

# *The Separation of Powers and Legislative Interference in Pending Cases*

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## **1. Introduction**

This article is concerned with the identification of principles, derived from the doctrine of the separation of powers, which govern the relationship between the Commonwealth Parliament and the courts referred to in Ch III of the Commonwealth Constitution in the situation where Parliament purports to amend the law which is applicable in pending legal proceedings. This is an area of considerable complexity in that, unlike legislative *usurpations* of judicial power, such as a Bill of Attainder,<sup>1</sup> legislative *interferences* are not always, or indeed often, regarded as unconstitutional. Legislative interferences in the judicial process may not always raise concerns that there has been a denial of procedural due process,<sup>2</sup> that an essential element of the judicial power of the Commonwealth is being removed from the court, or that the court is being required to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power.<sup>3</sup> Quite discrete principles, albeit related to these more dominant principles derived from Ch III, need to be relied on to test the constitutional validity of the interferences with which this article is concerned. It is noted at the outset that the concern here is more precisely with principles which can be derived from the separation doctrine as opposed to the principle of statutory interpretation that Parliament will not be taken to intend the retrospective application of legislation to pending cases in the absence of express words to that effect.<sup>4</sup>

When purported amendments to the law applicable in a pending case are impugned as unconstitutional legislative interferences, they are often *ad hominem*, retrospective, and tailored to address the very issues in the pending case. *Prima facie*, unlimited legislative power in this regard may pose a potential threat to the

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1 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('*Polyukhovich*').

2 See *Wilson v Minister for Aboriginal and Torres Islander Affairs* (1996) 189 CLR 1 at 17.

3 See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 ('*Chu Kheng Lim*') (Brennan, Deane & Dawson JJ).

4 See the discussion of the authorities in the judgment of Spigelman CJ in *Lodhi v R* (2006) 199 FLR 303 ('*Lodhi*').

purposes underlying the separation of powers, in particular, ensuring that legal disputes are protected from political influence and factional interest. This is especially the case where the government is party or has an interest in the outcome of pending proceedings.

Although arising rarely, the issue tends to do so in matters of high political significance. The temptation, if not political imperative, to legislative intervention can at times be overwhelming. One need only list the facts of the main cases here to illustrate the point. These include, for example, the criminal prosecution of the perpetrators of an abortive coup (*Liyanage v R*),<sup>5</sup> the deregistration of highly controversial industrial unions (the *BLF* cases),<sup>6</sup> the detention of asylum seekers (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*)<sup>7</sup> and the admission of evidence in prosecutions for narcotics offences resulting from the illegal conduct of law enforcement officers (*Nicholas v R*).<sup>8</sup> Moreover, the issue may have arisen with respect to the legislative response to the *MV Tampa* Incident relating to the removal from Australian waters of the Norwegian ship which had taken on board some 400 asylum-seekers<sup>9</sup> and more recently in prosecutions based on anti-terrorist laws (*Lodhi v R*).<sup>10</sup> The United States cases reveal similarly politically sensitive issues: property rights and rights to compensation affected by the Franco-American War (*United States v Schooner Peggy*)<sup>11</sup> and the American Civil War (*United States v Klein*),<sup>12</sup> the effect of presidential pardons (*United States v Klein*),<sup>13</sup> environmental issues relating to logging and endangered species (*Robertson v Seattle Audubon Society*),<sup>14</sup> the protection of claims for securities fraud during the notorious financial excesses of the late 1980s (*Plaut v Spendthrift Farm*),<sup>15</sup> prison conditions (*Miller v French*),<sup>16</sup> compensation payable to Indian tribes for the taking of tribal land (*United States v Sioux Nation of Indians*),<sup>17</sup> and the right to terminate life support in extreme cases (*Schiavo v Schiavo*).<sup>18</sup> In such circumstances, the definition of relevant constitutional limitations takes on a particular significance.

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5 *Liyanage v R* [1967] 1 AC 259 ('*Liyanage*').

6 *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372; *BLF v Commonwealth* (1986) 161 CLR 88.

7 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 ('*Chu Kheng Lim*').

8 *Nicholas v R* (1998) 193 CLR 173 ('*Nicholas*').

9 For detailed analysis, see the special issue of the *Public Law Review*: (2002) 13(2) *Public Law Review*.

10 *Lodhi* (2006) 199 FLR 303.

11 *United States v Schooner Peggy* 5 US (1 Cranch) 103 (1801).

12 *United States v Klein* 80 US (13 Wall) 128 (1871) ('*Klein*').

13 *Klein* 80 US (13 Wall) 128 (1871).

14 *Robertson v Seattle Audubon Society* 503 US 429 (1992).

15 *Plaut v Spendthrift Farm* 514 US 211 (1995).

16 *Miller v French* 530 US 327 (2000).

17 *United States v Sioux Nation of Indians* 448 US 371 (1980).

18 *Schiavo ex rel. Shindler v Schiavo* 404 F 3d 1270 (11<sup>th</sup> Cir, 2005), application for stay of enforcement denied, 544 US 957 (2005).

## 2. *First Principles and 'Decisional Independence'*

The High Court has unequivocally confirmed the legal entrenchment of the separation of powers in the Constitution and applied it with particular rigour to the separation of judicial power.<sup>19</sup> However, whilst the dominant concern of Ch III jurisprudence is the protection of the independence and integrity of judicial power, in the pending case scenario equally important is the concern to ensure that the legislative competence of Parliament is not unduly eroded merely because changes in laws have an effect on pending proceedings. This is reflected in the first relevant constitutional limitation: Parliament has the undoubted competence to make new law, or amend the law (even if it is retrospective<sup>20</sup> and *ad hominem* in nature) which Ch III courts must apply in any pending case if the law is otherwise within power. This was stated succinctly by Mason J in *R v Humby; Ex parte Rooney*: 'Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action'.<sup>21</sup> The American shorthand used for this rule, 'the Changed Law Rule',<sup>22</sup> will be adopted here for ease of reference. This rule thus allows for valid legislative interferences effected by a change in the law.

However, is there a quality to the legislation which causes such interferences to be in breach of the separation of powers doctrine? To answer this, the precise element of judicial power which is sought to be protected needs to be appreciated. It is the independence of the judicial branch in its exercise of the core element of judicial power, that is, the conclusive adjudication of controversies between parties in litigation resulting in an authoritative and binding declaration of their respective rights and duties according to existing law.<sup>23</sup> Although 'judicial power' is a concept notoriously resistant to precise definition,<sup>24</sup> and indeed to such definition which may render it absolutely distinct from non-judicial powers,<sup>25</sup> this core element remains at the centre of all serious attempts to provide some definitional framework.<sup>26</sup> The independence of the exercise of this power in the hands of the Ch III courts, as has often been observed, affords citizens the right to enjoy the fruits of litigation, even, or especially, against the Commonwealth (or one of its

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19 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; affirmed *sub nom Attorney-General for Australia v The Queen* [1957] AC 288 ('Boilermakers').

20 See *Polyukhovich* (1991) 172 CLR 501.

21 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 250.

22 The term was originally used by Gordon C Young, 'Congressional Regulation of Federal Courts Jurisdiction and Processes: *United States v Klein* Revisited' [1981] *Wisconsin Law Review* 1189 at 1240.

23 These are the elements contained in the oft-quoted classic definition by Griffith CJ in *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

24 In the words of Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394, '[t]he concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis'.

25 In the (unanimous) judgment in *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188, reference was made to the 'difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive'.

26 See above n 23. See also *Fencott v Muller* (1983) 152 CLR 570 at 608 and *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

agencies) given the obvious advantage afforded it by the power of Parliament to legislate to effect a desirable outcome.

This very specific independence was referred to as ‘decisional independence’ by the American scholar Professor Martin Redish. It is ‘the ability ... to interpret and apply ... substantive legal principles *in the specific context of an individual adjudication*, free from control or interference by the purely political branches of the federal government’.<sup>27</sup> Redish emphasised the singular nature of this independence, distinguishing it from ‘institutional independence’, that is, ‘the *noncase* specific protections of salary and tenure’. In the pending case scenario — because it is case specific — the decisional independence of the judicial branch is of particular concern. This was articulated by Jacobs J in *R v Quinn; ex parte Consolidated Foods Corporation*, where he noted that the separation of judicial power ensures that the rights of citizens are protected

by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example.<sup>28</sup>

It is significant for present purposes that his Honour added that ‘there are multitudes of such instances’.

The first limitation on legislative power in this context can be sourced in the Changed Law Rule itself. The Rule is based on the assumption that the legislation changes the law. The corollary is that if the legislation does not in substance change the law, if it is not substantively *legislative*, the Changed Law Rule cannot apply. In the United States cases relevant to the separation of judicial power,<sup>29</sup> this principle was stated in the early case of *United States v Schooner Peggy*<sup>30</sup> involving the seizure and subsequent forfeiture to the United States of a French trading vessel pursuant to a condemnation order by a federal court. Pending an appeal, the law was amended to require the return to their respective nations of all vessels which were not yet ‘definitively’ condemned. The Supreme Court held it had no alternative but to apply the new law to the pending case. Marshall CJ, delivering the opinion of the Court, stated that:

[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and *positively changes the rule which governs*, the law must be obeyed, or its obligation denied .... I know of no court which can contest its obligation.<sup>31</sup>

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27 Martin H Redish, ‘Federal Judicial Independence: Constitutional and Political Perspectives’ (1995) 46 *Mercer Law Review* 697 at 699 (emphasis added).

28 *R v Quinn; ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 11.

29 Art III, § 1 of the United States Constitution provides: ‘The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish’.

30 *United States v Schooner Peggy* 5 US (1 Cranch) 103 (1801).

31 *Id* at 110 (emphasis added).

Marshall CJ was nevertheless concerned not to allow for completely unbridled legislative power in this context, expressing some disquiet about the retroactive application of new law to pending cases. Courts will, he noted, ‘struggle against a construction’ which will by retroactive operation affect the rights of the parties.<sup>32</sup> He tentatively drew a distinction between suits involving private parties and those involving the government as litigant. In the latter situation, he considered the possibility of setting a higher threshold for the validity of such retroactive laws, without definitively concluding on it.<sup>33</sup>

The argument was taken up by Thomas Cooley, who stated in his influential *Constitutional Limitations*:

If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and *cannot be done by a mandate to the courts, which leaves the law unchanged*, but seeks to *compel* the courts to construe and apply it.<sup>34</sup>

He thus posited the fundamental distinction between a (constitutional) substantive amendment to the law, and an (unconstitutional) direction to the federal courts.

