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Parliamentary Will vs. Legislative Bill: The Important Role of Legislators in Progressive Social Change – presented by The Hon. John Hatzistergos MLC

The Attorney General of New South Wales, John Hatzistergos, presented his speech against the backdrop of the central theme of the 2009 Samuel Griffith Society Conference, which was the issue of a Bill of Rights in Australian domestic law. Many key speakers of the conference had addressed the issue in the negative (our own Attorney General was one such presenter arguing from the perspective of the legal ramifications of such an enactment) and Mr. Hatzistergos did not stray from such perspective in his presentation.

THE PRESENTATION AT A GLANCE

Taking the position that it is the legislature – not the courts - that are the engine rooms of social change, the Attorney General highlighted the increased societal development role the courts will inevitably undertake if a Bill of Rights is legislated for in the Australian context. Rejecting the American stance on the role of the judiciary as a bulwark against executive tyranny, Mr. Hatzistergos argued that the traditional role of the courts is a purely legalistic one. Asserting that the separation of powers established the judiciary as a body which declares and applies the law in a conclusive manner to resolve controversies surrounding rights, duties and liabilities, he upheld that it should not be for the courts to operate as an ad-hoc legislature bringing about social change contrary to its theoretical role. The Honourable Member went further, alleging that it is not for the courts to operate as a source of human rights development via the invalidating of acts of parliament which are incompatible with such rights – something which an entrenched Bill of Rights would empower the courts to do, citing the doctrine of parliamentary sovereignty as paramount to an effective democracy. Finally, the Honourable Member argued that the dominance of rights development is an exclusive feature of the legislative/ executive branches of government. Relying on the intrinsic link that such branches have to the people via the electoral process, the Attorney General utilized examples throughout history to relay the point that this enabled such bodies to operate as the mouthpiece of society, and as such are able to flexibly and progressively meet the needs of a rapidly developing society – something which a rigid, unelected judiciary is ill-equipped to undertake, both in its theoretical roles and practical operation.

The remainder of this report will take the reader through an outline of a few of the various historical examples where the legislature has proven its role as pivotal in the development of social change over and above its judicial counterpart. This will be bolstered with reference to examples where the court, in acting to further social development, have done so to their own

detriment, often eliciting outcry due to the activist role such decision making involves. Finally, the report will conclude with a few criticisms of the Honorable Members position in order to effectively contrast the position put forward by Mr. Hatzistergos with that of those who see a greater role for the judiciary in the area of human rights and social change.

THE PROGRESSIVE LEGISLATURE: A HISTORY OF SOCIAL DEVELOPMENT

Universal Suffrage

Utilizing one of the key components of representative democracy the Attorney General is attempting to establish that historically, it has always been the legislature that has been at the forefront of societal development. In the context of Britain it was the Westminster Parliament that initially pushed for male suffrage which culminated in full, universal suffrage in 1928 for both males and females. In the Australian experience it was the newly formed Commonwealth Parliament that enacted the *Franchise Act 1902* (Cth) which entitled, *all persons not under twenty- one years of age, whether male or female… to vote at the election of the Members of the Senate and the House of Representatives.*[1] Though this was a restricted franchise to those of European decent, it was the Federal Legislature that effectively expanded the rights of suffrage for Indigenous Australians (via a referendum and consequent amendments) thereby developing what is today a shared electoral experience by all Australians regardless of race, colour, creed or religion.

To contrast this developmental role of legislatures it was contended that the history books are absent on any incremental or progressive franchise development within the judiciary. It was parliament that noted the subjectification of women to 'mans' laws without adequate representation and made the adequate enactments to entitle those citizens with representation in the houses of parliament – not the courts. This establishes the legislature's flexibility to evolve its stances towards certain societal issues through the political process to meet the expectations of its citizenry. This can be juxtaposed with the formalistic, rigid operations of the judiciary which are often bound to a reactive role due to the nature of the judicial process. This arguably leaves it ill-equipped to pro-actively bring about social change in any meaningful way.

The Abolition of Slavery

Slavery is one of those dark chapters in modern history however the Attorney General utilized the example to again assert the dominance of the legislature over and above the judicial intervention approach. Noting that it was the abolitionists in the United Kingdom that embraced the avenue of parliament to argue against such a heinous practice, it was the British House of Commons that successfully enacted the *Abolition Act 1833* (UK) which effectively ended the slave trade within the Commonwealth nations. This change did not come from some 'test case' brought forward in the English courts to argue the *possibility* of societal development away from

[1] *Franchise Act 1902* (Cth) s 3.

such a draconian practice; rather, it was the legislature, embracing the concerns of the people who freely petitioned and lobbied the Westminster Parliament to bring about radical change in the area of race relations that effectively changed society for the better. Certainly the will of the legislature is far more reaching in the area of social development due to its intrinsic link to the people and the various avenues that exist to alert parliamentarians to issues that are of paramount concern to the people.

THE JUDICIAL INADEQUACIES

The Controversial Judiciary

Mr. Hatzistergos noted that the separation of powers allocates a declaratory role to the judiciary – not a social development one. Asserting that were the courts have engaged in social development through judicial intervention they do so at the risk of controversy for breaching this theoretical role. Outlining the Australian cases of *Mabo, Wik* and the U.S. example of *Roe v Wade* the Honourable Member, though not denying the importance of these decisions in social recognition of the rights of those within various societies, highlighted that where the courts have acted in such a way they often elicit public outcry due to the perceived controversy and quite activist role the court is embarking on. Asserting the dominance of the idea of parliamentary sovereignty, the argument the Attorney General is putting forward is one which reserves the role of progressive social change to the legislature as constituted by elected representatives. This is upheld by the idea that parliaments are accountable to the people at election periods, contrary to the judicial position which is appointed and unaccountable to the people, thereby making parliament a more effective body to develop social change in tune with the perceptions of the public. It should not be for an unelected body, detached from the operations of society as a whole in terms of public access to petition the judiciary (outside of an adversarial trial setting), to engage in social development where the intention of parliament (and by extension the people) has not touched the area of concern. To allow such intervention is to implicitly sanction the idea that judicial elites are better equipped to decide issues of social development – however, this idea is completely counterintuitive the ideological underpinnings that enable the development of a healthy democracy.

CONCLUSION AND CRITICISMS

Though the Attorney General has effectively identified the theoretical flaws of a judiciary enacting social change the Honourable Member was silent on the role of a judiciary in the context of legislative excesses by a head strong government. As Lord Denning stated,

> An official who is the possessor of power often does not realize when he is abusing it. Its influence is so insidious that he may believe he is acting for the public good when, in

> truth, all he is doing is asserting his own brief authority. The Jack-in-Office never realizes that he is being a little tyrant.[2]

Certainly there is room for the view that the courts can operate as a bastion of human rights and social development in the face of draconian enactments from the executive/ legislative branches of government. Such a position would still be consistent with the idea of the separation of powers – clearly, the purpose of dividing power between three tiers of government was to prevent authoritative abuses of power. However the dominance of the notion of parliamentary sovereignty which has affirmatively been adopted into judicial policy via our own High Court limits the role of the courts in such an area. To maintain this distinction and effectively operate a healthy democracy the role of the legislature in the area of social change cannot be understated. If it were then the very view of a parliament that is reactive to whims of its citizenry would be undermined and the dominance of elitist intervention from unelected bodies could potentially be rife.

[2] Sir Alfred Denning, *Freedom Under the Law* (London: Stevens & Sons, 1949) 100.