THE JUDICIARY AND RELIGION IN SOCIETY

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INTRODUCTION

Let me begin with a question. Who began a book on his distinguished life as a Judge in the following way?

> I am quite sure that the centre of all my life, the thing which gives coherence to it, and purpose to the whole, is my belief in God.

And concluded it in the following manner:

> You ask, I say, how a just God can permit cancer, and motor accidents, and wars, and Belsen, and oppression. I reply that he does so because he wished to create a race of spiritual beings with free will, doing good for its own sake of their own free choice and because it is logically impossible to do this without evil co-existing with good, it is so ordered and decreed both that the just shall suffer and that they shall be rewarded, both that evil should exist and that it should be defeated in the end. As a guarantee and earnest of the good that there shall be we have been given a curious and unique insight into the nature of the Godhead itself. For it has been disclosed to us both that God loves, and that he suffers with, his creatures. The figure on the Cross is one reminder in time of suffering that we are not alone and that, though there is evil and hatred and bitterness in the world, the principle of reason and goodness, which lies at the root of reality, the logos of God, is neither indifferent to it nor will permit it to triumph in the end.

The answer is Quintin Hogg, better known as Lord Hailsham, Lord Chancellor of England, and as such the head of the judiciary in that jurisdiction. The two quotations are from his 1975 book, *The Door Wherein I Went*.

I have chosen these extracts because plainly this is a man of very strong convictions, and some would say, convictions which could not possibly be satisfactorily, let alone entirely, separated from his significant public life.

How are we to contemplate the prospect that some Judges will have distinct religious views? After all, Judges are supposed to do nothing that they cannot justify in legal principle, and to appeal only to principles they undertake to respect in other contexts. Can they - should they - let their personal religious convictions intrude?

In what follows, I raise two different viewpoints for consideration. I should make it plain that in doing so, I am speaking mainly of the work of appellate courts with the distinct ability to influence the development of legal policy and principles.

PERSONAL CONVICTIONS ARE APPROPRIATE IN JUDGING

We could probably all agree with Justice Rehnquist that, as he put it in *Tatum v Lead*, "proof that a Justice's mind at the time he joined the court was a complete tabula rasa … would be evidence of lack of qualification, not lack of bias" (409 US 842 at 835 (1972)). And in 1921 Benjamin Cardozo expressed the view that "we do not help the cause of truth by pretending that Judges stand aloof on the chill and distant heights of pure reason" (*The Nature of the Judicial Process* (1921) at 168). And the point, with respect, was put very well by Chief Justice Barak of Israel in discussing the role of objectivity in judging: it is "not to 'liberate' the judge from his past, his education, his experience, his faith, and his values … on the contrary its purpose is to stimulate him to make use of all of these in order to reflect as purely as possible the fundamental values of the nation" ("The Role of a Supreme Court in a Democracy" (2002) 53 Hastings Law Journal 1205 at 1211).

As a matter of context, we must also recall the kinds of things that Judges are asked to do today, at least in senior courts. Particularly after the Second World War, for a number of reasons constitutional and international judges have increasingly had to confront and pronounce upon moral issues for the purpose of interpreting basic principles of justice and democracy. It has always been the case that the strictly positivistic sources of law had indistinct boundaries, and left gaps which had to be

sharpened or filled in with interpretation, and historically it was always the case that Judges had to decide which way of continuing the story that the legislature or other Judges might have begun was appropriate.

But what happened after World War II is that more and more and more democracies - including my own jurisdiction in New Zealand - have given Judges new and relatively unprecedented powers to review the acts of a wide range of officials and administrative agencies under broad doctrines of concepts like reasonableness, natural justice and proportionality, and to determine whether legislatures have violated the rights of individual citizens as laid down in international treaties, domestic constitutions, and Bills of Rights.