The early scholars of the Commonwealth Constitution also traversed this ground. Harrison Moore noted that the constitutional limitations derived from the separation of powers extended beyond the obvious, egregious institutional usurpations of judicial power by Parliament to include limitations on its powers vis-à-vis the Ch III courts:

It is not merely that the Legislature may not constitute itself or any other body unauthorised by the Constitution, a Court of justice with functions which might be validly performed by a Court regularly constituted, ie the determination, after hearing, of rights according to law. *If this were all that is imported by the separation of powers, it would be of small importance legally, for a power of this nature is very rarely usurped by a Legislature.* The temptation to which Legislatures are liable, to which American Legislatures have succumbed, and which American Courts have met by the allegation of an invasion of judicial power, is to apply a new rule to past acts or events, or to deal with a specific matter of injury or wrong independently of all rule. However mischievous and dangerous may be *ex post facto* laws and *privilegia*, their very mischief lies in the fact that *they are something other than judicial acts*; that what should have been done in a judicial way and according to law has been done by the assumption of arbitrary power.<sup>35</sup>

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32 Ibid.

33 For subsequent applications of the Changed Law Rule, see *United States v Preston* 28 US (3 Peters) 57 at 66–7 (1830) and *Fairfax's Devisee v Hunter's Lessee* 11 US (7 Cranch) 603 at 612 (1813).

34 Thomas M Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the States of the American Union* (7<sup>th</sup> ed, 1903) at 137 (originally published in 1868) (emphasis added).

35 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) at 322 (emphasis added).

Andrew Inglis Clark took the matter a little further. First, ‘... after a law has been made and promulgated the Parliament cannot control its operation *otherwise than by altering it*’.<sup>36</sup> This is an early recognition of the fundamental premise underlying the Changed Law Rule. Second, ‘[t]he Parliament can at any time alter or repeal any law which it has made; but the alteration or repeal *must be effected by an exercise of the legislative power*, because that is the only power possessed by the Parliament, and any attempt on the part of the Parliament to do *anything which would not be an exercise of legislative power would not be a law*, and therefore would not be binding on the Judiciary or on any person in the Commonwealth’.<sup>37</sup> The concern is not necessarily the fact that Parliament might be usurping in any particular instance all, or indeed any, of the hallmarks of judicial power, but rather that it was acting in a non-legislative manner. The implication was that Parliament cannot simply direct how a law is to be interpreted or applied by a Ch III court. Clark gave the following example:

A new rule of conduct may be prescribed by the Parliament by the repeal or the alteration of an existing law, but any exposition of the purport of the language of an existing law, or any declaration of the existence of any rights or liabilities as the result of its enactment, *is not an exercise of legislative power*; and if any such exposition or declaration is made by the Parliament *in the shape of apparent legislation*, it is an attempted encroachment on the provinces of the Judiciary and is therefore invalid, if the explicit distribution of the legislative, the executive and the judicial powers made by the Constitution is to be enforced as part of the supreme law of the Commonwealth.<sup>38</sup>

Quick and Garran made similar observations, but these were limited more to the integrity of final judgments and their conclusiveness: ‘It cannot be doubted that any attempt by Parliament, under cover of a declaratory law or otherwise, to set aside or reverse the judgment of a court of federal jurisdiction, would be void as an invasion of the judicial power’.<sup>39</sup> Like Inglis Clark, they recognised that the cover of properly enacted legislation will not shield the purported exercise of legislative power from separation of powers scrutiny. Moreover, the constitutional offence did not lie in the fact that the legislature was *exercising* judicial power, but rather that it was *interfering* with its independent operation by the courts by prescribing the outcome of cases.

### ***3. Judicial Recognition of the Direction Principle***

This element of prescription or direction was eventually to be adopted by the courts in both Australia and the United States as the basis for defining unconstitutional legislative interference in pending cases based on the separation of powers doctrine. The seminal cases to be examined below established the

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36 A Inglis Clark, *Studies in Australian Constitutional Law* (1st ed, 1901) at 50 (emphasis added).

37 *Ibid* (emphasis added).

38 *Id* at 39 (emphasis added).

39 John Quick & Robert R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 721.

central constitutional limitation here, which the writer will refer to as the ‘direction principle’: the Changed Law Rule will not apply if the legislation is not in substance an amendment to the law but rather a direction to the judicial branch which interferes with its independent adjudication in the pending case, or directs the exercise of judicial discretion therein. Such purported legislation will be invalid as a breach of the separation of powers doctrine. For the rule to be breached it is not essential that an actual outcome be mandated so long as a particular aspect of the court’s independent adjudication is interfered with a view to influencing the outcome.

In certain circumstances, such directive quality will be obvious on the legislation’s face. Thus, for example, legislation expressly targeting particular legal proceedings and expressly directing a court how it must resolve a particular legal or factual issue in that case could not be regarded as, in substance, a change in the law. Whilst rare, the provision declared invalid in *Lim*, is a case in point: ‘[a] court is not to order the release from custody of a designated person’.<sup>40</sup> The term ‘designated person’ was clearly applicable to the plaintiff asylum-seekers. They were being detained and had made application to the Federal Court for orders that they be released pending the reconsideration of their claim for refugee status. The provision was enacted two days prior to the hearing.

#### A. *Liyanage v R*

Usually, however, the situation is not as obvious; not even in the leading case — the decision of the Privy Council in *Liyanage v R*.<sup>41</sup> The Parliament of Ceylon (as Sri Lanka was then known) purported to amend the *Criminal Procedure Code*, with retrospective application, in its application to some sixty persons accused of offences against the state for their part in an abortive coup. The legislation left no doubt that it was directed at these persons and their prosecution. It was made applicable ‘to any offence against the State’ committed on or about the date of the coup and it was to cease to have application upon the conclusion of the relevant trials. It widened the class of offences for which trial without jury could be ordered to include those with which the accused had been charged; allowed for arrest without warrant for ‘waging war against the Queen’, and widened the scope of that offence to ensure that the actions of the accused came within its scope. In addition, it legalised *ex post facto* the detention of the accused and made admissible in evidence certain statements made to the police which were otherwise inadmissible. Finally, it retrospectively increased the punishment which was to be imposed.<sup>42</sup>

The Privy Council invalidated the legislation as an unconstitutional legislative direction on separation of powers grounds. In so doing, it accepted the Changed Law Rule and the direction principle as above stated. The Privy Council, however, eschewed a precise definition of unconstitutional interference as it was ‘not

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40 *Chu Kheng Lim* (1992) 176 CLR 1.

41 *Liyanage* [1967] 1 AC 259.

42 As a preliminary step, the Privy Council held that the separation of powers was incorporated into the Constitution of Ceylon: *id* at 283 ff, especially from 287.

necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference'.<sup>43</sup> It settled rather for the identification of *indicia* of unconstitutional interference based on legislative direction which impugned the substantively legislative nature of the enactment. These did not constitute a closed set, but were to be determined by the facts and circumstances of each case.<sup>44</sup> In addition to the critical *indicia* of specificity and retrospectivity, relevant *indicia* were to be found in the following:

- 'the true purpose of the legislation' by which was meant, when read in context, the need to take a substance-over-form approach;
- i) 'the situation to which it is directed', which referred to the need to examine carefully the precise legal issues under consideration in the pending case; and
  - ii) 'the existence (where several enactments are impugned) of a common design'.

The common thread was the 'the extent to which the legislation affects, *by way of direction or restriction*, the discretion or judgment of the judiciary in specific proceedings'.<sup>45</sup> It did not appear necessary that the ultimate outcome be directly pre-determined, so long as there was legislative direction as to how any legal issue under consideration was to be resolved with a view to facilitating an outcome desired by the legislature. Thus, for example, the Privy Council found constitutionally offensive on this ground the fact that judges 'were deprived of their normal discretion to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial'.<sup>46</sup> Professor Lane, when commenting on this case, stated that even a change in the law of evidence may in certain circumstances be held invalid in this context: 'Certainly Parliament cannot bring down a "legislative judgment" specifically directed against particular individuals and intended to make their conviction easy (by altering evidentiary rules)'.<sup>47</sup>

The Privy Council regarded, as relevant in its finding of unconstitutional direction, the *ad hominem* nature of the legislation, its retrospectivity, and the fact that it was clearly aimed at the precise issues in the pending prosecution almost as if to fit glove-like around them.<sup>48</sup> The Privy Council also had regard to the fact that the legislation sought to interfere with matters that were traditionally matters reserved for the exercise of judicial discretion: the fact that the legislation made provision for trial without jury, legalised arrest without warrant, made admissible (in these proceedings only) evidence which was otherwise inadmissible under the general law of evidence, and increased the sentence to be imposed on the particular accused. None of the *indicia* of direction was *per se* determinative of the issue. It was their combination and interrelationship that led it to accept the appellant's

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43 Id at 289–90.

44 Id at 290.

45 Ibid (emphasis added).

46 Ibid.

47 Patrick H Lane, *Lane's Commentary on The Australian Constitution* (2nd ed, 1997) at 483.

48 *Liyanage* [1967] 1 AC 259 at 290.

submission that the ‘the pith and substance of [the legislation] was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals’.<sup>49</sup> That is,

The *true* nature and purpose of these enactments was revealed by their *conjoint* impact on the specific proceedings in respect of which they were designed, and they *take their colour*, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere.<sup>50</sup>

It was not necessary to establish a usurpation of all the elements of judicial power; it being sufficient that the legislature overstepped the boundaries of branch power by directing the courts, even under the guise of otherwise valid legislation. However, a key factor in the Board’s decision, though not decisive on its own, was the barely disguised attempt by the legislature to influence the specific trials of specific known accused.

### **B. *United States v Klein***

A virtually identical position had been reached in the United States in 1871 in the seminal case of *United States v Klein*.<sup>51</sup> The administrator of a deceased estate, Klein, had successfully argued in the (federal) Court of Claims that the estate was entitled to be compensated for the confiscation, during the Civil War, of the deceased’s property. This was because, even though the deceased had assisted the Confederate cause, he had received a presidential pardon and had honoured the requisite loyalty oath. While the government’s appeal to the Supreme Court was pending, that Court held in *United States v Padelford*<sup>52</sup> that presidential pardons erased any disbarment to compensation. Reacting to *Padelford*, Congress purported to change the law with effect on pending and future cases, including the *Klein* suit. The legislation, ‘the 1870 proviso’,<sup>53</sup> provided that, first, proof of presidential pardon was inadmissible in the Court of Claims (or in any appellate court) in support of suits for the return of property or to establish that a litigant had the right to bring or maintain the suit. Second, it provided that where such pardon, reciting a person’s involvement in aid of the rebel cause, had been given and accepted with no protestation as to involvement, such pardon would be deemed conclusive evidence that the recipient *did* take part in that cause. Third, on proof that such pardon had been granted, the ‘jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant’.<sup>54</sup>

The Supreme Court held this to be an impermissible legislative interference in the pending case because Congress was directing federal courts to treat Presidential pardons as conclusive proof of involvement in the rebellion, and

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49 *Liyanage* [1967] 1 AC 259 at 290.

50 *Liyanage* [1967] 1 AC 259 at 290 (emphasis added).

51 *Klein* 80 US (13 Wall) 128 (1871).

52 *United States v Padelford* 76 US (9 Wall) 531 (1870).

