

Why judges should not be moral arbiters

Issues of social preferences can be expressed only through electoral process, US judge tells Singapore audience



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After the United States Supreme Court gave same-sex marriages the green light, Singapore Prime Minister Lee Hsien Loong was asked if, in his view, such thorny issues were better decided through politics or in the courts.

In his response to the question, which was posed at a dialogue at the Singapore Management University (SMU) last June, he said of the US ruling that any ban on such unions was unconstitutional: "That is their (the US) system. They will not say that they made a decision on the issue; they will say that they interpreted the Constitution in its true sense and this is what it has always meant.

"Things like abortion, racial discrimination, drugs, all sorts of things go to the Supreme Court."

And that means that the US Congress, made up of those elected by the people, does not have the last word, he highlighted at the SMU's Ho Rih Hwa Leadership in Asia Public Lecture.

That same issue was at the heart of a lecture that Justice Antonin Scalia delivered here late last month.

Justice Scalia, 79, the longest-serving judge with the US Supreme Court, took office in 1986 when Mr Ronald Reagan was president. He voiced his objection to recent developments in the US which were in his view making "moral experts" out of judges and giving rise to judicial hegemony even when "it is abidingly clear that judges have no better ability than the rest of us in deciding what's moral".

Speaking to a packed audience at the National University of Singapore during a public lecture titled "Judges as Moral Arbiters" under the Lee Kuan Yew Distinguished Visitors Programme, Justice Scalia said he believed instead that the "most important issues have no right or wrong answers".

"They involve social preferences,

which in democracies can be expressed only through the electoral process."

More than 50 years ago, he explained, there was belief in looking to experts to provide direction, but in the US and the West, these have been replaced by the "judge moralist" in issues like abortion, the death penalty, denial of equal protection for marriage between people of the same sex and euthanasia.

But Justice Scalia said there is no reason that decisions over such issues should be taken away from the people and given to judges to determine in black-and-white terms. "We have become addicted to abstract morality," he went on. "And abstract morality is dangerous when it is given force of law."

He cited the European Convention on Human Rights which had ruled on people's right to respect of their private life.

"But what does respect for private life mean? The European Court of Human Rights has had to decide that. Should the right to orgies be part of the right to respect for one's private life? The answer is that the question shouldn't be answered by seven unelected judges. But my court does that all the time!"

(The orgies case refers to a 2000 case involving a British homosexual whose home was raided by police. They found videotapes showing the accused and up to four other men engaged in sex. He was convicted of gross indecency, but on appeal the European Court ruled that the conviction violated his right to respect his private life and ordered the British government to pay him £34,000 in compensation.)

Justice Scalia referred to how far judges have taken the "due process" clause in the American Constitution. Its Fifth Amendment, for instance, states that no one can be deprived of "life, liberty, or property, without due process of law...".

Until relatively recently, the meaning of such laws was "static" and could be changed only by amending the US Constitution.

But in present times, Justice Scalia said that "my court" changed that; it invented the notion of a "living Constitution" where the meaning of the Constitution can change over time, along with evolving standards of decency.

"So judges decide when there has been evolution and when evolution equals progress," he added.

The Supreme Court "has used the due process clause to hold that



it is not permissible for military colleges to be men-only, even though it has been constitutional at West Point for centuries", he said.

"It has used the due process clause to include the right to assisted suicide."

He went on to say: "So judges decide when there has been evolution and when evolution equals progress. We are the envy of Western judicial powers and even the constitutional courts in Europe have followed us.

"But I am questioning the propriety and sanity of a decision like that (on orgies) being made by unelected judges.

"Nothing in their experience, whether in law school or in practice, enables judges to decide on the right to assisted suicide. Why would they have special abilities to come up with the correct answers?"

Just as scientific experts are not qualified to give answers in policy issues, judges are not qualified to give judgments in cases just because they involve human rights.

ROLE OF POLITICS IN U.S. SYSTEM

Justice Scalia said the issue is compounded by the fact that (Supreme Court) judges are nominated by the US president and confirmed by the Senate - which means that "politics cannot be taken out of the judicial system".

"Every liberal president has promised to appoint judges that uphold the abortion rights case," he pointed out, and this essentially is judicial activism - which is when judges colour their decisions based on their liberal or conservative backgrounds.

Expressing unhappiness about



JUDICIAL HEGEMONY

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JUSTICE ANTONIN SCALIA, the US Supreme Court's longest-serving judge, on developments in the US making "moral experts" out of judges.

the intrusion of politics into judicial selection, he added: "I am not sure whether (judicial) hegemony has reached Asia, but be on guard.

"The temptation of judicial arrogance exists."

Justice Scalia's remarks can perhaps be understood when seen in a social context in the US. The historical record there suggests the difficulty in getting constitutional amendments through Congress, hence the preferred recourse to the US courts.

But as PM Lee pointed out at the SMU dialogue last June, the US system "is not our system".

"In our system, the Parliament decides, the Executive through the Parliament, takes the lead, legislates and legislates on behalf of the population. On an issue like LGBT (lesbian, gay, bisexual and transgender) where there are very strong views in the society, I think the legislature has to act very cautiously.

"We have a much more cautious approach towards social issues. Because it is really a conservative population and I think we let the views evolve with time. The population has to decide collectively rather than the Government decide that I am going to go one way or the other."

Still, the reality is that individuals who are dissatisfied with the status quo will try to seek redress through the courts, as has already happened here. That has also been the US experience, and Justin Scalia's warning against judicial activism is a timely reminder of the consequences of going down that route.

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