I have to say that as a Judge, particularly as I have advanced through the judicial system, this new role is different from the traditional one in a variety of ways. The need for Judges to confront moral issues is more pervasive in some kinds of "regulatory" litigation, and much more pervasive in constitutional and international adjudication than it is in ordinary statutory interpretation or the development of the common law. Rather obviously, the every-day laws relating to property, contract, crime and the like are structured by technical rules whose operation must be predictable with reasonable confidence by those affected by them. Secondly, the moral issues that Judges deciding constitutional questions have to address are amongst the most controversial and divisive in the community. This has made senior Judges into public figures ("Judges as Popes" as it was once tartly remarked).

It is said by some that the role now played by Judges - somehow wielding power in service of conscience - was once in fact played by priests, and then later by politicians, to be superseded in turn by what Ronald Dworkin has called "government by adjudication".

For those jurists who support such a role for Judges this is not seen to be a "bad thing". Though Judges necessarily rely on their own personal moral - and hence religious convictions - they have to accept an institutional responsibility for integrity with what other Judges have done and will do. This means that whatever body of principle is constructed is less tied to any particular cultural tradition, and that the

outcome is rather more a "political" one than an individualist, ethical one. The defence, it seems, in the end of this thesis is an intriguing mixture of what might be termed realist jurisprudence, and the "fittingness of the choice" made by the Judges.

THE ARGUMENT THE OTHER WAY

Perhaps the most accessible and powerfully argued case for what amounts to "judicial retreat" and "minimalism" in face of these challenges has come recently from Cass Sunstein in his 1999 book, *One Case at a Time - Judicial Minimalism on the Supreme Court*.

In this work, Sunstein mounts a defence of perhaps the most striking characteristic of the current United States Supreme Court - its inclination to decide one case - and one case only - and narrowly at that - at a time.

The argument as I understand it, is that at one level - although Sunstein does not make this point very well - Judges can and should in a sense "park" their own views. As to the instant case, they should say no more than is necessary to justify an outcome. Sunstein calls this "decisional minimalism". He sees this approach as being particularly appropriate in highly contentious areas such as abortion, affirmative action, the right to die, free speech, homosexuality, and sex discrimination.

Sunstein argues this is likely to reduce the burdens of judicial decision-making (every appellate Judge is familiar with the problems of arriving at an articulated viewpoint on a multi-member court!). Secondly, it is said that, in consequence, judicial errors will be less frequent and (above all) less damaging to society at large. Options will not be foreclosed and the risks of intervening in rather complex systems are reduced - after all, even a single shot intervention can have a range of unanticipated consequences.

In particular, Sunstein argues for the relationship between judicial minimalism and democratic deliberation. Minimalist rulings are said to "increase the space" for further reflection and debate at local, intermediate and national levels because they are less likely to foreclose subsequent decisions. And this is said to be consistent with

time-honoured approaches to constitutional litigation - that courts should not decide issues unnecessary to the resolution of a case, not hear cases that are not ripe for decision, avoid if possible deciding constitutional questions, respect their own precedents, not issue advisory opinions, and so on. There is great - even overwhelming - value, it is said in these "passive virtues".

A COMMENT

In a way, I have set up a straw-man. I have given you a Dworkinesque claim, that a Judge's personal convictions should very much count; as against Sunstein's claim that judicial minimalism, and a strict kind of legalism, is entirely appropriate in hard cases.

My deepest personal concern is at another level, and it really goes back to the central problem of what the doctrine of separation and state really intends. Is the doctrine intended to protect churches and religious groups from governmental interference, or to protect politics from religious pressure groups? Of course church and state have always rubbed up against each other. They always will. What worries me is that Judges may have gone too far in transforming the relevant constitutional provisions relating to religious freedom from a guardian of religious liberty into a "guarantor of public secularism", as Stephen Carter of Yale once put it. There is then a very real danger that the polity at large will blindly accept that religious convictions have no real or relevant bearing on civic responsibility and trust. And once that happens, it will be accepted that whatever the prevailing cultural mores are, have a higher claim on the polity and legislatures than do privately held convictions of conscience (however they are arrived at). Lose a voice for conscience out of the law, and we lose a timeless perspective that is outside our institutions and our national codes of law - and we lose a vital and inexhaustible source of the energy we need for human renewal and the human spirit.