Chapter Ten

Parliamentary Will v. Statutory Bill: The Important Role of Legislatures in Progressive Social Change

Hon John Hatzistergos, MLC

Courts are, for the proponents of rights charters, the saviours of society from the pernicious power of government and legislature. When politicians make laws or take executive action outside the values set down in a charter, courts will heroically force them into accordance with its human rights principles.

Courts in this scenario are at the forefront of the defence of the rights and interests that are central to our democracy. But does this picture really match reality? Does it in fact ignore the central democratic institution, the Parliament? In an effort to rebalance our perspective on this issue I would like to suggest that it is via Parliaments, and the legislative will of parliamentary representatives, that major social advances and the extension of basic rights to all of society have been effected, rather than through the courts.

Parliamentary reform for the rights of excluded members of society

The primacy of the parliamentary legislature as the lawmaking body in Western democracies has been examined by the American sociologist William M Evan, who also looks at the role of courts: while also identified as a source of lawmaking, their legitimacy stems primarily from the fairness of their decision-making processes, not their role in policy making, for which they generally lack authority.[1]

The legitimacy of Parliaments for determining questions of how society is to be governed and settling laws, and the relatively minor authority that courts wield in this area, are important to remember when examining the role of the legislature and the courts in recognising and advancing the rights of excluded members of society in Western democracies.

In doing this it is important to emphasise an identifiable phenomenon – the efforts of people and Parliaments to produce legislative change to adequately recognise or protect vulnerable sectors of the community – is observable across all significant campaigns for the expansion of rights to disenfranchised members of the community.

To me this illustrates the formidable responsibility that continues to be vested in the legislature by the community – to rebalance the scale of advantage, by legislative action, to ensure that unfairness and disenfranchisement are redressed for the benefit of the marginalised and consequently the community as a whole.

What the following cases also reveal is the centrality of Parliament as the engine room driving reform and social change. The idea that courts as an institution can play this same role, a purpose for which they were not designed and which they cannot achieve without significant restructure, is not backed up by the historical record. When looked at in their context, the hopes that charter advocates hold for a transformation in the courts' role in society are reduced to pure fantasy.

I also want to use these historical examples to show the benefits of change through legislation rather than through litigation. Professor Helen Irving has stated that rights "should be able to evolve, and the best way to do this is through the political process. The political process is accountable, and it is flexible. It allows for compromise, where litigation is usually a matter of winning or losing".[2]

Rights are not generic concepts waiting to be found. In fact, they often conflict. Take freedom of speech and the right to privacy, freedom of religion and the right to equality and freedom of movement and the right to private property.

Basic to our system of representative democracy is the identification and accommodation of conflicting social interests in the process of making laws and governing the state. The sophisticated electoral system of preferential and proportional representation, of our bicameral Parliament, standing committees and inquiries, together with institutions of a free press and ministerial accountability, all work together to ensure that complex political conflicts are resolved smoothly, and competing rights, values and interests are weighed up and decided in a democratic way.

To put it simply: parliaments are institutions specially designed for consultation on, discussion and resolution of difficult political questions. On the other hand, the judicial branch of government is set up in a different manner to achieve different ends: the adjudication of private conflicts and the application of law.

By transforming social and political questions into legal ones, a Charter of Rights threatens to harm the integrity of both institutions. It blurs the Parliament's authority to decide important political questions which the public has entrusted to it, and for which it has evolved a sophisticated democratic infrastructure. It also forces the Courts to start making decisions on these same issues, responding to questions which they are ill-equipped to answer and for which they do not have the democratic legitimacy.

Right of all men to vote regardless of their property rights

It is also informative to remind ourselves about the struggle to gain universal suffrage[3] in Britain. Suffrage, or the right to vote, is a key element (some would say the key element) to political, and therefore legislative, power in representative democracies.

The extension of the right to vote across the British population shows the central role of Parliaments in social progress. While the earliest rules about who could vote restricted the franchise according to the value and size of a person's property – meaning only men could qualify – agitation to extend the franchise finally resulted in the first Great Reform Act in 1832.

Within a few years, a popular movement supporting manhood suffrage (often referred to as Chartism) achieved significant support. It contained a broad representation of the national economic and social structure in 19th Century England, including skilled artisans and middle class radicals. They understood the power of the legislature to effect social change, and it was Parliament that they targeted with their campaigns, via the instrument of the petition. In contrast, history does not record any attempts to achieve these important reforms by initiating legal proceedings.

