CONJUNCTIONS AND DISJUNCTIONS

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It is inevitable, as Professor Smith states, that new and challenging issues require legislators and judges to look beyond settled legal principles to become, as he says, ‘architects of the new Age of Biotechnology’. However, the process of looking to religious values in making decisions on how we should behave and how we should resolve disputes may take different forms. These are implicit in Professor Smith’s paper but not distinguished in their significance to his fundamental question: Is religion conjunctive or disjunctive in our understanding of law and medicine? In my view, the answer depends on how religion and its values are ‘used’ by the proponents of religious arguments when participating in debates and decision making.

There are many ways in which religion is disjunctive in policy discussions – polarising issues, attempting to impose its views as the only ones that are defensible, stifling the arguments and sentiments of other people. In part, this flows from what Professor Smith calls the

two legal elements [within every religion] – one which relates to the social processes of the particular community sharing a faith and the other ‘to the social processes of the larger community of which the religious community is a part’.

If this means that religious adherents should not only observe the canons of their faith themselves (within the ‘particular community’), but also proselytise and impose their views on others (working on the ‘social processes of the larger community’), then one can see at once the potential dangers in a culturally diverse liberal democracy. There is no reason why members of a church should not encourage others to join their faith but who are those people to dictate to others who are not members of their church their view of what is ‘right’ and ‘wrong’?

At most, the authority of church leaders is an authority to speak on behalf of their members and even that has been questioned. Professor Tony Coady, a philosopher...
based at the University of Melbourne, said in relation to his fellow Roman Catholics:

What evidence there is suggests Australian Catholics are nowadays no different from other citizens in their attitudes to [reproductive technology], and the same is likely to be true about controversial issues, such as lesbian access to it.\(^3\)

However, even if church leaders are entitled to speak on public issues, Professor Coady says, they should not move from statements of religious principles that are part of their shared faith to ‘detailed injunctions about political, scientific, professional or other social issues … that are legitimately open to debate and decision amongst the laity and indeed people of good will of various persuasions’.\(^4\)

On this view, the Catholic, Anglican and Uniting churches are acting outside their legitimate role in speaking publicly against the federal government’s recent policies on industrial relations and anti-terror legislation. Those issues should be left to politics and not the church.

Traditionally, the Roman Catholic Church has been the most active of the churches in promoting its doctrine in civil society. Professor Smith gives a number of examples in the United States where religious groups have used the law in their attempts to prevent the teaching in schools of Darwinian evolution, such as the ‘Scopes monkey trial’ in 1928.

In other countries, religious bodies, especially the Roman Catholic Church, have also used the courts to promote their doctrine. One method is by seeking intervener status in litigation between private individuals or bodies. This occurred in an appeal to the High Court of Australia in the New South Wales abortion case, *CES v Superclinics*\(^5\) in which the Roman Catholic Church was granted *amicus curiae* status. The case arose from a woman’s claim for damages against a medical clinic because its employee doctors failed to diagnose that she was pregnant until after a number of consultations and two pregnancy tests. She said that the delayed diagnosis of pregnancy deprived her of the opportunity to have the pregnancy terminated. One issue was whether such a termination, if it had occurred, would have been lawful. This was an opportunity for the Roman Catholic Church to influence the development of the common law, both by influencing the outcome in the particular case and also by creating a precedent for subsequent case law.

The church gained the standing, or legal status, to intervene in the litigation, together with the Australian Catholic Health Care Association, by virtue of the church’s role in providing services to pregnant women. The church said it had special knowledge and experience that ordinary members of the community would


\(^4\) Ibid.

\(^5\) *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47.
not have. Given this aspect of the case, it is not surprising that the arguments presented by the church were not doctrinal. There were no quotations from the Bible or other church teachings. Rather, the arguments were pragmatic – based on such matters as the effect on health-care facilities if they were required to provide pregnancy counselling and advice. The appeal did not proceed, so the arguments were not fully developed. However, one might assume that a primary aim of the intervention was an attempt by the church to limit the circumstances in which women may obtain lawful abortions.

Perhaps more problematic was the Roman Catholic Church’s intervention in the case of *McBain v State of Victoria*, which concerned the right of single women to gain access to assisted reproductive technology (ART) programs in Victoria. The case was brought by Dr McBain, who was treating a single woman who wanted to gain access to screened semen in order to have a child. The *Infertility Treatment Act 1995* (Vic) limited ART to married or stable de facto heterosexual couples. Dr McBain argued that this prohibition was inoperative because it was inconsistent with the federal *Sex Discrimination Act 1984*. The Roman Catholic Church applied for, and was granted, *amicus curiae* status in the Federal Court and in fact presented all of the arguments in response to Dr McBain. Justice Sundberg devoted a large part of his judgment to ‘Submissions of the Roman Catholic Church’ (he rejected all of the Church's arguments). Later, the Church applied to the High Court for an order to review Justice Sundberg's decision; and leave was granted for the case to be heard by the Full Court of the High Court of Australia but the appeal did not proceed.