53 *Act of July 12, 1870*, 16 Stat 230 at 235.

54 *Klein* 80 US (13 Wall) 128 at 129 (1871).

directing them not to entertain suits for compensation based on such a pardon. Legislation which ‘prescribes rules of decision to the Judicial Department of the government in cases pending before it’ was held to be constitutionally invalid on separation of powers grounds.<sup>55</sup>

Chase CJ, foreshadowing *Liyanage*, emphasised substance over form. *Prima facie*, the legislation purported to regulate the jurisdiction of the Court of Claims, and appeals from it to the Supreme Court. As such it was perfectly valid under the United States Constitution. However, in substance, the legislation

did not intend to withhold appellate jurisdiction *except as a means to an end*. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have.<sup>56</sup>

Chase CJ then gave expression to the direction principle:

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power. The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to *prescribe a rule for the decision of a cause in a particular way?*<sup>57</sup>

The Court was sensitive to the fact that the proviso was enacted whilst an appeal by the government was pending and that Congress was in a position to influence the outcome in favour of the government. Special vigilance by the Court was therefore required. As Chase CJ put it:

We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of the pardon granted ... Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not ...<sup>58</sup>

Again, the *indicia* of specificity and retrospectivity were present. The ‘language of the proviso’ was also clearly directive and prescriptive:<sup>59</sup> ‘...such [presidential] pardon ... *shall be taken and deemed in such suit* ... conclusive evidence that such person did take part in and give aid and comfort to the late rebellion ... and on proof of such pardon and acceptance the jurisdiction of the court in the case *shall cease*, and *the court shall forthwith* dismiss the suit ...’.<sup>60</sup> The legislation was

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55 *Klein* 80 US (13 Wall) 128 at 147. There was some debate amongst constitutional scholars in the United States whether the *ratio* of *Klein* extended beyond the purely jurisdictional point to be authority also for the direction principle. That uncertainty was largely resolved in a seminal article on *Klein* in 1953 by Professor Henry Hart in favour of the proposition that it did: Henry M Hart, ‘The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic’ (1953) 66 *Harvard Law Review* 1362. It is this view which has prevailed in both judicial exegesis and constitutional scholarship.

56 *Klein* 80 US (13 Wall) 128 at 147 (emphasis added).

57 *Klein* 80 US (13 Wall) 128 at 146 (emphasis added).

58 *Klein* 80 US (13 Wall) 128 at 146 (emphasis added).

59 *Klein* 80 US (13 Wall) 128 at 145.

highly particularised with respect to the issues to be considered in the pending proceedings.<sup>61</sup> Moreover, the legislation clearly favoured the government as a party.<sup>62</sup> Taken together, the proviso was held not to be substantively legislative but rather an unconstitutional direction. Thus, the direction principle was established as a key constitutional limitation based on the separation of powers in the United States.

#### **4. *The BLF Cases Revisited: The Direction Principle Confirmed***

In Australia, the cases involving the deregistration of the Builders Labourers' Federation ('BLF'), confirmed the acceptance of the direction principle, particularly when the decision of the High Court is juxtaposed with that of the New South Wales Court of Appeal relating to the analogous State legislation. In *BLF v Commonwealth* ('*BLF v Cth*'),<sup>63</sup> the BLF had challenged the declaration by the Australian Conciliation and Arbitration Commission that it, the BLF, had engaged in the type of improper conduct which empowered the Minister to order its deregistration. It applied to the High Court to have the Commission's declaration quashed. Meanwhile, Parliament enacted legislation which simply cancelled the BLF's registration 'by force of this [the relevant] section'.<sup>64</sup> The BLF unsuccessfully challenged this legislation as an unconstitutional direction which abrogated the function of the High Court in the pending proceedings.<sup>65</sup> The Court,<sup>66</sup> relying on *Rooney*, held that 'Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution'.<sup>67</sup> Confirming the direction principle's essential role in testing the substantively legislative nature of the legislation, it further held that '[i]t is otherwise when the legislation in question interferes with the judicial process itself, rather than with the substantive rights which are at issue in the proceedings'.<sup>68</sup> The Court was sensitive to its *ad hominem* nature and the fact that it addressed an issue — the deregistration of the BLF — central to the pending proceedings. Neither was held, however, to negate the substantively legislative quality of the enactment as the impugned provision simply achieved deregistration by its own force, that is, as a change in the law. It did not attempt to address, or indeed fashion itself to, the particular legal issues in the pending proceedings. It merely bypassed them to achieve a result — the deregistration of the union — which was within Parliament's legislative competence.

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60 *Klein* 80 US (13 Wall) 128 at 129 (emphasis added).

61 *Klein* 80 US (13 Wall) 128 at 145–6.

62 *Klein* 80 US (13 Wall) 128 at 147.

63 *BLF v Commonwealth* (1986) 161 CLR 88.

64 *Builders Labourers' Federation (Cancellation of Registration) Act* 1986 (Cth) s 3.

65 *BLF v Commonwealth* (1986) 161 CLR 88 at 94.

66 Gibbs CJ, Mason, Brennan, Deane, & Dawson JJ.

67 *BLF v Commonwealth* (1986) 161 CLR 88 at 96.

68 *BLF v Commonwealth* (1986) 161 CLR 88 at 96.

By contrast, the analogous State legislation, according to the New South Wales Court of Appeal,<sup>69</sup> sought to achieve deregistration by a legislative direction in the pending proceedings. Had the separation of powers doctrine been entrenched in the State it would have declared the legislation invalid on this basis alone.<sup>70</sup> The Minister had cancelled the registration of the State branch of the BLF. The BLF unsuccessfully challenged the decision in the Supreme Court on natural justice grounds, whereupon the BLF appealed. In the week prior to the appeal, Parliament enacted *ad hominem* legislation, the *Builders' Labourers Federation (Special Provisions) Act 1986* (NSW) which provided as follows:

- (a) The union's registration 'shall, *for all purposes*, be taken to have been cancelled'<sup>71</sup> by the ministerial declaration (s 3(1));
- (b) the Minister's certificate pursuant to that Act, as the prerequisite step in the deregistration process, 'shall be treated, *for all purposes*, as having been validly given from the time it was given or purportedly given'<sup>72</sup> (s 3(2));
- (c) this shall be so *notwithstanding* any decision in any court proceedings relating to the certificate or to the executive declaration (s 3(3)); and,
- (d) the costs in any such proceedings should be borne by the party 'and shall not be the subject of any contrary order of any court' (s 3(4)).

The difference between the wording used in the State Act — 'for all purposes' — and the analogous Commonwealth provision — 'by force of this section' — was a significant factor leading to the different conclusion. The Commonwealth Parliament merely exercised its legislative competence to deregister the Union, whereas the State Parliament directed a court how to decide certain legal issues in a pending case.

The leading judgments of Street CJ and Kirby P<sup>73</sup> clearly recognised the direction principle and the Changed Law Rule pursuant to the *Lyanage* formulation. The State legislation did not simply deregister the BLF but rather prescribed the effect that the relevant executive actions 'shall for all purposes' have. This prescription did not exclude from its ambit the court's adjudication in the pending proceedings.<sup>74</sup> The provisions were 'cast in terms' that 'amount[ed] to commands to this Court as to the conclusion that it is to reach'.<sup>75</sup> The corollary is that had the legislation been cast in other terms it may have achieved the same ends by constitutional means. However, '[r]ather than *substantively* validating the cancellation of the registration and the Ministerial certificate, Parliament chose to achieve its purpose in terms that can be more accurately described as *directive*

69 *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372.

70 Following *Clyne v East* (1967) 68 SR (NSW) 385; see also *Gilbertson v South Australia* (1976) 15 SASR 66 at 101 and *Nicholas v Western Australia* [1972] WAR 168 at 175.

71 Emphasis added.

72 Emphasis added.

73 *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 375 and 387 respectively.

74 *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 376.

75 *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 378.

rather than substantive'.<sup>76</sup> In both the judgments, as in the cases considered above, the legislation's *ad hominem* nature, its retrospectivity and the fact that it appeared to be fashioned to the precise issues in the pending case were very influential factors. In particular the fourth subsection dealing precisely with the issue of costs was regarded as reinforcing these *indicia* of direction.<sup>77</sup> As Street CJ pointed out:

[I]t was plainly open to the ... Parliament without criticism — indeed probably with widespread acclaim — to cancel the Federation's registration by an express Act to that effect, as did the Commonwealth Parliament. But the method chosen ... was a legislative interference with the judicial process of this Court by directing the outcome of particular litigation.<sup>78</sup>

Thus, the *BLF* cases, when taken together, constitute a clear acceptance of the direction principle and its status as a discrete separation of powers limitation.

## 5. *The Direction Principle Diminished*

However, it has become apparent that the direction principle, and the *Liyanage* method of application pursuant to *indicia* of direction, is not always appreciated as a discrete constitutional limitation. This is revealed by more recent cases, in both Australia and the United States. The two major cases will be considered.

### A. *Nicholas v R*

In *Nicholas v R*<sup>79</sup> the facts set up a classic pending-case scenario. Nevertheless, the direction principle was overshadowed by the other Ch III principles concerned with the maintenance by the courts of the integrity of their own processes, and public confidence in the administration of justice, pursuant to the rule in the then recently decided case of *Ridgeway v R*.<sup>80</sup> That rule required the exclusion of evidence resulting from the illegal conduct of law enforcement officers.<sup>81</sup> Nicholas was facing charges in the Victorian County Court for possessing prohibited narcotics in breach of the *Customs Act 1901* (Cth) (and on two other counts of criminal breaches of Victorian statutes). The narcotics had been imported illegally by law enforcement officers as part of a 'controlled operation'. While the case was pending, the High Court in *Ridgeway* (where the material facts were identical) held that the illegal nature of the importation could not be ignored and evidence thereof had to be excluded on the above-mentioned grounds. Nicholas applied successfully to the County Court to have the evidence of the (illegal) importation excluded at his trial and for orders permanently staying his

<sup>76</sup> *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 378 (emphasis added).

<sup>77</sup> *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 378 and 394.

<sup>78</sup> *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 379.

<sup>79</sup> *Nicholas* (1998) 193 CLR 173. There are other cases which touch on this issue, but they do not add to the present discussion. See, eg, *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 which considered the direction principle although holding that it had not been breached.

<sup>80</sup> *Ridgeway v R* (1995) 184 CLR 19 ('*Ridgeway*').

<sup>81</sup> See *Ridgeway* (1995) 184 CLR 19 at 31–2, in the joint judgment of Mason CJ, Deane & Dawson JJ, with whom Brennan & Toohey JJ agreed on this point.

prosecution for offences under Commonwealth law. While his trial was pending, Parliament amended the *Crimes Act* 1914 (Cth) to secure the viability, post-*Ridgeway*, of ‘controlled operations’ and any resulting prosecutions.<sup>82</sup> Whilst the amendments expressly removed the taint of illegality from *future* ‘controlled operations’, this was not done for the ‘controlled operations’ that had already taken place.<sup>83</sup> The express intention of Parliament was to reverse, retrospectively, the effect of *Ridgeway* on evidence of the importation.<sup>84</sup> Thus, in relation to past ‘controlled operations’, the critical s 15X provided that, specifically in a prosecution for offences under s 233B of the *Customs Act* (the Nicholas charges) or associated offences, and expressly where an issue arose as to the admissibility of evidence of an illegal importation, ‘the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in, their importation is to be disregarded ...’.