In June 1839 the Chartists presented their petition to the House of Commons with over 1.25 million signatures. A second petition was presented in May 1842, signed by over three million people. In April 1848 a third and final petition was presented, accompanied by a mass meeting on Kennington Common in South London.

The power of this political movement, coupled with parliamentary processes that resulted in legislative answers to the Chartists' demands, brought about the social change that the movement had envisaged.

The second Reform Act in 1867 expanded the franchise to borough householders, including many working men, and the 1884 Reform Act extended the same franchise to the counties, bringing the franchise to over 5 million men. The introduction of the secret ballot in 1872 freed voters from landlord and employer influence. The 1918 *Representation of the People Act* extended the vote to all men over 21 and most women over 30.

Women's right to vote

By the late 19th Century the issue of universal suffrage, and more specifically the right of women to vote, was firmly on the agenda in England[4] and in many other young parliamentary democracies. The common thread in these movements was the insistence that Parliaments should be answerable to all those they seek to govern, and that this expectation should be reflected in legislation.

The milestones leading up to the enfranchisement of women in New Zealand[5] – claimed as the first self-governing nation to grant the vote to all adult women – reveal striking similarities with those leading to universal male suffrage in England and similarities with women's suffrage movements in the US, Britain and Australia.

In New Zealand the campaign for women's suffrage included the efforts of individual women writing and speaking in public; the activities of the Women's Christian Temperance Union; women's trade unions;[6] the presentation of numerous petitions;[7] the formation of cause-specific organisations;[8] and the drafting of several Bills preceding the enactment of the final legislation providing universal suffrage for New Zealand women.[9]

In Australia the *Franchise Act* 1902 conferred universal suffrage for white men and women with respect to federal elections. Aboriginal enfranchisement had occurred in part in the States in the 1850s, but federally required a more complex process to ensure the rights of all Aboriginal men and women to participate, culminating in 1962 amendments to the Commonwealth *Electoral Act* that provided the right to vote in federal elections to Aboriginal Australians.

Legislative action to end slavery

The abolition of slavery has been one of the great moments of progress in the modern era. It was achieved not by the interpretation of legal principles by courts, but by the formation of abolitionist movements, by parliamentary debate and legislative action, and in the case of the United States of America by executive declaration and military victory.

In England the abolitionist movement became a powerful political force at the end of the 18th Century, made up of diverse religious and humanitarian groups and represented in Parliament by the Anglican evangelist William Wilberforce. Following broad based campaigns the movement attained success in having the slave trade in the British Empire banned with the passing of the *Slave Trade Act* 1807 by the British Parliament. Continued campaigning resulted in the passing of a further piece of legislation, the *Slavery Abolition Act* 1833, which set in place the process for the abolition of slavery itself throughout the British Empire.

Similarly, the abolitionist movement grew in America in the early 19th Century, leading to legislative change across States of the north to abolish slavery. In 1808 the importation of slaves was banned by Congress,[10] although this did not stop the natural increase in the slave population or slave smugglers taking advantage of lax enforcement.

In the end, of course, America had to fight a civil war to end slavery and guarantee freedoms to its African-American population. The victory of the Union forces ensured that President Lincoln's Emancipation Proclamation of 1862/63 granting liberty to slaves in the Confederate States could be enforced, and would eventually be strengthened further with the Thirteenth Amendment, abolishing slavery and involuntary servitude in 1865.

What was the role of the courts in this epochal development? While the British common law did assist the cause to some extent with Lord Mansfield's decision in the *Somersett Case*[11] of 1772, which has been interpreted as holding that slavery was not lawful in England, it is also true that the extension of the fundamental right of freedom from slavery to the populations of the United States and Britain relied on the generation of popular political support and the enactment of legislation through parliamentary processes. Popular movements drove change through the engine room of the Parliaments, allowing social conflicts to be mediated, and questions of progress to be negotiated,

advanced and implemented. The courts at best played a role in clarifying the legal context in which these debates took place, but cannot be said to have actively pushed the process forward.

Civil rights laws

After the abolition of slavery following the Civil War, the next great advance in the right of people of colour in America came out of the civil rights movement of the 1950s, '60s and '70s. One of the primary aims of this movement was legislative change, which was achieved in the *Civil Rights Act* 1964 and the *Voting Rights Act* 1965, changes that enforced rights for marginalised peoples, including women, blacks, Asians and Latinos.

