

Comment*

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We are indebted to Peter Gerangelos for his comprehensive and informative paper on legislative interference with judicial functions. The critical issues centre on the tension between what he calls the ‘Changed Law Rule’ and the ‘Direction Rule’ and on his conclusion, which is correct, that the balance, both in Australia and the United States, has swung in favour of the Changed Law Rule.

Whether Dr Gerangelos's proposal for re-invigorating the Direction Rule is the appropriate solution is open to question. Although the reasoning of the Supreme Court of the United States in *Robertson*¹ is perfunctory and unconvincing, I have no quarrel with the emphasis now given to the Changed Law Rule. I begin, however, by making some preliminary comments.

My first comment is a rather obvious one, though not one with which Andrew Inglis Clark would agree were he alive today;² it is that the barrier to legislative intervention in the judicial process stems not from limitations inhering in the legislative power itself, but from the limitations imposed on the exercise of the legislative power imposed by Ch III and the constitutional separation of powers. There are various reasons why this is so. Our inability to define the legislative and judicial powers in such a way that they are mutually exclusive makes it very difficult to say that a statute which has an application to the judicial process is not a law. Our unyielding loyalty to the omniscience element of the doctrine of parliamentary sovereignty, subject, of course, to the limits imposed by the Constitution, makes that difficulty all the more acute. Although occasionally it is suggested that a law directed to a specific individual or to the conviction of such an individual is not a ‘law’ because it lacks sufficient generality, that idea has little going for it. The idea has, however, some utility in showing that the law may be an unconstitutional interference with the exercise of judicial power.

The consequence is that the grants of legislative powers in the Constitution do not authorise the making of a law which requires or enables Ch III courts to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.³ Parliament cannot direct the courts as to the *conclusions* they should reach in the exercise of their jurisdiction.⁴ This is what is known as the ‘Direction Rule’.

* Comment on Peter A Gerangelos, ‘Legislative Intervention in Pending Cases’ (2008) 30 *Sydney Law Review* 61.

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

2 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (1st ed, 1901) at 39, and (2nd ed, 1905) at 39.

3 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

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

The functions which are essentially and exclusively judicial in character, whether in criminal or civil cases, are not only the making of the final determination but also the finding of the facts, the ascertainment of the relevant law and the exercise of any relevant judicial discretion. Generally speaking, a law which directs a court as to the facts which it shall find, the law it will ascertain or the end result of its exercise of discretion is an impermissible law because it interferes with the exercise of judicial power.⁵

On the other hand, it has always been accepted that the legislature can by statute alter the applicable substantive law in pending proceedings – the ‘Changed Law Rule’ – without compromising the exercise of judicial power. Likewise, the legislature can prescribe the practice and procedure to be applied by the courts. Practice and procedure include the rules of evidence⁶ which regulate the method or burden of proving facts.

The creation of the rights adjudicated upon, whether arising by virtue of statute or the common law, forms no part of the functions which are essentially and exclusively judicial in character. So the Parliament acts within its legislative powers, and not in contravention of Ch III, by creating rights and obligations under the relevant constitutional head of power, without its action in so doing trespassing upon the exercise of judicial power, even to the extent of enacting legislation which alters or affects the rights in issue in pending litigation.

Rules of evidence may, however, be so formulated, whether by way of presumptions or otherwise, so as to restrict a court's free and independent determination of an issue of fact in the litigation in such a way as to amount to an unconstitutional interference with the exercise of judicial power.⁷ The prescription of a conclusive presumption in relation to the commission of a crime is put forward as the most flagrant example of such an interference.

A question of characterisation of the rule of evidence arises. Is it legislative amendment prescribing a reasonable rule of evidence or is its true character something more than a rule of evidence amounting in substance to a direction to the courts as to how it will decide the case or a critical issue in the case? The latter inference is less likely to be drawn when the rule of evidence is directed to an issue of fact which is not critical.

Nicholas v The Queen,⁸ admittedly an unsatisfactory case by reason of the divergent judgments which were delivered, appears to support this approach. The majority took the view that the provision in question was no more than a rule of evidence. There, s 15X of the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth) was directed to the exercise of the judicial discretion, discussed in *Ridgeway v The Queen*,⁹ to reject evidence of importation of narcotic goods on account of the unlawful conduct of law enforcement officers. The section excluded

5 *Nicholas v The Queen* (1998) 193 CLR 173 at 187.

6 *Williamson v Ah On* (1926) 39 CLR 95 at 122.

7 *Williamson v Ah On* (1926) 39 CLR 95 at 108.

8 *Nicholas v The Queen* (1998) 193 CLR 173.

9 *Ridgeway v The Queen* (1995) 184 CLR 19.

from the exercise of the judicial discretion consideration of one fact, regarded by Kirby J in dissent as a critical fact, but not so regarded by any of the majority justices. Although Kirby J considered that there was a strong case for holding that the Direction Rule was engaged, he stopped short of reaching that conclusion and went on to hold that there was an interference with an exclusive element in the exercise of judicial power, namely an aspect of public policy relating to the integrity of the judicial process.

In this respect, it is important to note that, in essence, *Ridgeway* dealt with the impact of a public policy consideration on the exercise of the judicial discretion to exclude evidence. On such a question, it is ordinarily appropriate that the legislature should be permitted to identify what public policy is and to require the courts to give effect to the public policy so declared. Indeed, the joint judgment in *Ridgeway*, in contemplating legislative intervention, expressly recognised that there was a basis for legislative action which would not compromise the exercise of judicial power.