I have argued, with Associate Professor Mal Parker, that such intervention by church groups is open to criticism. Civil litigation essentially involves a dispute between private parties who have (though their counsel) defined the issues and decided what arguments to make to the court. Why should they be required to address new issues, or bear additional costs, because of third party intervention? While churches may properly intervene if they are service providers and directly affected by the outcome of the legislation, they should not be permitted to do so for political purposes. Arguments advanced by a religious body are unduly powerful because they seem to rest on God-given morality, even if that is not specifically stated. As noted above, churches are not ‘representative’ in a ‘democratic’ sense, as the laity is not consulted in their formulation and there are often diverse views in the laity. Also, allowing churches to intervene confers advantages on those who are financially well resourced (the

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7. *Re The Honourable Justice Sundberg; Ex parte Australian Catholic Bishops Conference and Anor* (C21/2000).
Roman Catholic Church) over those who are not (members of minority groups – individual litigants).9 Finally, the religious bodies who act in this way are acting disjunctively, seeking to impose their view of what is morally right on other people who may not share the faith on which the view is based.

A more acceptable means of religious intervention in ethical and legal discussion about medical procedures is one in which religious beliefs and ideas are offered in the debate, to guide decision making,10 rather than to dictate the outcome. Professor Smith calls this an ‘interrogative’ role,11 requiring an acknowledgement of ‘fallibilism’:

In other words both parties need to accept the proposition that they may not only be incorrect in their understandings of each other, but ‘in their inferences about implications of their positions, in their development of their own arguments and even in some basic claims they have never questioned’.12

This provides scope for what Professor Smith calls a ‘Creative Partnership’.

In the law, an example is the intervention by the Roman Catholic Church in the English case called Re A (Children), or the ‘conjoined twins case’.13 The principal issue in the case was whether it would be lawful to kill one of two conjoined twins in order to save the other one. If that was not done, both twins would die. The Court of Appeal ‘[e]xceptionally allowed the Archbishop of Westminster and the Pro-Life Alliance [a political party] to make written submissions to [the court]’, and said that the court was ‘grateful for them’.14 The Archbishop’s submission made ‘five salient points, based on Roman Catholic faith and morality’:

- human life is sacred and inviolable;
- a person’s bodily integrity should not be invaded when that can confer no benefit;
- the duty to preserve one person’s life cannot without grave injustice be effected by a lethal assault on another;
- there is no duty on doctors to resort to extraordinary means in order to preserve life;

9 Nevertheless, Professor Parker and I ultimately concluded that there is no principled basis on which church participation could be excluded from court participation. One reason is the difficulty in distinguishing for legal purposes between ‘doctrinal’ and religious views, in the traditional sense, and the views of people with other ‘doctrinal’ perspectives, such as wilderness societies, public interest safety groups, consumer advocates and the like.
10 Smith, above n 1, see text to n 123, citing K Greenwalt, Private Consciences and Public Reason (1995) 142.
12 Ibid.
14 Ibid 155 (Ward LJ).
… the rights of parents should be overridden only where they are clearly ‘contrary to what is strictly owing to their children.\(^{15}\)

The submission of the Pro-Life Alliance in the conjoined twins case was more specific than the Archbishop’s concerning the moral issues in separating conjoined twins where that will cause one to die. For example, Pro-Life argued that ‘the negative obligation to refrain from the intentional deprivation of life in effect trumps the positive obligation to take steps to protect the enjoyment of the right to life’.\(^{16}\)

Although the judges clearly considered the Archbishop’s submissions carefully and discussed them in the judgments, they were not accepted. Walker LJ said, ‘The five salient points made by the Archbishop are entitled to profound respect’ but ‘ultimately the court has to decide this appeal by reference to legal principle, so far as it can be discerned and not by reference to religious teaching or individual conscience’.\(^{17}\)

What was different in this case from the Australian cases on abortion and access to ART was that here, the arguments were specifically stated to be from a religious perspective, ‘based on Roman Catholic faith and morality’. The religious arguments were not disguised as secular ones. They were placed and judicially considered alongside a range of other arguments from other perspectives. The Church was not attempting to override all other arguments on the basis that its view was the only ‘right’ one. It was acting conjunctively and not disjunctively.

The Roman Catholic Church has recently stated what appears to be a similar position to that of Professor Coady concerning the role of the Church and the State. Pope Benedict XVI said in his most recent Encyclical Letter:\(^{18}\)

> Catholic social doctrine has its place: it has no intention of giving the Church power over the State. Even less is it an attempt to impose on those who do not share the faith ways of thinking and modes of conduct proper to faith … A just society must be the achievement of politics, not of the Church.\(^{19}\)

Dr Paul Collins, a historian and former priest, reportedly praised this Encyclical Letter as a return to mainstream Catholic thinking: ‘the material about not replacing the state and not directly participating in politics is particularly good and is also in a way a veiled attack on movements such as the Right to Life, which impose what

\(^{15}\) Ibid 257 (Walker LJ).