The Montgomery bus boycott, together with the decision in *Brown v. Board of Education*, are often cited as catalysts for the civil rights movement. Together with the championing of legal methods by the National Association for the Advancement of Colored People (formed in 1910), the non-violent protest by the Congress of Racial Equality (formed in 1942), and the mobilisation of black students in the south and white liberal students in the North in the 1960s, the infrastructure of the Civil Rights movement became formidable.

In the America of the civil rights era, such collective action culminated in legislative action, by way of the introduction, under the Johnson administration, of the *Civil Rights Act* in 1964 – which barred discrimination on the grounds of race, sex, religion or national identity – and the *Voting Rights Act* – which codified the 15th Amendment[12] and finally enfranchised African-Americans of the south in 1965.[13]

Ultimately, there can be no doubt that the consequences of these laws for the integration of the hitherto marginalised women and blacks and, subsequently, mature workers and people with disabilities into the workforce was significant. As noted by Dowd Hall:

> "Government intervention (by enacting the *Civil Rights Act*) and grass-roots action made 1965-1975 the breakthrough period for black economic progress, especially in the South. That victory inspired Latinos and others to make similar demands and adopt similar strategies. As a result, legal protection of individuals from workplace discrimination was extended to a large majority of Americans, including not only people of color and all women, but also the elderly and the disabled".[14]

The courts obstructing rights

While there are notable and oft-cited cases of court decisions which have had a significant political and social impact – *Roe v. Wade*, *Brown v. Board of Education*, *Mabo* and *Wik* for instance – it should also be remembered that courts also play a role in limiting social change and taking a more conservative approach to issues which charter advocates may wish to advance.

Gun control laws: One example of this is the decision of the US Supreme Court in *District of Columbia v. Heller*, which has been characterised[15] as the first Supreme Court decision in history to strike down a gun control statute under the Second Amendment,[16] so that a State law that effected a functional prohibition on the possession of handguns in one's own home was invalidated.[17]

For those familiar with the controversy that has followed the majority decision of Justice Scalia in that case, it will probably come as no surprise to you that I am attracted to the arguments of the commentators who have objected to this decision on the basis that judge-made law and judicial veto of democratically-sanctioned criminal statutes, where there is no constitutional text that requires such judicial intervention, is bad law.[18] In this context, I agree with those who suggest that legislating from the bench is undesirable.

There are of course recent counter-examples to the rights-limiting function of some courts, and it should be no surprise that courts can play both limiting and expansive roles when it comes to decisions on rights. In *Roach v. Federal Electoral Commissioner*[19] (*Roach*) the High Court struck down the Howard government's *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 to the extent that it denied voting rights to prisoners serving full-time sentences. Their decision was based on an implied guarantee of the right to vote inherent in the political system laid down in the Constitution, where members of Parliament were to be "directly chosen by the people".[20]

This was a finding that directly contradicted the express will of the Parliament, enacted in legislation. It was a significant intervention into national political life by the Justices of the High Court, and had an immediate electoral impact on the 25,790 people imprisoned in Australian correctional centres at the time.[21] There is no explicit guarantee of the right to vote in the Constitution to justify the High Court's decision, and instead it relied on an analysis of the structure of the Australian polity set out in the way that the Constitution was drafted.

The High Court's decision in this matter occasioned controversy and public debate and, as on previous occasions like the handing down of the *Wik* decision, it showed how ill-suited courts are to manage this kind of intervention into the public sphere. Unlike the Prime Minister, the Chief Justice of the High Court is not institutionally equipped to come out and engage in media debate about the effects of his court's decision, and there are legal constraints on him justifying it beyond the published reasons laid out in the official judgment. Compared to the daily frequency of decisions made in Parliaments on socially and economically controversial topics, it is beneficial for the High Court to be constrained from entering into these areas to the relatively few cases where it is necessary to remedy breaches of the Constitution. This situation would be reversed under a Charter of Rights regime, where the High Court would be called upon to routinely and frequently make interventions into political areas.

Socially progressive lawmaking is the responsibility of the legislature, as elected representatives are best placed to make laws suited to the community values of the moment. Anti-discrimination laws, for reasons I will now explore, are an excellent example of how the legislature can be responsive to contemporary social conditions.

Anti-discrimination laws in Australia

Commonwealth racial vilification laws: In the main, contemporary human rights laws have been the purview of the legislature – especially in the context of agreement among Western nations in the aftermath of the Second World War that respect for human rights and the protection of minorities was properly a global concern.