On the other hand, Kirby J saw the relevant aspect of public policy as a matter for the courts, not the legislature. He said:

This aspect of public policy, and the power and duty of the courts to defend it, belong, ultimately, to the judicial power. They can be enhanced, but not diminished, by the legislature or the executive. The central entitlement, and duty, of courts to ensure that the process of the law is not abused is recognised in common law countries even without the particular constitutional protections afforded to Australians by Ch III of the Australian Constitution. Upholding the integrity of the judicial system is the unavoidable obligation of courts. It cannot be surrendered to the other branches of government. They cannot be permitted to direct the courts to act in ways which would undermine the integrity of the judicial process and thereby run the risk of imperilling public confidence in the courts.¹⁰

His Honour went on to say:

The Parliament cannot give a direction to a court obliging it to disregard such a fact. Least of all can it do so in a law addressed in substance to a very small number of particular accused already before the courts and by a direction of limited application confined to their particular cases.¹¹

Toohy J explicitly rejected the argument that the prescription of public policy in this area was a matter exclusively for the courts. For my part, I think that he was right. Once that conclusion is reached, it was open to the legislature to direct the courts as it did on that aspect of the discretion.

McHugh J also dissented, not on the Direction Rule, but on the ground that the legislation withdrew an essential element in the exercise of judicial power – the *Ridgeway* discretion, to use a form of shorthand. McHugh J's dissent was potentially more far-reaching than that of Kirby J because, in his view, the

¹⁰ *Nicholas v The Queen* (1998) 193 CLR 173 at 265.

¹¹ *Nicholas v The Queen* (1998) 193 CLR 173 at 266.

withdrawal of any part of the judicial discretion was an impermissible interference with the judicial process.

Whether the result in *Nicholas* would have been different if the legislation had abolished altogether the public policy discretion to exclude evidence is not clear, even if McHugh J's answer to that question is obvious. The reliance placed by some members of the Court on the continued existence of the residual discretion, despite the legislative direction, might suggest that abolition of the discretion would have been fatal. Such an abolition might so adversely affect the 'integrity' of the judicial process as to compromise it. That might well be the case if the legislature sought to abolish the judicial discretion that enables the trial judge to exclude evidence on the basis of unfairness to the accused. That discretion goes to the very notion of fair trial itself.

Before I leave *Nicholas*, I should refer to another observation by Toohey J. He said:

It is a considerable step to reason that legislation may not affect the way in which judicial power is exercised. It is an even bigger step to contend that the legislature may not provide that evidence possessing a certain character must be treated in a certain way or that evidence of a particular character must be rejected or, for that matter, admitted.¹²

These two sentences reflect, in my view, the underlying philosophy in both *Nicholas* and the United States Supreme Court decision in *Robertson*. In both cases, the court was primarily concerned with the question: is there anything more to this than a change in the law or a rule of evidence? In both cases, the question was answered in the negative, although Toohey J seemed to be suggesting that only something like a Bill of Attainder would have engaged the Direction Rule, a suggestion that seems rather radical.

I turn now to another point. In recent cases on Ch III, the Court has retreated from the reliance on maintaining public confidence in the courts and the judicial process, which reached its high water mark in *Kable v Director of Public Prosecutions (NSW)*.¹³ In *Baker v The Queen*¹⁴ and *Fardon v Attorney-General (Qld)*¹⁵ the Court says that the critical matter is preserving the integrity of the judicial process and that public confidence in the courts and the judicial process is a matter relevant to that concept. While the retreat may be a step in the right direction, reliance on preserving or protecting the integrity of the judicial process presents its own problems. What does the expression 'the integrity of the judicial process' mean in this context? Is it synonymous with the notion of fair trial and due process as distilled from the judicial process as we know it? Or does it mean 'the free and independent process of curial decision-making' which will be compromised if the court is required to act at the dictation of the legislature? Or is

12 *Nicholas v The Queen* (1998) 193 CLR 173 at 202 [53].

13 *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51.

14 *Baker v The Queen* (2004) 223 CLR 513.

15 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

it concerned with some public misperception that the judicial process is engaged when the actual exercise falls short of that.

Of course, in some cases – *Nicholas* is an illustration – the legislature may legitimately direct the courts to give effect to a change in the law which it is entitled to enact. But there are limits to what the legislature can do, even if they are difficult to define. That difficulty is linked to the indefinable character of judicial power, which is a core problem besetting the formulation of firm principles regulating the exercise of judicial power and what is an illegitimate interference with it.

*Liyanage*¹⁶ seems to have been consigned to perennial distinction. That is because it was an extreme case. But I do not doubt that cases not as extreme as *Liyanage* will involve unconstitutional interference with judicial process. They would generally involve retrospective legislation affecting pending litigation which targets individuals, departs in some significant respect or respects from normal processes and amounts to a direction on a crucial issue in the case, the direction being confined to the litigation which is the target of the legislation.

It has been repeatedly said that, in considering whether there is unconstitutional legislative interference in pending litigation, the focus is on the substance rather than the form of the legislative interference. This focus cuts both ways. So, an interpretive provision which on its face is capable of being regarded as a direction to a court may in substance amount to a legislative amendment, which as Dr Gerangelos says is the critical question. And a new legislative presumption or deeming provision may amount to a change in the substantive law.

In the result, I accept a balance which gives emphasis to the Changed Law Rule but allows scope for the Direction Rule to apply in cases where the legislature directs a court to reach a conclusion on a crucial issue in pending litigation in the circumstances already outlined. There will be other cases of unconstitutional interference where an essential function is withdrawn from the judicial process.

16 *Liyanage v The Queen* [1967] 1 AC 259.

