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Legislative Responsibility to Human Rights Controversies

An examination of judicial cases in the United States, Jamaica, and South Africa highlights the important role of a state's legislative body in addressing the human rights controversies raised through issues such as capital punishment. First, it is important to discuss the structure of the representative legislature, in comparison to a court structure that relies far more on the opinions and abilities of individual justices. Next, I will consider the specific scope of various legislatures and parliamentary bodies that enable them to best address these controversies. Finally, I will address the role of the judiciary in answering the questions raised by these controversies, while considering the role of the legislature. Although both the legislature and judiciary play an important role concerning human rights controversies such as capital punishment, the legislature has the primary responsibility and ability to do so, whereas the courts are limited due to the method and manner through which they address such questions.

The structure of a representative legislative body ensures it is responsible as the first line of defense in addressing human rights controversies such as capital punishment. Although there was no plurality in *Furman v. Georgia*, Chief Justice Burger commented in his dissent that, despite the fact that many of the opinions were at odd with each other, there was an underlying general recommendation that "legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital

punishment”¹. He concludes that as a whole, the concurrences and dissents comprising the Supreme Court’s opinions in this case “show that [capital punishment] is an area where legislatures can act far more effectively than courts.”² A key issue in *Earl Pratt & Ivan Morgan v. The Attorney General for Jamaica & The Superintendent of Prisons* was that the appellants were delayed in their appeal process for four years from their first application to the Court of Appeal. Upon investigation it was discovered that this delay was because “no reasons had yet been prepared by the judge to whom the writing of the judgment had been assigned. The papers had apparently been put in the wrong bundle and forgotten.”³ As a representative body, when controversies such as capital punishment are addressed through legislative action, the body as a whole is responsible for the question at hand. The Parliament would not directly address the specific failures of the Jamaican Court of Appeals as they were addressed in this instance. However, there is a wide scope of responsibility among the many members of such a body which provides insurance against the possibility of some particular debate or issue slipping through the cracks as blatantly as happened in this case of an individual judge. As the demands of the citizenry can be key in understanding the needs for furthered human rights protections, it is important to recognize that “the assessment of popular opinion is essentially a legislative, not a judicial, function.”

The scope of a representative body is a key factor in determining its ability to address human rights controversies as they arise. When considering the vast differences of death penalty law between various regions in *The State v. T. Makwanyane and M. Mchunu*, there is a sense of

¹ *Furman v. Georgia*, 408 U.S. 238 (1971).

² *Furman v. Georgia*, 408 U.S. 238 (1971).

³ *Earl Pratt & Ivan Morgan v. The Attorney General for Jamaica & The Superintendent of Prisons*, Privy Council Appeal No. 10 of 1993.

inevitable disparity regarding the introduction of such laws to the entirety of a country that had long existed in the divided state brought by Apartheid. However, it is clear that the “national and provincial legislatures”⁴ will be best positioned to address such disparities, through other law such as the Criminal Procedure Act. Furthermore, it is acknowledged that the slow and deliberate process of legislation, which, in this case, “allows different legal orders to exist side by side until a process of rationalization has been carried out,”⁵ can be highly effective. As long as the legislation on each side is found to be in line with the Constitution, the separate laws governing separate areas do not necessarily have to be in line with one another. In discussions around issues such as capital punishment, this can become tricky but ultimately will enable a more thorough development of the law in the future.

In *Furman v. Georgia*, Justice Rehnquist addressed the specific nature of legislation. In his dissent, he wrote that the majority essentially “at one fell swoop [invalidated] laws enacted by Congress and 40 of the 50 state legislatures, and would consign to the limbo on unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, high jacking, and desertion in the face of the enemy.”⁶ The apparent broad address of the death penalty through a variety of legislation stands in sharp contrast to the single Supreme Court case that effectively went against all of that legislation. By highlighting the disparity between the two approaches, Rehnquist is ensuring that it is understood that the deliberate and specific nature through which legislation is introduced and made into law manages to cover a wide range of the many specific questions involved in the controversy

⁴ *The State v. T. Makwanyane and M. Mchunu*, Case No. CCT/3/94 (1995).

