COURTING CONTROVERSY

First the Mabo ruling, then the political advertising case: the High Court is clearly turning 'political'. A common Left response is to defend parliamentary sovereignty. But Angus Corbett disagrees. He argues that the supremacy of parliament is already a thing of the past.

The recent decision of the High Court that the federal government's legislation on political advertising was unconstitutional raises a number of important issues about the nature of Australian democracy and society. It comes at a time of great change in Australian politics, society and law. Discussion of the Court's decision has, for the most part, been addressed to defining the proper role for the High Court in the Australian political system. Much of the discussion has questioned the legitimacy of the High Court's authority to limit the power and authority of Parliament.

While the political advertising case does raise these issues this is not the chief reason why it is such an important contribution to the ongoing debate about the direction and future of Australian democracy. It is an important contribution because, by questioning the role of parliament in the Australian political system, it brings to the fore one of the great, sleeping issues of Australian politics—notably the problem of defining an acceptable and effective role for parliament in the Australian political system.

In the political advertising case the High Court found that parliament's recent amendment to the Broadcasting Act, which had the effect of banning political advertising during election campaigns, was unconstitutional. The basis of the decision was, in general terms, (each of the judges expressed themselves slightly differently) that the Constitution embodied an implied freedom of communication in political affairs. According to the Court, the amendment to the Broadcasting Act which introduced the advertising ban was unconstitutional because, whatever the intentions of parliament in enacting the law, it limited this implied freedom in an unreasonable and unjustifiable way.

The responses which immediately followed the High Court's decision were rather muted and somewhat confused. This perhaps reflects the inchoate and rather uncertain perception that the decision marks an important turning point in the direction of Australian society and government. Critical responses to the Court's decision have followed two paths. One has been to focus on the judicial method adopted by the judges; the other has been to focus on the changed relationship between the High Court and parliament in the form of a challenge to the principle of parliamentary sovereignty.

The first form of criticism has been concerned with the question of whether the High Court is capable of making decisions about issues of fundamental importance which have substantial economic, social and political impacts. The subject of a recent Debating Final at the University of NSW captures this form of criticism—"That the High Court should adjudicate and not legislate". Yet, while discussion
about the institutional capacity of the High Court will continue, the primary focus will remain on the second path of criticism—the challenge to the notion of parliamentary sovereignty.

Parliamentary sovereignty is a legal term which describes the ultimate authority of parliament to pass any law and the duty of courts to recognise and enforce those laws where appropriate. As a central element in what is described as responsible government it is also a practice and an idea which has been central to Australian politics and society. On the one hand, the primacy of parliament in Australian politics has been supported by a strong belief in the legitimacy of majorities. It has been a central tenet of Australian politics that a majority should be able to decide upon the direction of government. This belief in the legitimacy of majorities has been political with relatively little concern about the capacity of majorities to oppress minorities. This is one respect in which the political and legal traditions in Australia and the United States differ markedly; the American Constitution is founded on a basic distrust of majorities.

The legitimacy granted majorities in Australian political culture has been matched by a high level of distrust of courts, especially on the Left. At the time of Federation there was a high level of concern about the interference of the US Supreme Court in labour relations and its generally conservatively-minded restrictions on the capacity of state legislatures to introduce progressive social legislation. Since World War Two one of the enduring fixations of the Labor Party has concerned the conservative impact of decisions of the High Court. The primary source of this concern was the decision of the High Court in 1948 declaring that the Chifley government’s bank nationalisation legislation was unconstitutional. Indeed, one of Gough Whitlam’s achievements as opposition leader was to convince Labor that the party could work within the framework established by the Constitution even though it was an essentially conservative and antiquarian document.

The decision of the High Court in the political advertising case is a fundamental challenge to the notion of parliamentary sovereignty and to the practice of responsible government. Both the method and approach which the court adopted in deciding upon the constitutional validity of the political advertising law implied a reconsideration of the significance of the practice of parliamentary sovereignty.

The High Court’s traditional approach to determining the constitutionality of Commonwealth laws required that it decide whether the particular law fell within one of the heads of power set out in Section 51 of the Constitution. This section lists the subjects upon which the Commonwealth Parliament may legislate, and defines the division of legislative power between the Commonwealth and the states. If the relevant law fell within one of the heads of power included in Section 51, the High Court has not (except in some limited circumstances) traditionally placed any further restrictions upon the power of parliament to pass that law. In this way the court has been able to divide legislative responsibilities between the states and the Commonwealth and, at the same time, preserve the central notion of parliamentary sovereignty.

In the political advertising case the Commonwealth followed this model of argument in support of the law. The argument was in two parts. The first was to point out that the Constitution included a requirement that the system of government would be one of ‘representative government’. The second was to assert that the decision as to what kind of ‘representative government’ operated in Australia is one left to parliament. The only role for the High Court is to define the limits of the very broad spectrum which, so the argument ran, falls within the general description of ‘representative government’. In this way the actual form of ‘representative government’ adopted in Australia would be left to the ‘democratic process’—in other words, left to parliament to determine.