Clearly s 15X had a direct bearing on the outcome of the Nicholas prosecution, albeit that it was not directing the court as to the ultimate outcome of the case. The provision was clearly aimed at the critical issue in the pending prosecution. Parliament could have achieved the same result, as in the manner of the Commonwealth *BLF* legislation, simply by declaring past ‘controlled operations’ to be legal. However, it maintained the illegality of the importations and directed the court to disregard it when exercising its discretion whether to admit evidence thereof. The spectre of the pending trial warranted a thorough consideration of the application of the direction principle, especially in light of the *ad hominem* (in the broader sense) and retrospective nature of the legislation.

Even though the direction principle was a key component in Nicholas’s submissions, it did not have an impact on the outcome of the decision. The majority judgments (Brennan CJ, Toohey, Gaudron, Gummow and Hayne JJ) were predominantly concerned with the second of Nicholas’s submissions, that is, that the amendments undermined the integrity of the judicial process, and public confidence in the administration of justice, in that they required the court to disregard the illegal conduct of law enforcement agencies. Because the protection of the integrity of its processes was an essential aspect of the ‘judicial power of the Commonwealth’ exclusively to be exercised by the Ch III courts, Parliament was purporting to prevent the court from exercising this essential and exclusive function. Only two justices, McHugh and Kirby JJ, found the legislation to be invalid on this ground, but clearly acknowledged the relevance of the direction principle in these circumstances. The judgments of Gummow and Gaudron JJ did not consider the application of the direction principle, at least not as a discrete

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82 See the Explanatory Memorandum to the Crimes Amendment (Controlled Operations) Bill 1996, and Second Reading Speech to the Crimes Amendment (Controlled Operations) Bill 1996, House of Representatives, *Parliamentary Debates* (Hansard), 20 June 1996, at 2510 ff. See also in relation to an earlier Bill to the same effect, Senate Legal and Constitutional Legislation Committee, *Crimes Amendment (Controlled Operations) Bill 1995* (1995).

83 Section 15G.

84 This being clearly stated in the Explanatory Memorandum to the amending Act.

constitutional limitation. Brennan, Toohey and Hayne JJ did consider *Liyanage*, but interpreted it unnecessarily restrictively.

Kirby J most clearly appreciated the discrete nature of the *Liyanage* direction principle and its precise protection of ‘decisional independence’. He emphasised the non-legislative nature of an exercise of power by the legislature entering into activities properly belonging to the courts. This was not a case of a pure institutional usurpation whereby the legislature purports ‘to constitute itself or some other non-court body, a tribunal to perform functions reserved by the Constitution to the courts’.<sup>85</sup> He recognised that interferences with judicial functions were more likely to occur under the guise of otherwise properly enacted legislation which purported ‘to prejudge an issue which is before a court affecting a particular individual and which required that court to exercise its functions in accordance with such pre-judgment’.<sup>86</sup> The nature of such legislation may range from, on the one extreme, a Bill of Attainder ‘which amounts to a parliamentary finding of guilt and is thus offensive to the separation of powers’<sup>87</sup> to, at the other, ‘a law of general application’, that is, properly enacted legislation of general and prospective application.<sup>88</sup> Without more, the latter does not offend constitutionally even if it does have consequences for the determination of a particular issue in a pending case.<sup>89</sup> Between these two extremes, there existed a myriad of instances which might fall on either side of the line of constitutional validity,<sup>90</sup> and in relation to which ‘minds will reasonably differ’.<sup>91</sup> It was the unique contribution of Kirby J that, in determining the constitutional validity of s 15X, he acknowledged that the clear imperative was to determine whether the legislature was acting beyond its competence, not exercising legislative functions, and attempting to ‘enter into the activities properly belonging to the judicial power’.<sup>92</sup> The critical factor here was unconstitutional direction and its definition. Thus, his Honour referred to legislation that ‘impermissibly seeks to dictate how the [judicial] power or discretion will operate in a particular case’.<sup>93</sup>

He thus sought to locate *indicia* of direction, confirming that there was no predetermined closed set thereof. Moreover, their particular interrelationship, and their impact on the pending proceeding, had to be considered.<sup>94</sup> First, in noting the *ad hominem* nature of the amendment, he indicated that it was not necessary that individuals be named<sup>95</sup> if the legislation was ‘highly selective and clearly directed at a particular individual or individuals’.<sup>96</sup> Nowhere did he treat the existence of

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85 *Nicholas* (1998) 193 CLR 173 at 254 [201].

86 *Nicholas* (1998) 193 CLR 173 at 254 [201].

87 *Nicholas* (1998) 193 CLR 173 at 256 [201].

88 *Nicholas* (1998) 193 CLR 173 at 256 [201].

89 *Nicholas* (1998) 193 CLR 173 at 256 [201].

90 *Nicholas* (1998) 193 CLR 173 at 256 [201].

91 *Nicholas* (1998) 193 CLR 173 at 256 [201].

92 *Nicholas* (1998) 193 CLR 173 at 254 [201].

93 *Nicholas* (1998) 193 CLR 173 at 257 [201].

94 *Nicholas* (1998) 193 CLR 173 at 256 [201].

95 See *Chu Kheng Lim* (1992) 176 CLR 1 at 26–9.

96 *Nicholas* (1998) 193 CLR 173 at 257 [201].

*ad hominem* legislation, or indeed any of the other *indicia* he identified, as *per se* determinative of the existence of unconstitutional direction and anything more than a relevant consideration.<sup>97</sup> This is noted because, as will be seen below, too much emphasis is often placed on this indicator. Second, it was clearly retrospective in its operation.<sup>98</sup> Third, and very significantly, it was highly specific in its application to the pending proceedings, being fashioned to affect the outcome of those proceedings in one critical respect.<sup>99</sup> Fourth, it affected a key judicial discretion in relation to admissibility of evidence. As Parliament had ‘undoubted’ power to make and amend laws relating to the laws of evidence,<sup>100</sup> s 15X could not be challenged on separation of powers grounds if it was such law. However, for Kirby J, s 15X was more in the nature of a direction to the court as to how it was to exercise a critical discretion relating to the admissibility of evidence which clearly affected the outcome of the pending case.

Even though Kirby J was fully aware that Parliament intended to overcome the effect of *Ridgeway* and avoid community disapproval,<sup>101</sup> he noted that ‘[t]he motivation of the Parliament or the fact that it might have gone about the legislation ... in a different way is irrelevant. The only duty of the Court is to measure ... s 15X, against the requirements of the Constitution’.<sup>102</sup> The direction to the court simply to disregard illegal conduct clearly troubled his Honour. He was careful to point out that all residual discretion had been removed from the court.

Given the history, language and obvious purpose of the Act, I do not consider that s 15X, if valid, could be interpreted to preserve any residual discretion based upon the *fact* that narcotic goods were illegally imported as distinct from the *offence* thereby committed. Such a construction would also contradict the materials placed before the Court relevant to the purposes of the Parliament in enacting the provision.<sup>103</sup>

Therefore, his Honour proceeded to find that the legislation directed the court to disregard the offence committed by officers in controlled operations, notwithstanding the High Court’s contrary holding in *Ridgeway*. He rejected the Crown’s submission that this was simply a legislative guide to the exercise of the discretion. In rejecting this constitutionally innocuous view of the legislation, Kirby J, relying on *Liyanage*, noted that the legislation should be examined in the context of its ‘high particularity’ with respect to the pending proceedings. Although clearly not as egregious a situation as that in *Liyanage*, ‘in material

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97 *Nicholas* (1998) 193 CLR 173 at 257 [201]. See also *Chu Kheng Lim* (1992) 176 CLR 1 at 27; and *Liyanage* [1967] 1 AC 259 at 280–90.

98 *Nicholas* (1998) 193 CLR 173 at 259 [201].

99 *Nicholas* (1998) 193 CLR 173 at 259 [201] ff.

100 *Nicholas* (1998) 193 CLR 173 at 260 [201].

101 *Nicholas* (1998) 193 CLR 173 at 244 [183] ff. He examined very carefully in this regard the parliamentary debates, statements of the relevant Minister, the explanatory memorandum to the Bill, and other background materials relating to it.

102 *Nicholas* (1998) 193 CLR 173 at 249 [197].

103 *Nicholas* (1998) 193 CLR 173 at 251 [197] (emphasis in original). Relevant materials being Explanatory Memorandum, *Crimes Amendment (Controlled Operations) Bill* 1996.

respects' there were 'close parallels'.<sup>104</sup> Section 15X 'was designed to direct the court ... to disregard illegality on the part of law enforcement officers although no defence, immunity or excuse was provided by the Act to such officers to exempt them from the illegality'.<sup>105</sup> That is, there was no change in the law. Courts were required 'to disregard ... illegality ... although such illegality is admitted and ... is a pre-condition to the operation of the section'.<sup>106</sup> He concluded by revisiting his own words in *BLF (NSW)*: 'In *Liyana*, the Privy Council looked to substance not form. So should we'.<sup>107</sup>

His Honour, however, fell just short of stating that the legislation constituted a breach of the direction principle on these *indicia* alone. The factor that tipped the balance in favour of his finding of invalidity emerged from the separate, though related, set of principles concerning the integrity of the exercise of 'judicial power' by Ch III courts based on *Ridgeway*.<sup>108</sup> Because the courts were being directed to disregard unexcused illegality or criminality on the part of law enforcement officers, they were prevented from exercising a critical aspect of the 'judicial power of the Commonwealth'. That was the exclusive power to protect the integrity of their own processes and to prevent the administration of justice falling into disrepute.

McHugh J likewise acknowledged the directive, prescriptive nature of s 15X.<sup>109</sup> He too emphasised that element of the legislation preventing the courts from exercising the discretion defined by *Ridgeway* as exclusive to Ch III courts.<sup>110</sup> *Ridgeway* 'did more ... than extend the *Bunning v Cross* discretion to cases where the illegal or improper conduct of law enforcement officers has created one of the elements of an offence' because the majority judgments made 'it clear that this discretion depends on the necessity to preserve the integrity of the administration of justice and to protect the processes of the courts of justice'.<sup>111</sup> Accordingly, 'it is "an incident of the judicial powers vested in the courts in relation to criminal matters"'.<sup>112</sup> Parliament therefore did not have the competence to remove it, or any element of it, from the exclusively judicial domain. Section 15X, whilst not changing the law to legalise the importation of narcotics inherent in past 'controlled operations', to the extent that it purported to remove the discretion of the courts to reject the admission of evidence based on such events, was invalid.