⁵ *Ibid.*

⁶ *Furman v. Georgia*, 408 U.S. 238 (1971).

surrounding capital punishment. In contrast, the judiciary is limited to ruling on whatever cases come before it, and could never have the chance to rule on how to protect human rights considering the use of capital punishment for something such as mutiny. Justice Burger also touched on this phenomenon by stating that the “unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.”⁷

The balance of the legislative and judicial bodies in addressing human rights controversies such as capital punishment is a very careful one. The nature of the relationship between the legislature and judiciary is unbalanced in some ways—“the first indicator of the public’s attitude must always be found in the legislative judgments of the people’s chosen representatives,”⁸ while the judiciary interprets the constitutionality of those laws when they are brought into question. Therefore, the legislative branch is positioned as the primary voice to address the controversies that often are most important to the public. However, on the back end, the judicial branch is tasked with the responsibility of validating those laws, and upholding the human rights protections introduced, or striking down those laws that do not align with the Constitution even in the consideration of some new controversy.

Ultimately, the first responsibility to address the capital punishment issue falls with the legislation. Unfortunately, in some instances certain bodies could fail to address this controversy as they should have—Justice Powell wrote that some bodies failed to address it with “frankness or effectiveness,” and other disappointments included, depending on opinion, the failure to “abolish the penalty entirely or selectively, or to establish standards for its enforcement.”⁹

⁷ *Furman v. Georgia*, 408 U.S. 238 (1971).

⁸ *Ibid.*

⁹ *Ibid.*

Despite this, he admonished that impatience with this legislative process could not serve as justification for the overreach of the courts. Instead, the opinion advocates for the courts to recognize their role in addressing specific incidents of the controversy in a “case-by-case approach” that “may seem painfully slow and inadequate to those who wish the Court to assume an activist legislative role in reforming criminal punishments.”¹⁰ The power of the Court to determine the Constitutionality of very specific questions comes at the price of abstaining from a legislative role in any fashion. The Court’s deference to the legislative position in this matter further highlights the primary responsibility of the legislature. In *Pratt v Morgan*, one of the early delays in their appeals process was attributed to the 1979 Senate Resolution addressed towards determining the “desirability of retaining the death sentence in Jamaica.”¹¹ The legislative body in this situation had the opportunity to, quite literally, assert its position as the first step in addressing the human rights controversy of capital punishment by instituting a moratorium on all executions, and theoretically all judicial review of them, for an eighteen month period. Furthermore, the nature of these two examples in Jamaica demonstrates that the courts were tasked with addressing specific questions, such as the appropriate length of time between conviction and execution without violating the prisoner’s rights, while the legislature addressed the broad question concerning the “desirability of retaining the death sentence.”¹²

It is evident that due to the nature of legislative and judicial bodies, and their relationship, the representative body will be better positioned to address the human rights controversies facing a population, while the judiciary provides a constitutional check on the methods adopted by the

¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1971).

¹¹ *Earl Pratt & Ivan Morgan v. The Attorney General for Jamaica & The Superintendent of Prisons*, Privy Council Appeal No. 10 of 1993.

¹² *Ibid.*

legislature to address these issues. I first addressed the structure of the legislature. It is established as a representative body that interprets the will of the people to make law, and is best positioned to introduce legislation that serving the electorate. Furthermore, the legislature inherently depends on the body of law it produces, rather than on the specific individuals who steer specific legislation. This is in contrast to the judicial system, where a single judge or court can hold great influence over the development of the common law regarding some controversy. I then considered the scope of the legislature. The many different manifestations of legislative bodies in the United States, Jamaica, and South Africa allow for public opinion to be appropriately weighed when determining the possibilities offered by a new piece of legislation. Although the laws are naturally tailored to the electorate, by virtue of their choice of representatives, they are still able to address a broad range of issues associated with controversies like the death penalty. With this understanding, it is evident that the legislature has the opportunity to address all facets of a controversy—for example, the death penalty when applied as punishment to many different types of crime, while the judicial branch is restricted to ruling only on the facets that happen to come through the =court. Finally, I examined the relationship between the two branches of government and how the specific roles of each determine their suitability to address controversies such as capital punishment. The legislature is the ‘line of first defense’ in determining how the government may best strive to protect the rights of citizens, and how the use of policies such as the death penalty may or may not infringe on those rights. The judiciary then follows by determining the constitutionality of measures brought about in the legislature, which could threaten human rights through the continued use of the death penalty. The roles and responsibilities of both the judiciary and legislature lend the bodies

to addressing human rights controversies such as capital punishment, however the nuanced balance between the powers of the two places the legislative body in a position to more directly address such controversies right off the bat, while the judiciary comes into play with the specific questions that arise in addressing those controversies in a constitutional manner.

Works Cited

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