.[44] There exists a clear danger that acting Judges appointed on a sessional basis might be beholden to the Attorney-General to obtain permission to continue legal practice.

Particularly in those three respects, there is scope for debate as to whether acting judges appointed pursuant to the Bill would have sufficient guarantees of independence to satisfy the minimum criteria for an independent and impartial tribunal. Those questions, and related questions with respect to the shorter term acting appointments that are possible in other jurisdictions, may well provide the context in which any further elucidation of the *Kable* principle occurs.

16 February 2005

DR STEPHEN DONAGHUE
ISAACS CHAMBERS
MELBOURNE

---

42 s 80D(6)(d).
43 s 80D(6)(b).
44 s 80D(13).