His Honour acknowledged that the separation of powers doctrine, 'to be fully effective', must protect the judicial branch from legislative interference.<sup>113</sup> He

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104 *Nicholas* (1998) 193 CLR 173 at 263 [206].

105 *Nicholas* (1998) 193 CLR 173 at 263 [206].

106 *Nicholas* (1998) 193 CLR 173 at 263 [206].

107 *Nicholas* (1998) 193 CLR 173 at 263 [206].

108 *Nicholas* (1998) 193 CLR 173 at 264 [208] ff.

109 *Nicholas* (1998) 193 CLR 173 at 215 [96].

110 *Nicholas* (1998) 193 CLR 173 at 216 [98] ff.

111 *Nicholas* (1998) 193 CLR 173 at 216 [101].

112 *Nicholas* (1998) 193 CLR 173 at 217–18 [104].

113 *Nicholas* (1998) 193 CLR 173 at 220 [111].

drew the important distinction between an interference with judicial power — ‘legislative interference with the exercise of judicial power by the courts’ — and a usurpation — ‘when the legislature has exercised judicial power on its own behalf’.<sup>114</sup> The legislation invalidated in *Lim* he regarded as an example of the latter because it provided for detention of certain persons and directing the courts not to order their release. Similarly he regarded the legislation impugned in *Liyanage* as a ‘grave and deliberate incursion into the judicial sphere’. He invoked Professor Lane’s definition of impermissible interference with judicial functions, which definition did not limit unconstitutionality to legislation which directed the ultimate outcome of the pending suit.<sup>115</sup> Lane had written that a breach of the *Liyanage* principle would occur when there was: ‘(a) legislative interference “in specific proceedings”; (b) the interference “affect[s] ... pending litigation” ... (c) the interference affects the judicial process itself, that is, “the discretion or judgment of the judiciary”, or “the rights, authority or jurisdiction of [the] court”’. As noted above, Lane also stated that legislation ‘altering evidentiary rules’ may be invalid if ‘specifically directed against particular individuals and intended to make their conviction easy’.<sup>116</sup> McHugh J referred to *Polyukhovich* to note that there would be a usurpation of judicial power if a law inflicted punishment on specified persons without a judicial trial.

Whilst distinguishing the present facts from the cases mentioned in the previous paragraph, his Honour nevertheless did locate the existence of an impermissible direction because s 15X

does ... direct courts exercising federal jurisdiction to disregard a fact that is critical in exercising a discretion that is necessary to protect the integrity of Ch III courts and to maintain public confidence in the administration of criminal justice. That being so, s 15X infringes the judicial power of the Commonwealth just as effectively as if it purported to change the direction or outcome of *pending* proceedings.<sup>117</sup>

It is clear from his Honour’s reasoning that he did not regard s 15X as a substantive amendment to the law at all but rather an unconstitutional legislative prescription which purported to direct the court not to take into account a factor — the criminality of the conduct of law enforcement officers — which it had already held was ‘at the core of a Ch III court’s power to protect the integrity of its processes’.<sup>118</sup> His Honour reasoned as follows:

Section 15X operates on the hypothesis that law enforcement officers have committed an offence against s 233B and that it is their criminal conduct that has brought into existence an essential element of the charge against the accused. Yet the section then directs courts exercising the judicial power of the Commonwealth to disregard the critical fact that the offence by the accused exists as a result of the

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114 *Nicholas* (1998) 193 CLR 173 at 220 [112].

115 *Nicholas* (1998) 193 CLR 173 at 221 [113], quoting Lane, above n 47 at 484.

116 Lane, above n 47 at 484.

117 *Nicholas* (1998) 193 CLR 173 at 222 [115] (emphasis in original).

118 *Nicholas* (1998) 193 CLR 173 at 224 [120].

criminal conduct of a law enforcement officer. That is to say, s 15X directs those courts to disregard a fact that, according to *Ridgeway*, is crucial in determining whether the integrity of the processes of the courts are [sic] being demeaned. ... I cannot accept the claim that such a direction does not infringe the judicial power of the Commonwealth.<sup>119</sup>

His Honour then proceeded to distinguish s 15X from valid legislative provisions which can be regarded as substantive amendments to the law, such as those regulating judicial discretions by requiring certain matters to be taken into account and which can, therefore, be categorised as *legislative* definitions of the elements to be taken into account when the discretion is exercised.

It is true that under *Ridgeway* the ultimate issue is whether evidence establishing an element of a criminal charge should be rejected. But if that evidence is rejected, it is partly, perhaps wholly, because the processes of the court would be demeaned if the evidence was admitted. What s 15X does is to prevent a court exercising federal jurisdiction from considering a fact which is a relevant step in determining whether its process is being demeaned. Its effect is to hamper, and in some cases to prevent, such a court from protecting its processes and thereby maintaining public confidence in courts exercising the judicial power of the Commonwealth.<sup>120</sup>

Moreover, s 15X was not comparable to those enactments which regulate the admission of evidence or which govern the practice and procedures of courts exercising federal jurisdiction. It was not an amendment to the rules of evidence.<sup>121</sup> Nor was it a provision 'which merely reverses the conclusion of a federal court as to what the public interest requires'.<sup>122</sup> Rather,

s 15X ... strikes at the capacity of a court, exercising federal jurisdiction, to protect its processes. True it is that the section does not take that power away from such a court. But it does direct that court to disregard a fact that in *Ridgeway* was, and in other cases might be, critical to the exercise of the power.<sup>123</sup>

In short, a legislative direction to exercise a particular discretion that is at the core of a court's capacity to protect its processes, and therefore exclusive to the judicial function, will constitute an unconstitutional interference in breach of the separation of powers doctrine. Of course, it was open to the legislature to remove the taint of illegality from past controlled operations, as had been done with such future operations in Division 2. Albeit that the practical result would have been the same, both minority justices reasoned that merely because the same result could have been achieved by constitutional means does not excuse the choice of past unconstitutional ones. By not changing the law relating to the legal status of past

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119 *Nicholas* (1998) 193 CLR 173 at 224 [121].

120 *Nicholas* (1998) 193 CLR 173 at 225 [122].

121 *Nicholas* (1998) 193 CLR 173 at 225 [123].

122 *Nicholas* (1998) 193 CLR 173 at 226 [126].

123 *Nicholas* (1998) 193 CLR 173 at 225–26 [125].

controlled operations and simply directing the courts to disregard the illegality, the legislature overstepped the mark.

Brennan, Toohey and Hayne JJ appeared simply to reject the application here of the *Liyana* principles on the basis that the legislation did not direct the court in relation to the ultimate outcome of the case — that is, the guilt or innocence of the accused. Their primary concern was with the arguments based on *Ridgeway*, and the more established concerns relating to the institutional integrity of the exercise of the judicial power of the Commonwealth by the Ch III courts. Brennan CJ held that the discretion that the court was required to exercise pursuant to s 15X was not inconsistent with the essential character of a court or with the nature of judicial power.<sup>124</sup> It was merely an evidentiary provision; and Parliament had the power to make or amend the rules governing the discretionary exclusion of evidence. The impugned legislation did not affect the judicial function of fact-finding. Nor did it affect the judicial power to be exercised in determining guilt or innocence.<sup>125</sup> It did not undermine public confidence in the administration of justice.<sup>126</sup> Toohey J agreed. He repeated his critical statement in *Polyukhovich*<sup>127</sup> that '[i]t is *only* if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Ch III may be involved'.<sup>128</sup> Section 15X was no more than an 'evidentiary provision'.<sup>129</sup> It was analogous with 'a statutory provision removing a requirement of corroboration'.<sup>130</sup> It is apparent that Toohey J was addressing a separate issue entirely to that of pure legislative direction in the pending case scenario. Of course, this is not *per se* problematic as the facts of the case certainly did warrant such an approach. Similarly, this was the approach of Hayne J. He held that as the legislature may make or change the rules of evidence, it might also change or make rules governing the discretionary exclusion of evidence. This was held to be the effect of s 15X, which was, on that account, valid.<sup>131</sup>

However, it was the easy dismissal of the direction principle which warrants consideration, particularly as these judgments seriously limited the applicability of *Liyana*. For Brennan CJ, because s 15X did not seek directly to prescribe the final outcome relating to guilt or innocence, the impugned provisions bore 'no resemblance' to those in *Liyana* which therefore had no present applicability.<sup>132</sup> However, it was undeniable that s 15X did seek to address the major legal hurdle faced by the prosecution in the pending trial. It certainly did facilitate a successful prosecution and was enacted with that in mind. Moreover, it was not the directing of the ultimate result which was regarded as the constitutional offence in *Liyana*. It was rather the direction to the court in its consideration of legal and factual issues

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124 *Nicholas* (1998) 193 CLR 173 at 185 [13] ff.

125 *Nicholas* (1998) 193 CLR 173 at 188–91 [21]–[26].

126 *Nicholas* (1998) 193 CLR 173 at 193 [31] ff.

127 *Polyukhovich* (1991) 172 CLR 501 at 689.

128 *Nicholas* (1998) 193 CLR 173 at 202 [53] (emphasis added).

129 *Nicholas* (1998) 193 CLR 173 at 202 [53] (emphasis added).

130 *Nicholas* (1998) 193 CLR 173 at 202 [53] (emphasis added).

131 *Nicholas* (1998) 193 CLR 173 at 274 [238].

132 *Nicholas* (1998) 193 CLR 173 at 193 [28].

in the pending case which had an impact on the outcome of the case. It just so happened that in *Liyanage* the purpose of the legislature was more transparent in its aims to secure a conviction. Brennan CJ also sought to distinguish s 15X from the legislation considered in *Liyanage* on the basis that it was not directed exclusively to the trial of persons whose prosecutions were pending (although clearly it had enormous significance for Nicholas' pending trial) but rather to 'any prosecution which thereafter required proof of illegal importation in an authorised controlled operation started before Div 2 commenced'.<sup>133</sup> This is a rather fine distinction. The principles enunciated in *Liyanage* were broad enough to encompass legislation which appeared of general application on its face, but was clearly applicable to known litigants or an identifiable group thereof, as was the case in the present circumstances.

To distinguish *Liyanage* further, Brennan CJ stated that the impugned *Nicholas* legislation was merely concerned 'with the effect of illegality on the part of law enforcement officers ... It remains for the court ... to determine whether the elements of the offence ... have been proved'.<sup>134</sup> This also, with respect, is too narrow a reading of *Liyanage* as there were elements in the legislation in that case which were relevant not so much to the conviction of the accused as to the conduct of the law enforcement officers and the conduct of the legal proceedings. In addition to time limits being set for the operation of the amendment, in *Liyanage* the detention of the accused was legalised *ex post facto*, and arrest was allowed without warrant in the particular circumstances. Moreover, it dealt with aspects of the court proceedings by broadening the class of offences for which trial by jury could be ordered, including those with which the accused were charged. And, most significantly, the legislation made particular provision for the admissibility of certain statements and admissions made to law enforcement officials which were otherwise inadmissible. Thus, there were indeed significant similarities between the two cases which made *Liyanage* less obviously distinguishable. Was not s 15 X enacted to facilitate a successful prosecution of known accused, albeit less directly?

