

Commentary on Skene and Parker: the role of a church (or other ideologically based interest group) in developing the law—a plea for ethereal intervention

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This paper discusses the provocative views of Skene and Parker as to the role of religious or other ideologically based interest groups in law and policy making. We draw distinctions between doctrine and prejudice and between argument and ideology which we trust take the debate further. Finally we recommend an ethereal, democratic, and populist partial solution.

The question that the paper by Skene and Parker raise is: under what circumstances should a church or other ideologically based interest group be allowed to influence that part of the development of law that takes place in courts? This question has become increasingly important, partly because such interest groups are increasingly trying to gain influence, partly because courts are increasingly active in developing law in controversial areas, such as the areas of interest to bioethics.

Before answering or trying to answer Skene and Parker's question some preliminary points are perhaps important. Skene and Parker suggest that "the church is as much justified in arguing that abortion should continue to be a criminal offence as abortion providers' associations are in arguing the opposite view". This is both improbable and false. It is rare that two incompatible positions are equally well justified by evidence and argument. What Skene and Parker may mean is that these two parties are equally entitled to make their case; but that is a rather different claim and the difference can be important. While we might think that these two partisan interest groups are equally entitled to make their arguments heard on an issue as important and as of such general interest as abortion we are unlikely to think this of all conceivable interest groups or individuals on all conceivable topics. For one thing to hear all who may wish to be heard via *amicus curiae* petitions would simply be too time consuming and expensive. To suggest as Skene and Parker do that "everyone is entitled to argue for their own ideals as much as possible" surely does not include an entitlement to be given space and time in all fora where these issues are debated or decided. There seem to be two ways forward. We might then want to limit any such entitlement to views or positions which reach a certain threshold of plausibility or acceptance. Plausibility and acceptance are of course usually alternatives, religions almost always failing on plausibility and rationalism often on acceptability. This is a position which Skene and Parker consider only to reject for reasons we criticise below. The other possibility is to give all who wish to be heard access and a cheap and effective mechanism for making their views known, although not through the ponderous and expensive *amicus curiae* device; and this second possibility will also be further explored below.

Skene and Parker seek to explode a supposed distinction that might be made between the nature of submissions made by the church on the one hand and secular bodies on the other. Once this distinction is exploded Skene and Parker feel there is no longer "a principled distinction between doctrine and legal argument". They argue:

It may be thought that secular bodies will be likely to present verifiable factual material while the church will limit itself to doctrine, or metaphysics. Perhaps this prejudice is encouraged by our current cultural acceptance of the truth and authority of science. This argument mistakes the message for the messenger. There is no reason to think that the church could not produce hard-won scientific material which it believed was important for the court's deliberations, just as any secular body could do. There is also no reason to suppose that secular bodies may not submit material which is just as doctrinal as the most traditional religious beliefs. Beliefs in God's moral laws and beliefs in the enduring value of wilderness—for example, are both beliefs in a doctrine, which is not based on evidence of a scientific kind. The belief in the enduring value of wilderness for its own sake is not established by a scientific study of wilderness; such studies indeed are carried out against the metaphysical assumption of and respect for that value.

This seems unconvincing. Skene and Parker are worried by the possibility of "bodies insinuating their doctrine under the guise of legal argument in civil proceedings", and confess to finding "it difficult to enunciate a principled distinction between doctrine and legal argument". There are two problems with Skene and Parker's concession here. The first is the rather false dichotomy between doctrine on the one hand and evidence "of a scientific kind" on the other. The crucial distinction is between doctrine or "faith-based principles" on the one hand and the willingness to provide evidence and argument in support of a position on the other. Scientific evidence is one rather narrow form of support that may be given

to a position. Whether or not “secular bodies . . . submit material which is just as doctrinal as the most traditional religious beliefs” is not determined by whether the position is or is not “not based on evidence of a scientific kind”. Rather it depends on whether the position is supported by evidence or argument rather than by simple referral to “doctrine” as Skene and Parker choose to call it. Thus, belief in the importance of preserving areas of wilderness may be supported in various ways which, while not necessarily bolstered by evidence of a scientific kind, are by no means the moral or rational equivalent of “doctrine”. For example, the preservation of wilderness may be supported by arguments which connect wilderness to ecological diversity and argue for the importance of that diversity in furthering other defensible values. Or the value of wilderness may be situated in a conception of the importance of “unspoilt” or “natural” environments and their supposed spiritual or life enhancing or aesthetic properties. We do not seek to establish a defence of wilderness, merely to point out that a rational defence of wilderness does not necessarily depend on evidence of a scientific kind.