\(^{16}\) Ibid 204 (Ward LJ).

\(^{17}\) Ibid 257 (Walker LJ).


\(^{19}\) Ibid 28 (emphasis added).
they see as a Catholic theology on the state’. If that is true, we may see a decline in court interventions and political lobbying by the Church and its members.

On the other hand, whether the Encyclical Letter in fact signifies a new approach on the part of the Roman Catholic Church may depend on how the Pope’s words are interpreted by members of the church. In practice, little may change. The Pope states the church ‘has no intention of giving the Church power over the State’, but says that the Church should ‘help purify reason’; help free reason ‘of the danger of a certain ethical blindness caused by the dazzling effect of power and special interests’; and ‘help form consciences in political life’. How will the faithful interpret these injunctions? Will Roman Catholic members of Parliament continue not only to vote according to their own faith but also to impose it on others in order to enlighten their ‘ethical blindness’, and form their consciences? Will church members still feel they are on a ‘mission from God’ to convert others to their views?

The recent debate on the Australian ban of the abortion drug RU486 was a test of the Roman Catholic Church’s new approach to direct political lobbying. Opponents of the drug encouraged worshippers to write to members of parliament opposing any loosening of control over the drug. More than 200 Catholic doctors apparently threatened to resign from the Australian Medical Association and the Royal Australian College of General Practitioners over RU-486. The legislation to transfer control over RU468 from the Health Minister to the Therapeutic Goods Administration was passed by the Senate after a lively debate on 9 February 2006. Some members put fervent arguments clearly based on their own religious beliefs. However, there is a fine line between giving a view and the reason for it, as Senator Lyn Allison did with her experience of having an abortion, and Senator Nick Minchin did when telling of his child being aborted by a former girlfriend. It is quite different to argue that one’s view is right and must be accepted by others because the Roman Catholic Church states that it is right!

Finally, I do not accept the assertion with which I suspect Professor Smith agrees, that ‘without religious beliefs, moral teachings merely “hang in the air” without any foundation’. There are other values that may guide our decision making. These

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21 Ibid.
25 Smith, above n 1, citing at n 213, P Singer, Writings on an Ethical Life (2000) xviii.
include the human rights perspective underlying what Professor Smith calls ‘the Kirby Ethic’ (‘an abiding respect for human goodness and dignity together with a tolerance for diversity’\textsuperscript{26} and ‘participatory democracy’\textsuperscript{27}). There is also what I call ‘lived experience’ – the views of gay and lesbian women and their children, scientists undertaking embryonic research, people suffering from diseases that may be cured by embryonic stem cell research. From a personal perspective, I can cite my own experience as a member of the ‘Lockhart Committee’ on embryonic stem cell research in 2005.\textsuperscript{28} I was more persuaded of what the Roman Catholic Church calls ‘the moral status of the embryo’ by hearing women speak of the meaning for them of their embryo than dogmatic statements of church doctrine (human life starts at fertilisation). When women described an embryo created in love with their partners, and formed to make a baby combining their genes, one could see at once why the embryo should not be treated instrumentally in a research project (unless they specifically wanted that to happen) – and why such an embryo may be regarded differently from one created specifically for research by somatic cell nuclear transfer (the ‘Dolly’ technique).

Thus, in conclusion, I believe that Professor Smith’s paper challenges us to examine more closely not so much the meaning of religion and whether it is conjunctive or disjunctive to law and medicine. Rather, how is religion used in particular contexts? It may be used disjunctively to stampede its opponents without reflection or doubt. That seems to me to have occurred in Terri Schiavo’s case,\textsuperscript{29} where religious intervenors would not accept the views of the courts despite the matter being considered on numerous occasions by judges. If, on the other hand, religious views are expressed alongside others in a genuine attempt to find a way forward through a shared acknowledgment of difficulty and uncertainty, a conjunctive approach, then religion may be a helpful source of reference and wisdom in the development of law and medicine.

\textsuperscript{26} Smith, above n 1, citing at n 12, Hon M Kirby, \textit{Through the World’s Eye} (2000) 6, 13 and 40.
\textsuperscript{27} Smith, above n 1, citing at n 15, Hon M Kirby, ‘Teaching Australian Civics’ (1997) 13 \textit{Queensland U Tech LJ} 149.
\textsuperscript{29} J Robertson, ‘\textit{Schiavo} and Its (In)significance’ (Research Paper Series No 72, Public Law and Legal Theory. University of Texas, March 2005).