Toohy J similarly passed over the significance of the direction principle. More than Brennan CJ, he too readily assumed the impugned legislation to be a change in the law. Although he had regard to its *ad hominem* nature, he failed to regard this as an indicator of direction. *Liyanage* was referred to for the purpose of indicating how the legislation in that case 'went a great deal further by purporting to legislate *ex post facto* the detention of particular persons charged with offences on a particular occasion'.<sup>135</sup> Too much emphasis was placed on the significance of the *ad hominem* element, almost to the point of suggesting that this element alone was enough to establish an unconstitutional interference.<sup>136</sup> The problem with this approach, according to both *Liyanage* and *BLF (Cth)* in particular, was that it was not the determinative test of invalidity, but merely an indicator. Indeed, the

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133 *Nicholas* (1998) 193 CLR 173 at 193 [28].

134 *Nicholas* (1998) 193 CLR 173 at 193 [28].

135 *Nicholas* (1998) 193 CLR 173 at 203 [57].

136 *Nicholas* (1998) 193 CLR 173 at 203 [57].

legislation in *BLF (Cth)* was clearly specific and *ad hominem*, yet held valid. But Toohey J did not examine the *ad hominem* nature of the legislation as an indicator of direction such as to impugn its substantively legislative nature. For him,

The proposition is that the legislature cannot direct a court exercising the judicial power of the Commonwealth as to the manner in which the power is exercised. If necessary, this is further refined to say, at least not in such a way as is inconsistent with the essential powers of a court or with the nature of judicial process.<sup>137</sup>

A very high threshold for the application of *Liyanage* principles was also evident in the judgment of Hayne J. He interpreted Nicholas's submission to be that the legislation 'deals only with a small and identifiable group of persons and is, *on that account*, an impermissible interference with the exercise of judicial power'.<sup>138</sup> Acknowledging the *ad hominem* element, he did not appear to treat this as a test of the substantively legislative quality of s 15X. On the contrary, his treatment of the issue appeared to be based throughout on the assumption that the legislation constituted a substantive change in the law.<sup>139</sup> It would appear that it would be invalid only if it directed the ultimate outcome in precisely identified prosecutions:

For present purposes it is enough to say that because the legislation does not deal directly with ultimate issues of guilt or innocence but only with whether evidence of only one of several elements of an offence can be received and deals not with a single identified, or identifiable, prosecution but with several prosecutions ... it does not have the character of a bill of attainder or like impermissible interference with the judicial process.<sup>140</sup>

To confuse matters, his Honour did appear to recognise the applicability of the direction principle, in the *Liyanage* manner, when he postulated that there might be changes to the law of evidence or procedure which 'would be so radical and so pointed in their application to identified or identifiable cases then pending in the courts that they could be seen, in substance, to deal with ultimate issues of guilt or innocence'.<sup>141</sup> Nevertheless, the threshold for the application of the direction principle, based on a very narrow reading of *Liyanage*, was set at a very high level.

The judgment of Gaudron J passed over the direction principle. Her Honour was concerned to determine whether the legislation directed the ultimate outcome such as to amount to a legislative judgment. The emphasis was on usurpation as opposed to interference. In a criminal trial, this would involve a legislative determination of guilt or innocence, and in all cases, 'making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and, in making binding adjustments of rights and interests in accordance with legal standards'.<sup>142</sup> As s 15X affected the 'ancillary

137 *Nicholas* (1998) 193 CLR 173 at 200 [48].

138 *Nicholas* (1998) 193 CLR 173 at 272 [231] (emphasis added).

139 *Nicholas* (1998) 193 CLR 173 at 277 [249].

140 *Nicholas* (1998) 193 CLR 173 at 277 [249].

141 *Nicholas* (1998) 193 CLR 173 at 278 [252].

142 *Nicholas* (1998) 193 CLR 173 at 207 [70].

[to judicial] power to exclude evidence in the exercise of a discretion which permits that course',<sup>143</sup> it was not therefore an exercise by the Parliament of judicial power. These ancillary powers 'are not properly identified as judicial power for the purpose of Ch III of the Constitution'.<sup>144</sup> The emphasis was, therefore, not on legislative direction or prescription in relation to the court's independent adjudication, but rather on whether any aspect of the legislation in some way constituted an exercise of judicial power, pursuant to a previously defined notion thereof.<sup>145</sup> The balance of the judgment proceeded on the unchallenged assumption that the impugned legislation was a substantive change in the law.

Gummow J also did not decide the matter on the basis of the direction principle. His Honour was not unconcerned by the element of direction in the legislation, but decided the case on the basis of whether the court was being required to exercise a power which was either not 'judicial' or incompatible with judicial power. It was assumed throughout that s 15X was a change in the law which would be rendered invalid only if it offended in relation to one of these constitutionally relevant considerations: '[the] dispute does not turn upon the alteration or abrogation by statute of antecedent private substantive rights or status which are at stake in, or which provide the foundation for, particular pending civil litigation. Indeed the validity of such a law has been upheld'.<sup>146</sup> Whilst relying on the *BLF (Cth)* case as authority for this proposition, his Honour did not mention the relevant aspects of *BLF (NSW)* which suggested possible qualifications to the position so stated. The issue, rather, was the maintenance of the traditional right to judicial determination of criminal guilt. As this was a matter pertaining exclusively to judicial power, the only question for consideration was whether this exercise of legislative power was such as to undermine the exclusive judicial function of adjudging criminal guilt:<sup>147</sup> 'Is this such an interference with the governance of the trial and a distortion of its predominant characteristics as to involve the trial court in the determination of the criminal guilt of the accused otherwise than by the exercise of the judicial power of the Commonwealth'.<sup>148</sup>

It is not being suggested that this is an incorrect approach to the problem. It is simply noted that the direction principle is being overlooked. *Liyanage* was considered essentially on this basis: the statutory provisions were held invalid in that case because they required the court to exercise a power inconsistent with the nature of judicial power to the extent that issues which were central to the exercise of judicial power, such as guilt or innocence and length of sentence, were decided pursuant to statutory provisions as opposed to judicial discretion.<sup>149</sup>

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143 *Nicholas* (1998) 193 CLR 173 at 207 [70].

144 *Nicholas* (1998) 193 CLR 173 at 208 [71].

145 *Nicholas* (1998) 193 CLR 173 at 208 [74].

146 *Nicholas* (1998) 193 CLR 173 at 232 [144].

147 *Nicholas* (1998) 193 CLR 173 at 231 [142] ff.

148 *Nicholas* (1998) 193 CLR 173 at 232 [145].

149 *Nicholas* (1998) 193 CLR 173 at 233 [147]–[148].

The difficulty, however, is that *Liyantage* appears to be saying something more. His Honour's concerns certainly overlap with those in *Liyantage* in that they are concerned with the protection of a core element of the judicial power, that is, the independent and conclusive adjudication of a legal dispute exclusively by the judicial branch. His Honour approached this question not by impugning the substantively legislative nature of the legislation, but by asking whether the determination of the guilt or innocence of the accused was being usurped by the legislature. However, the *Liyantage* direction principle conducts its analyses one step prior to these considerations. It is the element of direction and the existence of *indicia* thereof which, if of sufficient extent, impugn the substantively legislative nature of the legislation and render it unconstitutional.

In sum, *Nicholas* reveals the difficulties faced by the direction principle in establishing itself as a discrete Ch III principle, given the obvious need for it to be addressed on the facts of this case. The tendency to limit its application, to distinguish *Liyantage*, or to set a very high threshold for the application of the direction principle, does not augur well for its future consolidation as a discrete constitutional limitation.

### ***B. Seattle Audubon Society v Robertson***

While the direction principle is well-established in the United States, its precise definition has become uncertain as a result of the modern cases and its application has caused difficulties. This is despite the fact that the seminal *Klein* case was subjected to considerable scholarly examination leading to its eventual recognition as clear authority for that principle.<sup>150</sup> The parameters of the direction principle, as defined above, are now largely accepted by constitutional scholars,<sup>151</sup> the Supreme Court and the federal courts. However, recent Supreme Court decisions, in contrast to those of federal Courts of Appeal, reveal a certain reluctance to apply the direction principle.

When the Court of Appeals for the Ninth Circuit decided *Seattle Audubon Society v Robertson*<sup>152</sup> in 1990, the direction principle was applied rigorously against the backdrop of the Changed Law Rule.<sup>153</sup> The delicate balance between the two rules was struck appropriately by the Ninth Circuit. The significance of the case, however, lay rather in the fact that the Supreme Court on appeal<sup>154</sup> not only overruled the Ninth Circuit, but did so in such a way as to undermine seriously this balance by adopting a very dismissive attitude toward the direction principle. It almost reduced it to a mere formality which any deft legislature, intent on directing the outcome of a pending case, might avoid.

Environmental interests had challenged the land management plans of the relevant government authorities on the basis that they breached a battery of

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150 *Klein* 80 US (13 Wall) 128, above n 55 and accompanying text.

151 See Young, above n 22.

152 *Seattle Audubon Society v Robertson* 914 F 2d 1311 (9th Cir, 1990).

153 914 F 2d 1311 (9th Cir, 1990) at 1315.

154 *Robertson v Seattle Audubon Society* 503 US 429 (1992).

environmental statutes because their implementation would result in the killing of a protected bird species. While the suit was pending appeal in the Court of Appeals, Congress purported to amend the law, with application only to the relevant land areas in these suits, to safeguard the plans from legal challenge. However, the pre-existing regime of environmental statutes was not repealed or amended. The legislation, the ‘Northwest Timber Compromise’ (‘NTC’),<sup>155</sup> in its central provision, § 318(b)(6)(A), provided that Congress ‘hereby determines and directs’ that if the management of the thirteen *named* national forests was in accordance with subsections (b)(3) and (5), this would meet ‘[t]he statutory requirements that are the basis of’ the present litigation, which was *expressly* named. The critical subsections simply prohibited the sale of timber from specifically designated areas within the named forests known to be the habitat of the relevant endangered bird species. Thus, Congress sought to avoid the invalidation of the plans and yet provide some protection for the endangered birds, not by repealing the prohibition on their killing, but requiring the federal courts *to deem* that there would be no breach of existing environmental statutes if the ‘no sale’ requirements were met in these precise areas. Whether killing had occurred, or might occur, was rendered irrelevant.