The enactment of anti-discrimination statutes in Western democracies can be closely aligned with major shifts in the post-World War Two social, political and legal environments of the developed world, including Australia. While time will not permit a comprehensive examination of the context for the enactment of discrimination statutes in this country, the comments of the Commonwealth Attorney-General about the *Racial Discrimination Act* and *Racial Hatred Bill* should be highlighted.

It is a summary of how anti-discrimination laws – in this case the federal racial vilification laws – can address demands of the Australian community to enact socially progressive laws, reflective of both a global human rights framework and local concerns with the consequences of the failure of Australian society to properly recognise the rights of our racial minorities.

The Attorney-General said the following in the House on 15 November 1994 (about the Bill, which contained both civil and criminal provisions):

> "The *Racial Discrimination Act* does not eliminate racist attitudes. It does not try to, for a law cannot change what people think. But it does target behaviour – behaviour that causes an individual to suffer discrimination. ..

> "The *Racial Hatred Bill* is about the protection of groups and individuals from threats of violence and the incitement of 'racial hatred', which leads inevitably to violence. …. This Bill is controversial. It has generated much comment and raises difficult issues for the Parliament to consider. It calls for a careful decision on principle.....…
>
> "The Bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims.
>
> "Three major inquiries have found gaps in the protection provided by the *Racial Discrimination Act*. The National Inquiry into Racist Violence, the Australian Law Reform Commission Report into Multiculturalism and the Law, and the Royal Commission into Aboriginal Deaths in Custody all argued in favour of an extension of Australia's human rights regime to explicitly protect the victims of 'extreme racism'.
>
> "The 1992 report of the National Inquiry into Racist Violence found that while State and Territory criminal law punishes the perpetrators of violence, it largely is inadequate to deal with conduct that is a pre-condition of racial violence. The report documented 60 such incidents. The Law Reform Commission report and the Royal Commission also dealt extensively with examples of extreme racist behaviour. .....
>
> "Racism should be responded to by education and by confronting the expression of racist ideas. But legislation is not mutually exclusive of these responses. It is not a choice between legislation or education. Rather, it is in the government's view, a case of using both. .....
>
> "In this Bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. …..".

This quotation accurately encapsulates the responsiveness of the legislature in advancing the rights of excluded members of our society. The fact that they are quoted in the decision of the full Federal Court which upheld findings that internet publications of Mr Toben vilified Jews within the meaning of the Commonwealth vilification laws is further evidence of the effectiveness of the legislature in enacting socially progressive laws.

The Attorney-General's comments also reveal the complex environment in which anti-discrimination legislation operates and the multitude of different interests and rights that it must deal with, respond to and reconcile in multicultural societies like Australia. As well as setting out norms and penalties, both Commonwealth and State legislation also established government agencies to oversee anti-discrimination initiatives (with the Australian Human Rights Commission operating federally and the Anti-Discrimination Board in New South Wales), in recognition of the fact that merely deciding on and enforcing rules is not enough, but that community education and cultural change is necessary.

These sorts of measures are far beyond the capacities of courts, designed as they are for the resolution of legal conflicts and not sophisticated policy development in a complex, conflicting and rapidly changing social environment. Another important aspect of NSW anti-discrimination legislation is the provision of exemptions for organisations, including churches and educational institutions, as well as a mechanism for the Government to grant exemptions on a case-by-case basis.

This is a way of managing the conflict between general norms prohibiting discriminatory practices and the particular interest of different community groups to retain autonomy to act in accordance with their own beliefs. The exemption system is also used to allow the operation of organisations which seek to advance the interests of disadvantaged groups, who need to specifically target these groups in a beneficial way but who would be in breach of anti-discrimination provisions in doing so. For example, a transport company that has special provisions to encourage women truck drivers, an industry in which women are under-represented, recently received an exemption under this system.

The complex, targeted nature of this legislation, accommodating the needs of different groups from the heterogeneity of Australian society and resolving conflict between them, is a good example of the work that Parliaments can do to achieve social progress while maintaining social cohesion. It is the unique nature of Parliaments that enables such a resolution to be reached, and is a function that cannot be achieved by courts in their consideration of legal conflicts. Outsourcing responsibility for the advancement of rights to the courts runs the risk that accompanies the replacement of a fine-tuned, sophisticated tool with a blunt one that has been built for different purposes.