However, the approach taken by the High Court diverged markedly from this model. Having found that the Constitution contained an implied freedom of communication in relation to political affairs, the Court claimed the right to decide on whether this implied freedom had been unreasonably restricted by the legislation introducing the advertising ban. Chief Justice Mason argued that, in reaching a decision about whether the legislation was a reasonable restriction on the implied freedom of communication, the Court would “give weight to legislative decisions”—but that “in the ultimate analysis it is for the Court to determine whether the constitutional guarantee has been infringed”. In this manner the Court substantially qualified the notion of parliamentary sovereignty in two ways—both by defining the implied guarantee of freedom of communication and by claiming the right to decide whether the parliament had infringed that freedom by introducing the political advertising ban.

In other words, the High Court has used the political advertising case to qualify substantially the operation of parliamentary sovereignty. The importance of this decision cannot, though, be reduced to a discussion about either the relative capacity of the Court or of parliament. Nor can the full significance of the decision be resolved by reference to an abstract discussion about the legitimacy of Parliament as the elected arm of government as against the “unelected judges”.

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The wider legal and political context within which the High Court reached its decision renders abstract debates about the legitimacy or otherwise of parliamentary sovereignty as one only of historical interest.

Parliamentary sovereignty, and its practice in the form of responsible government, represents ideas and practices which were first developed in the 19th century. Specifically, the principle of parliamentary sovereignty and the notion of responsible government are based on a particularly simplistic model of the relationship between individual citizens and the state. Both are based on the assumption that parliament will be the primary institution which mediates between the popularly expressed views of the citizenry and the power of the state. In this analysis the principle of parliamentary sovereignty provided the essential flexibility necessary for parliament to mediate between the citizenry and the state.

Yet changes in the structure of Australian government and society have made the relationship between citizens and the state far more complex than this model allows. The range and sophistication of economic and social activities carried on in the Australian polity, and the accompanying growth in systems of regulation to support these activities, have created a far more complex relationship between civil society and the state. The boundary between citizens and the state is now more indistinct and the role of mediating between citizens and the state is largely left to complex and inter-related systems of regulation.

In the last two decades the form of regulation used to mediate between citizens and the state has changed. During this time there has been a general move toward the creation of systems of regulation formed around independent regulatory agencies. These systems of regulation are based on the assumption that specific areas of activity—such as broadcasting or the operations of companies and of securities markets—are so complex that they need dedicated agencies to administer the framework within which the activities are carried on. Independent agencies like the Australian Broadcasting Tribunal (now replaced by the Australian Broadcasting Authority) and the Australian Securities Commission have a wide degree of discretion in administering and enforcing the law. They are independent in the sense that their controlling members are subject to limited direct political direction from their relevant ministers.

The role of parliaments in the creation of these independent regulatory agencies has been chiefly to establish the general principles and policies which form part of the framework within which the activities are carried on. The administration of these principles and policies has then

"The High Court's decision is a fundamental challenge to parliamentary sovereignty"

been delegated to the independent agencies. Parliaments and governments have established the independent agencies both because it insulates specific areas of activity from immediate political control and because it insulates governments from the day-to-day conflicts which the administration of these activities generates. A primary consequence of the use of independent regulatory agencies is that the relationship between 'citizens' and the 'state' is substantially modified. The bodies mediating between the citizen and the state are bodies created by parliament—but they are, to a substantial degree, independent of it.

In this context the decision of the High Court in the political advertising case takes on particular significance. The Court's claim to have found an implied freedom of communication in the Constitution and to be possessed of the power to decide upon when that freedom had been unjustifiably transgressed, was made within the context of a scheme of regulation administered by an independent agency—the Australian Broadcasting Tribunal. One of the factors the Court considered when it ruled upon the validity of the law banning political advertising was that this particular law, aimed at particular goals, was introduced into an existing set of laws which generally regulated the rights of companies and individuals to use the electronic media. It was the particular and partial nature of this piece of legislation which the Court found to be suspect.

In this sense the Court has a problem of coming to terms with particular instances in which the traditional definition of the function and role of parliament no longer adequately describes the actual function of parliament. The limitation which the Court imposed on the power of parliament in this case is not just therefore a challenge to the centrality of the principle of parliamentary sovereignty. The limitation on the power of parliament, and the identification of implied rights in the Constitution in the political advertising case, are the beginning of a long process of reassessing the role of parliament in the structure of Australian government.

The great importance of the political advertising case is that by challenging the principle of parliamentary sovereignty it may help to bring into focus an issue of primary importance for the future of Australian democracy: the appropriate role for parliament. The current criticism of the political advertising case as a threat to democracy because of the limitations which it imposes on popularly elected parliaments serves only to obfuscate the discussion of the important changes which have taken place in Australian society.

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