The Ninth Circuit held that there was a clear breach of the direction principle because the NTC was not an amendment to the law but rather a direction to the court in pending cases.<sup>156</sup> Obvious *indicia* of direction were present. It named the land affected and the pending proceedings in relation to which it was applicable. The pre-existing legislative regime was left intact. Congress did not attempt, by force of the statute alone, to exempt the public bodies in those cases from the relevant environmental statutes, nor to remove the prohibition on killing. The NTC used express words of direction to deem compliance with the statutory regime if certain conditions were met, *which conditions were unrelated to the precise requirements of those earlier statutes*. In all the circumstances, the legislation appeared to be almost designed to produce the outcome desired by Congress in targeted pending proceedings<sup>157</sup> and, ‘in doing so, Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for a decision in a particular way, without changing the underlying law, as it unquestionably cannot do’.<sup>158</sup> This was a clear and unambiguous application of the direction principle.

The reasoning of the Supreme Court<sup>159</sup> was remarkable in that, unanimously, the opposite conclusion was reached with very little elaboration and explanation. The direction principle was mentioned almost as if in passing.<sup>160</sup> The Court too easily accepted the legislation at face value as a simple change in the law, although

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155 *The Interior and Related Agencies Appropriation Act* 1990 (US).

156 914 F 2d 1311 at 1315 (9th Cir, 1990).

157 See 914 F 2d 1311 at 1312 for detailed background to the enactment.

158 914 F 2d 1311 at 1317.

159 *Robertson v Seattle Audubon Society* 503 US 429 (1992). The Opinion of the (unanimous) Court was delivered by Thomas J.

160 For example, see *id* at 436.

accepting that a legislative direction would be unconstitutional.<sup>161</sup> However, the *Klein* principles and the *Klein* method were remarkably ignored in a case which so clearly warranted their serious consideration. The Supreme Court emphasised the imperatives of the Changed Law Rule without the necessary balance provided by a serious application of the direction principle. It appeared to be fixated on one aspect of the legislation which counted against even the ‘three textual features of the Compromise’ which to the Ninth Circuit were strong indicators of unconstitutional direction.<sup>162</sup> That was the fact that the judiciary in the pending proceedings was left free to determine compliance with the environmental provisions according to the new special dispensation.<sup>163</sup>

However, the point was, surely, that by these deeming provisions the legislature removed from judicial consideration, without any amendment to the general law, an issue which was of critical significance to the outcome of the pending cases expressly mentioned. Of course, it could have done so without breaching the direction principle by simply removing the prohibition on killing. This, however, it did not do as it generally maintained the illegality of land management which resulted in the killing of endangered birds. An analogy can be drawn here with the legislation considered in the *Nicholas* case which maintained the illegality of the importation of heroin, and directed the courts to disregard the illegality when conducted by law enforcement agencies. Thus, a federal court, already seized of the matter when the legislation intervened, was now directed to treat as being in compliance with the law any such killing *which may in fact result from the land management plan* if the *unrelated* condition could be met that no sales of timber from designated areas would occur. It was in fact required to disregard the pre-existing law and adjudge the issue according to criteria which were completely irrelevant to the issue of the killing of endangered species. Such considerations do not seem even to have engaged the Supreme Court. It was not troubled by the clear words of direction in the impugned provisions. It was correct that these words *per se* did not constitute unconstitutional direction. However, its outright dismissal of the suggestion, without explanation, that these words were relevant as indicative of direction, was problematic. Surely the very point of the application of the direction principle was to encourage a rigorous scrutiny of legislation so worded. The Court’s easy dismissal of this remains unconvincing.

A similarly dismissive attitude is evident with respect to the other *indicia* which were considered highly relevant by the Ninth Circuit. Even their cumulative effect, in all the circumstances, did not seem to engage the Court. The naming of the pending cases, it reasoned, was not for the purpose of directing an outcome, but ‘served only to identify’ the five ‘statutory requirements that are the basis for’ those cases.<sup>164</sup> But why did the legislature not simply name those statutory provisions rather than mention the pending proceedings by name? Indeed, it is

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161 *Id* at 437–8.

162 *Ibid*.

163 *Ibid*.

164 *Id* at 440.

arguable that the legislation, in its express naming of the pending legislation, was more extreme in its specificity than the legislation considered in *Liyana*.

The Supreme Court also rejected, quite dismissively, the position adopted by the Ninth Circuit that the element of direction should not be discounted merely because Congress could have achieved a similar outcome by simply repealing or amending pre-existing environmental statutes.<sup>165</sup> '[w]e fail to appreciate the significance of this observation', it stated.<sup>166</sup> This statement inclines one at least to sympathy with the harsh words of one commentator that the Court's explicit refusal 'to address any broad question of Article III jurisprudence proclaims vacuity'.<sup>167</sup> A true appreciation of the direction principle would have relegated to irrelevance the fact that there were other constitutionally valid means to achieve the same end. Surely a decision must be made on the constitutionality of the impugned legislation, not that which might have been enacted. To suggest otherwise is to reject the *Klein* method.<sup>168</sup> It is no basis for the constitutional validity of particular legislative action, which is otherwise unconstitutional, to suggest that the same result could have been achieved constitutionally by alternative legislative action.

For these reasons, American constitutional scholars have been very critical of the reasoning.<sup>169</sup> If nothing more, the Supreme Court bypassed an ideal opportunity to address and settle the difficult issues arising from *Klein*. At worst, it appears that the Court may have failed to appreciate the critical constitutional issues which arose on these facts. This harsh conclusion appears to have been borne out by the Court's own words in the following extraordinary passage:

*We have no occasion to address any broad question of Article III jurisprudence.*  
The Court of Appeals held that subsection (b)(6)(A) was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that subsection (b)(6)(A) did amend applicable law, we need not consider whether this reading of *Klein* is correct.<sup>170</sup>

Yet, the very point of *Klein* is that the direction principle is a threshold test in determining the very question whether the legislation is amending the law. The above statement appears to suggest that, because the Court has already determined that an amendment to the law has taken place, there is therefore no need to consider *Klein* at all. It almost constitutes an implied repudiation of *Klein*. Nevertheless, despite these inconsistent passages, the Supreme Court did not go so far as to

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165 Id at 439–40.

166 Id at 439.

167 Amy D Ronner, 'Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power After *Robertson v Seattle Audubon Society* and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934' (1993) 35 *Arizona Law Review* 1037 at 1054.

168 Id at 1054–5.

169 See in particular Ronner, above n 167; and Lloyd C Anderson, 'Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise' (2000) 39 *Brandeis Law Journal* 417 at 420.

170 503 US 429 at 441 (emphasis added).

overrule *Klein*. It seems rather to have misunderstood it or to have set a very high threshold for its application, upsetting the delicate balance set up with the Changed Law Rule. The position adopted by the Ninth Circuit is preferable. It is clearly more consistent with the detailed scholarly analysis of *Klein* by Professor Hart, reinforced by more recent detailed analysis by Gordon Young and Professor Redish.<sup>171</sup>

The baleful influence of the *Robertson* decision has nevertheless remained, seriously undermining the efficacy of the direction principle. Signs that this influence may be temporary have emerged from the lack of enthusiasm with which the decision was received by other federal courts. In *Gray v First Winthrop Corp*<sup>172</sup> the Ninth Circuit remarked — not without a hint of criticism — that *Robertson* indicated a ‘high degree of judicial tolerance for an Act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way’.<sup>173</sup> The impugned provision upon which it was ruling ‘... amply passe[d] whatever is left of the *Klein* test’.<sup>174</sup>

‘...[W]hatever is left of the *Klein* test’. The words of the Ninth Circuit accurately reflect the quandary that the Supreme Court had left in its wake. For while *Klein* had not been overruled, it seemed that it would be applicable in only the most egregious circumstances. Similar tendencies were evident in the two Supreme Court cases which followed *Robertson*, *Plaut v Spendthrift Farm Inc*<sup>175</sup> and *Miller v French*.<sup>176</sup> In *Miller v French*, the most recent Supreme Court case on point, the Supreme Court went even further to dilute the impact of the direction principle by adding certain novel qualifications to it. The *ratio* of the case, which the present writer has critically examined in detail elsewhere,<sup>177</sup> appeared to be that a provision which is an unconstitutional direction when examined in isolation, can nevertheless be valid when read in light of the Act as a whole if it merely facilitates the change in the law, or even ‘merely reflects’ the changed legal circumstances which are implemented by other legislative provisions. In that case, the legislation unambiguously directed federal courts to order a stay of previously granted injunctive relief in certain circumstances, judicial discretion in the matter being totally removed. Such qualifications make it almost impossible to sustain a breach of the direction principle and the present writer has concurred with the negative American academic criticism, suggesting that those qualifications not be adopted in Australia.<sup>178</sup> These cases reveal an easy willingness to treat legislation

171 Above n22; and see Martin H Redish and Christopher R Pudelski, ‘Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of *United States v. Klein*’ (2006) *Northwestern University Law Review* 437.

172 *Gray v First Winthrop Corp* 989 F 2d 1564 (9th Cir, 1993) (‘*Gray*’).

173 *Gray* 989 F 2d 1564 (9th Cir, 1993) at 1569–70 (emphasis added).

174 *Gray* 989 F 2d 1564 (9th Cir, 1993) at 1570 (emphasis added).

175 *Robertson, Plaut v Spendthrift Farm Inc* 514 US 211 (1995).

176 *Miller v French* 530 US 327 (2000).

177 Peter A Gerangelos, ‘The Decisional Independence of Chapter III Courts and Constitutional Limitations on Legislative Power: Notes From the United States’ (2005) 33 *Federal Law Review* 391.

178 *Ibid.*

as a change in the law in circumstances when it was being impugned for legislative direction. This was despite the fact that the Supreme Court, under the influence of Scalia J in particular, was adopting an increasingly formalist approach to separation of powers analysis and was seemingly less tolerant of even innocuous breaches of the separation of powers doctrine in other circumstances.<sup>179</sup>

## 6. Review

In light of these cases, the precise status of the direction principle as a discrete separation of powers principle remains uncertain. Why does it suffer from such uncertainty in recognition and application? It is not possible to ascertain precisely whether the primary difficulty lies in a lack of judicial appreciation of the relevant principles, or in the very imprecision which results from the principle itself with its heavy reliance on *indicia* of direction. It is probably occasioned by both. Yet, both are capable of remedy. Given the emergence of an almost identical formulation of the direction principle in both Australia and the United States — quite independently of each other it would seem — together with the emergence and recognition of common *indicia* of direction, there remains a sufficient basis for the reinforcement of a principle protective of the decisional independence of the judicial branch. But the hurdles must first be appreciated.

First, it is clear that the direction principle is overshadowed, indeed sometimes confused with, the more established Ch III principles. This was evident in *Nicholas*. In Australia, there is no comprehensive, ‘classic’ statement of principle to which reference may be made. The judgments of McHugh and Kirby JJ in *Nicholas*, and those of Street CJ and Kirby P in *BLF (NSW)* are the only exceptions; but they remain isolated instances, and certainly have not been endorsed unconditionally by the High Court.