Of course the church could produce evidence and argument in support of many of the positions that it also has doctrinal or metaphysical reasons for espousing. Likewise secular groups may have doctrinal or metaphysical reasons for advancing their agenda even where they do so by producing evidence and argument. There may of course indeed be a principled and sustainable distinction between positions supported only by doctrine on the one hand and those for which evidence and argument are produced on the other, which eluded Skene and Parker because of their pre-occupation with science. And while there may not be much in the way of a principled distinction between doctrine and legal argument, the distinction between prejudice, and rational argument supported by evidence where appropriate, may have longer legs.

The scientific measurement (or indeed the rational appreciation) of those legs may or may not be a scientific endeavour, it is, however, not an issue we will press further now. This is because we see merit in maximising citizens’ participation in public decision making even when that participation is not backed by the ability to provide evidence properly so called or rational argument. We merely note that those who believe this is an important distinction cannot only define the relevant differences in terms of a distinction between “doctrine” on the one hand and evidence “of a scientific kind” on the other. And we agree with Skene and Parker that the distinction between doctrinal support for a position and the support of evidence and argument does not mirror the divide between clerical and secular pressure groups.

Rather than further pursuing a possible basis for a principled distinction between the views of clerical and secular pressure groups might there not be another way of “hearing” what interested parties have to say about the judicial process?

An initial reaction could be that the processes of the court should be free from political influence (under the doctrine of separation of powers) and that this would rule out any direct influence from interest groups. But this answer seems unsatisfactory. Separation of powers is a device to keep the judiciary, and legal decisions, independent of the legislature and the executive, it is not a device to keep the judicial system isolated from society.

In legal systems where the higher courts play an important role in developing new law, or in finding laws passed by the legislature unconstitutional or otherwise void it is naïve to believe that many of these judicial decisions are not at the same time political. They may not necessarily be party political, but they are political in the sense that they inevitably promote a certain vision of the good society (if not the good life) above others.

If I as a citizen have a legitimate interest in influencing the legal developments in the polity to which I belong, then that

interest cannot be limited to those legal developments that happen in the legislature or the executive. But should a church be allowed to intervene in a dispute between two private individuals, for instance by submitting an *amicus curiae* brief?

Although in a technical sense civil litigation always involves a dispute between private individual parties, the reality can be very different, for instance if one of these parties is the state. Skene and Parker mention the case of *McBain v State of Victoria* where an assisted reproductive technology (ART) specialist successfully challenged a piece of state legislation on the grounds that it was inconsistent with a federal act. Although we can conceptualise the state of Victoria as a private legal entity, just like any other private legal entity, this conceptualisation leaves out much of the real existence of the state of Victoria as a polity. Any citizen of the state of Victoria has an interest in the outcome of the case just because he or she is a citizen of that state. It is a feature of modern representative democracies that citizens often do not pursue their political interests directly but through different kinds of associations. I may pursue some interests through membership of a political party, others through my labour union and others through my membership of the RSPCA. Just as my elected representative represents me globally in parliament (at least in a technical sense), these organisations also represent some of my interests and are able to speak on my behalf. Some churches and other ideologically based interest groups are of this kind and are therefore legitimate participants in all forms of activities aimed at obtaining political influence.

Only allowing interested parties to influence court proceedings through *amicus curiae* briefs, or other formal documents does, however, create a number of very undesirable side effects. First, it allows us to maintain the false belief that what the court decides is a matter of law, and not a question of social policy. Second, it imposes large costs on those wishing to make such submissions, and therefore restricts access to influence to well-heeled interest groups. And third, it creates costs for other participants in the current case.

It may also be worth considering another form of gaining influence on court cases that Skene and Parker do not mention, but which nevertheless plays an increasing role in many societies. In many high profile cases in the bioethics field the legal costs are not borne by the litigants themselves; the legal bill is underwritten by some interest group. We may of course believe that this does not in any way influence the legal and other arguments that are put forward, but this would surely be naïve. Just as in other areas he who pays the legal piper probably also decides the genre of the legal tune.

Why not be radical and look reality squarely in the eye. Some court proceedings are political acts with profound consequences for the law in certain areas. If it is legitimate for individual citizens, or for interest groups, to attempt to influence the political process in the legislature or the executive, why should it not be legitimate to do the same when law is being made in the courts? Instead of insulating judges from submissions from the outside world, we should perhaps make it as easy as possible for anyone to communicate his or her views to the judge. Deciding which cases have the potential to break new legal ground is not that difficult and it should at least be clear when they reach the first level of appeal. In such cases it would be easy for the appeal court publicly to invite submissions from all and sundry who have an interest in the case. This could be done very simply and cheaply via the internet.

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