Conclusion

Parliament is an institution central to our democracy and it is an institution worth defending. What I have argued here is a defence of Parliament's role in setting out the laws by which a society operates, with all the legitimacy conferred upon it by its democratic mandate, in opposition to those who wish to see Parliament bound up by a Rights Charter and subjected to the direction of the courts as to what it can and cannot do. Faith in the democratic legislative function of Parliaments has borne fruit for those who have fought for the advancement of marginalized groups over the centuries, and it has been Parliaments who have overseen the extension of rights and freedoms beyond the élites to the greater mass of the world's populations.

The examples given here, of the abolition of slavery, the extension of manhood suffrage, women's rights to vote and the civil rights movement in the USA all illustrate the importance of the political and parliamentary processes in achieving real and lasting social change. Reform comes through legislation, not litigation. Despite the great hopes that are put on test cases and the argument of public interest matters before the courts in an attempt to generate wider social reform, the kinds of change generated by litigation and different inflections of established legal principles pale in comparison to the transformations effected by parliamentary activity. The *Slavery Abolition Act*, the *Reform Act*, the *Civil Rights Act*, and Australian legislation such as the *Anti-Discrimination Act* and our recent mental health reforms have all created greater, more durable progressive change than the judgments of courts in the same areas.

Lawyers bear the scars of litigation and we know that the idea of social progress through adversarial litigation, where community values are converted to legal battlefields, is a formula for dysfunction.

We do not live in a perfect society and never will. There may well be laws perceived by some in our community to be unjust. It is however wrong to suggest that they can be remedied by enacting Charters with wide ranging values and all will be well. The remedies and accountability should rest with the democratically elected Parliament preserving and respecting the traditional role of the Courts and the balance between our institutions of governance.

Endnotes:

1. Cotterrell, R, *The Sociology of Law, An Introduction*, Butterworths 1992, p. 59.

2. Helen Irving, *Bill of rights talk*, Fabian Society, 25 July 2007.

3. Cannon J (ed), *The Oxford Companion to British History*, Oxford University Press, 2002, pp. 192-193, 896-897 and http://www.parliament.uk/about/livingheritage/transformingsociety.cfm.

4. *Ibid*., p. 897.

5. See generally http://nzhistory.net.nz/politic/womens-suffrage and http://www.Christchurch.org.nz/Women.

6. In NZ the Tailoresses' Union of New Zealand was active in the suffrage campaign.

7. In 1893, 13 petitions requesting that franchise be conferred on women, signed by nearly 32,000 women, were compiled and presented to the House of Representatives.

8. The Women's Franchise League was established in Dunedin (NZ) in 1892. The National Council of Women, established in 1896, grew out of the networks of campaigners for voting rights for women.

9. See the *Electoral Act* 1893.

10. Foner, Eric, *Forgotten step towards freedom*, *New York Times*, December 30, 2007.

11. *R. v. Knowles, ex parte Somersett* (1772) 20 State Tr 1, judgment of the Court of King's Bench.

12. Amendment 15 – Race No Bar to Vote. Ratified 2/3/1870.
"1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
"2. The Congress shall have power to enforce this article by appropriate legislation".

13. Morris, A, *Civil Rights Movement*, in Ritzer, G (ed), Blackwell Encyclopaedia of Sociology, Vol 11, Blackwell Publishing, 2007, pp. 507-511, and *Activism and Reform*, in Cayton, Gorn, Williams (eds), Encyclopaedia of American Social History, Macmillan, 1993, pp. 223-227.

14. Dowd Hall, J, *The Long Civil Rights Movement and the Political Uses of the Past*, The Journal of American History, Bloomington, March 2005, Vol.91, Iss. 4; p. 1233, para. 68.

15. By Lund, N, *Heller and Second Amendment Precedent*, 13 LCLR 335.

16. Amendment 2 – Right to Bear Arms. Ratified 12/15/1791.
"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed".

17. Levinson, S, *For Whom is the Heller Decision Important and Why?*, 13 LCLR 315.

18. As discussed in Merkel, WG, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 LCLR 349.

19. *Roach v. Electoral Commissioner* [2007] HCA 43, downloaded from http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html on 29 August 2009.

20. Sections 7 and 24 of the Australian Constitution.

21. Australian Bureau of Statistics, *Prisoners in Australia, 2006*, Report No 4517.0.