Second, there is emerging, particularly in the United States, a ‘soft’ approach to the direction principle. That is, there is a too easy acceptance of the fact that there is an amendment to the law and a failure to look to substance over form as both *Liyanage* and *Klein* urge. The present writer does not want to appear overly critical in this regard because the judicial branch must be sensitive to the need to protect the integrity of legislative power to amend the law. An amendment to the law should not be thwarted merely because it happens to affect pending proceedings. If it were to adopt too aggressive an approach in impugning the substantively legislative nature of legislation, it may lay itself open to charges of judicial branch aggrandizement, ‘turf protection’ and the like. One can only speculate as to whether this is the cause of the position adopted by the United States Supreme Court in *Robertson* and *Miller v French*.

Third, there is only an implied recognition, at best,<sup>180</sup> of the precise relationship between the direction principle and the Changed Law Rule; that is,

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179 The most prominent example being the decision of the Supreme Court, delivered by Scalia J, in *Plaut v Spendthrift Farm* 514 US 211 (1995) with respect to the absolute protection afforded final judgments by the separation of powers.

180 For example, the majority judgments in *Nicholas*.

that the former rule is a threshold test for the application of the latter. The *Robertson* decision remains the worst offender in this regard. Although the position adopted by the High Court is more consistent with a proper understanding of the relationship, the tendency in the Australian cases has been to emphasise the imperatives of the Changed Law Rule. Whilst this is not *per se* problematic, taken too far it will undermine both the proper operation of the direction principle as well as that of the Changed Law Rule.

Fourth, there is lacking a precise articulation of the *method* that should be adopted in the application of the direction principle. It is necessary that there be more explicit recognition that principal scrutiny must be reserved for the very *legislative* nature of the legislation which is being impugned — especially to prevent the melding of this issue with the more dominant and established principles emerging from Ch III. That legislation be so impugned is imperative in this context, given the uncompromising nature of the Changed Law Rule.

Finally, it must be acknowledged that the courts have had to come to terms with principles inherently subtle, complex and uncertain in application, especially in the hard case. No closed set of definitive criteria determinative of direction is recognised in all cases, reliance rather being placed on *indicia* as they might arise on a case by case basis. No one indicator, or indeed combination thereof, is necessarily decisive. Moreover, the existence of unconstitutional direction is a factor of the interrelationship and cumulative effect of the various *indicia* in any particular case. The result is enormous uncertainty as to whether a court will treat such *indicia* as constituting a breach of the direction principle.

## 7. *Towards a Resolution*

A first step towards a resolution of these problems is the recognition that the primary difficulty emerges from reliance on an open set of *indicia* of direction. It is submitted that a greater formalisation of the status of the main *indicia*, or combination thereof, will overcome many of the difficulties identified above. This has been attempted in the United States by only one scholar, Amy Ronner, who advocated the *mandating* of a finding of unconstitutional legislative interference where certain precise *indicia*, or combination thereof, are present.<sup>181</sup> Thus, the direction principle should be held to be breached, according to Ronner, in the following circumstances:

First, the legislation must be ‘so precisely tailored to address the issues in the pending case that it can be said to fit “glove-like” around a living case or controversy’.<sup>182</sup> Second, *either* one of the following factors exist:

- (a) the government is a party, and the impugned legislation has the effect of favouring it in the litigation; *or*,
- (b) the legislation infiltrates a domain that can be regarded as traditionally a judicial one (such as, for example, in *Lim* where it related to the issue of

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<sup>181</sup> Ronner, above n 167 at 1071.

<sup>182</sup> *Ibid.*

detention or, in *Nicholas*, the exercise of the critical judicial discretion whether to admit evidence of illegal conduct connected to the establishment of elements of a criminal offence).

In relation to the first factor, it could be said without difficulty that the facts of, for example, *Liyanage*, *BLF (NSW)*, *Lim* and *Nicholas* would meet this requirement. Further, as the government was a party, and the legislation favoured it in the pending litigation, there would be a straightforward application of the Ronner test to impugn the legislation successfully.

Whilst the present writer agrees with the attempt at greater formalisation of the *indicia* of direction, the Ronner formulation tends to a rigidity which may lead to artificial results, particularly in circumstances where there is a change in the law which only incidentally affects pending proceedings. The Ronner test shifts the balance too much in favour of the direction principle at the expense of the Changed Law Rule. For this reason, the writer would find greater merit in the Ronner formulation if it went no further than establishing a rebuttable presumption of unconstitutional interference based on these criteria. The application of such a test would certainly require that legislation such as that in *Nicholas* and *Robertson* be scrutinised far more rigorously in this context. Applying this test, either in its mandatory form, or in a less rigid rebuttable presumption form, it is clear that the minority judgment of Kirby J in *Nicholas* would be vindicated. In the United States, the *Robertson* case would clearly be decided differently and the view of the lower federal courts would prevail. Even in situations where the government was not a party, the existence of the two alternatives in the second compulsory element would ensure that the provision was nevertheless applicable. That is not to say, of course, that all difficulties would be overcome. For example, the first step — the ‘glove-like’ fit requirement — is difficult to determine, especially in hard cases.

However, while the degree of formalisation advocated by Ronner is excessive, that some degree of formalisation of the *indicia* of direction is both necessary and possible cannot be denied. Although obvious legislative direction is uncommon, it remains the case that where a matter of great political moment comes before the courts the temptation to which legislatures are liable is significant and the need for well-defined constitutional limitations remains an imperative. In Australia, this has been revealed in the recent jousting between the Ch III courts and Parliament in relation to immigration and refugee matters. In *Lim*, it was with a pending refugee case in mind that Parliament directed that ‘[a] court is not to order the release from custody of a designated person’.<sup>183</sup> One need only refer to the high political drama arising from the *MV Tampa* incident and the resulting litigation and legislative response.<sup>184</sup> Also overlooked is the fact that whilst such interferences are rare, they were sufficiently common in the pre-Constitution and colonial period in the United States to constitute a major catalyst for the constitutional entrenchment of the separation of powers in that nation’s constitution.<sup>185</sup> In other words, the issue of legislative interference is a separation of powers issue of the

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183 *Chu Kheng Lim* (1992) 176 CLR 1.

184 See above n 9.

first order and the issues with which the direction principle is concerned ought not to be relegated to secondary importance. The temptations to legislative intervention in pending cases, and the abuses which may result, are the same as those which gave rise to the complaint of Madison, Hamilton and Jefferson in the late eighteenth century.<sup>186</sup> If, instead, reliance is placed on rebuttable presumptions of unconstitutional direction, a solution may be achieved which will be far more sympathetic to the symmetry which currently exists between the direction principle and the Changed Law Rule.

### 8. *A Reformulated Direction Principle*

The central distinction on which the direction principle is based — between a genuine amendment to the law and a mere legislative direction which is not substantively legislative — remains uncontroversial, and can be safely assumed to be established as a central separation of powers constitutional limitation. The following is then proposed:

First, an attempt should be made to identify and catalogue those *indicia* whose nature and recurrence warrant their identification as primary *indicia* of direction and have been recognised as such by authority. Where any one of these *indicia* is present — and especially if more than one is present — this should put the court on notice of the possibility of unconstitutional legislative direction where pending proceedings are on foot. If the three *indicia* listed below are present, this should constitute a strong indication of unconstitutional direction. These common *indicia* share the critical characteristic of removing the impugned legislation from the norm, or ‘typical’ nature, of an exercise of legislative function as a prospective change in the law of general applicability altering rights and obligations. These are:

- a) the specificity of the legislation either as clearly *ad hominem* legislation, or being of sufficient specificity to enable the identification of the person or persons to which it is applicable. The impugned enactments in *Liyanage*, *Lim* and *Nicholas* are illustrative;
- b) the specificity of the legislation with respect to the pending litigation. The timing of the enactment and commencement of operation of the legislation would also be relevant. The greater the extent to which it can be shown that the legislation is dealing exclusively with, or ‘tailored’ to, the issues which arise in pending litigation — and not beyond those in a more general way — then the greater the likelihood of direction; and
- c) the status of the government either as a party to the pending proceedings, or as a third party which otherwise has an interest in those proceedings; and where the legislation favours it in the pending litigation. This interest may

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185 See Peter A Gerangelos, ‘The Separation of Powers and Legislative Interferences with Judicial Functions: A Comparative Analysis’ (PhD Dissertation, University of New South Wales, 2004) at 74 ff.

186 *Ibid.*

be pecuniary or proprietary in nature, or, simply related to the implementation of its policy agenda.

The existence of these *indicia* establish that the legislation has a ‘target’,<sup>187</sup> that is, precise issues and parties in pending litigation. If either of the following two *indicia* is also present, the existence of unconstitutional direction is reinforced. These minor *indicia* are:

- a) the object of the legislation being a traditional judicial discretion, such as, for example, in *Nicholas* in relation to the admission of evidence resulting from illegal conduct, or in *Lim* in relation to ordering persons to be kept in custody; and
- b) the wording of the legislation, and whether it uses the words ‘directs’ or ‘orders’ aimed at the judicial branch. Moreover, if the legislation specifically mentions the persons to which it is applicable, or if it refers to the litigation specifically by name (such as in *Robertson*) then this will reinforce the existence of direction. This particular element can almost stand alone as a sure indicator of direction if the language used is sufficiently unequivocal and therefore it may in fact become a major *indicium* in such circumstances.

Whilst the above-listed constitute the most common and obvious *indicia* of direction, the writer does not advocate a closed set of *indicia*, nor that any of the *indicia*, or combination thereof, be regarded as determinative *per se*. The adoption of these suggestions might help alleviate the weaknesses, and sometimes excessive subtleties, within the formulation of the direction principle itself, and prevent its further erosion as a constitutional limitation. Although it would be difficult to envisage the High Court not declaring *Liyanage*-style legislation to be a breach of the direction principle, the concern is that if the principle is not maintained in the less obvious cases, or those cases where the legislature is interfering with judicial functions on impeccable public policy grounds, its efficacy may be eroded over time even in more obvious cases. The consequences of *Robertson* in the United States have borne this out. Such a development ought to be guarded against in Australian constitutional jurisprudence.

Finally, a difficult situation is created in circumstances such as in *Lim* where the direction clearly would have affected the outcome of pending proceedings, but was also of general application to all persons who came within the description of ‘designated persons’. The successfully impugned section simply directed that a court ‘is not to order the release from custody of designated persons’. Would this constitute a breach of the direction principle in the absence of pending proceedings involving people who came within the relevant definition? It could of course be argued, as it was in *Lim*, that the legislature was removing from the court and usurping the essentially judicial act of deciding whether a person should be released from custody. However, it could also be said that, even in the absence of

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187 See *Baker v R* (2004) 223 CLR 513 at 534 (McHugh, Gummow, Hayne & Heydon JJ).

actual pending proceedings, it was directing the court how it was to exercise one of its essential functions, directing the court as to the manner of the exercise of its jurisdiction, without in substance amending the law. Thus, it becomes a breach of the separation of powers doctrine as an indirect usurpation of judicial functions and also because it is directing the court how it is to exercise its jurisdiction and not simply amending the law which the court is to apply.