MORIGIWA YASUTOMO

SUNSTEIN ON JUDICIAL MINIMALISM

It is with great pleasure that my fellow editor and I present the proceedings of the Ninth Kobe Lecture. This is on behalf of the Japanese National Section of the International Association for Philosophy of Law and Social Philosophy (IVR Japan) and the Japan Association of Legal Philosophy (JALP)[1]. The invited lecturer, Professor Cass R. SUNSTEIN[2], read his Kobe Lecture "Beyond Judicial Minimalism" in Kyoto, at the University of Kyoto.[3] Seminars were also given in Tokyo and Nagoya, where in-depth discussion took place, especially between the designated commentators and Professor SUNSTEIN. So much so, in fact, that instead of the usual format of the Kobe Lecture, which is the publication of the lecture in a regular issue of the *Archiv fuer Rechts- und Sozialphilosophie* (*ARSP*, the official publishing organ of the IVR[4]), a project was developed to publish the lecture, commentaries and the lecturer's reply to the commentators in a single volume. With the kind understanding of the managing editor of the *ARSP*, the project became reality in the form of the *Beiheft* you see here, entitled *Beyond Judicial Minimalism: for and against*.

In his Lecture, Cass SUNSTEIN reflects upon his Judicial Minimalism, a doctrine asserting that the proper role of the judiciary is to go "narrow and shallow," collectively making minimal changes to its jurisprudence. He goes "beyond Judicial Minimalism" by reflecting on the goal and conditions that make the minimalist strategy reasonable, culminating in the conclusion that there are situations when a different strategy is more efficient.

A precise and comprehensive analysis of the character and system of SUNSTEIN's thought is available in the commentary by my co-editor, TAKIKAWA Hirohide (Rikkyo). SUNSTEIN himself, in replying to TAKIKAWA at the Nagoya seminar, remarked that the commentator knew more about his theory than himself. I therefore take the liberty of discussing SUNSTEIN's views from my own, perhaps myopic point of view.

Judicial Minimalism is an ingenious way of understanding what judges are really doing, especially in judicial review. Traditional "theories" of legal interpreta-

1 http://www.houtetsugaku.org/en/index.html

2 The Felix Frankfurter Professor of Law at Harvard Law School. Now on leave to serve in the Obama Administration as the Administrator of the White House Office of Information and Regulatory Affairs.

3 Co-sponsored by the Program funded by Grant-in-Aid for Creative Scientific Research "Law and Ordering of Market and Society in the Post -'Structural Reform'Era: A New Legal System for Liberty and Communality" at the School of Law, the University of Kyoto.

4 Internationale Vereinigung fuer Rechts- und Sozialphilosophie, or the International Association for Philosophy of Law and Social Philosophy, founded 1909.

tion prove to be of little use here, as in other contexts. The issue for the judge is to give a satisfactory solution to the case at hand, a solution which can provide *de facto* if not normative guidance to future decisions, both by the judiciary and the public. What is the criteria that such a judicial decision should satisfy? A decent judicial decision must simultaneously provide society, seemingly two incompatible functions of the law, namely, authority and justice. I.e., on the one hand, to provide security and stability to the system of law by keeping the role that law plays in society constant; on the other, to produce and maintain justice through law, by keeping the legal system in tune with the times and the legal decision appropriate to the case at hand. Less able theorists than SUNSTEIN have referred to this as the problem of "balancing stability through law with justice in the concrete case." Judicial Minimalism may be understood as a name for the strategy by which such a seemingly impossible task is realized.

SUNSTEIN goes beyond judicial minimalism by treading beyond the scope of the judicial system and examines the role of the judiciary within the system of separation of powers: its proper role in a democratic government and a liberal society. It is the responsibility of the legislature to come up with major policy decisions; the judiciary is to avoid taking on such a role if it can be avoided. Legal reasoning is not tailored for this type of political decision-making. Decision making in the judiciary is a piecemeal process, not a revolutionary one. However, it should be noted that though piecemeal, the result of collective path-blazing and treading may sometimes culminate in a revolutionary view on what justice requires. I consider SUNSTEIN's theory, which leads to the development of this way of understanding law, a significant step in the advancement of legal philosophy.

There is one aspect, however, in which the editors do not see quite eye to eye with Cass SUNSTEIN. In replying to the commentators in his "On Fallibility: A Reply," SUNSTEIN stresses the importance of the acknowledgement of human fallibility and bounded rationality in general. If we pay due attention to this feature of the *conditio humana*, we are bound to have a certain moral attitude toward others. He thus concludes his reply:

> In both private and public life, people's fundamental convictions may seem to be at stake, and one or another approach might repudiate the defining beliefs of one or another group. In some cases, judges and others are explicitly asked to take sides. Of course it is true that in prominent cases, it is crucial to take sides …. But in many cases, reasonable people differ, and in such cases, it is important for human beings, including judges, to acknowledge their own fallibility. One of America's greatest judges, Learned Hand, once said that "the spirit of liberty is that spirit which is not too sure that it is right." An acknowledgement of fallibility, central to minimalism, is a way of respecting liberty's spirit; and it carries with it a strong signal of mutual respect.

As to this view of mutual respect, I agree with TAKIKAWA, who points out:

> However, the point here is the quality of respect. Mutual respect in incompletely theorized agreements implies that we should not challenge our "fellow citizen's deepest and most defining commitments."[5] This kind of respect is superficial. Since we are not required to give them reasons for our conclusions, we do not treat them as rational agents. We defer to their strong convictions because they blindly devote themselves to their fallacious beliefs. We tolerate them because they are pitiful. … We fail to show reasonable respect to each other unless we try to grant justificatory reasons for our actions and decisions, even if we often disagree about what they really are.

The Kobe Lecture is an international lecture program founded in 1988, commemorating the Thirteenth World Congress on Philosophy of Law and Social Philosophy held in August 1997 in Kobe, Japan. The lectures are administered by IVR Japan, in cooperation with JALP. As a rule, every two years (three, since 2002), a scholar engaged in creative research of basic issues of legal, social and political philosophy is invited to Japan. The lecturer usually gives one or two lectures in major cities of Japan in addition to several informal seminars. Major works by the lecturer are usually translated into Japanese and published before the lectures take place.

Professor Ronald DWORKIN (New York) gave the Inaugural Lecture in 1990. Professor Ralf DREIER was the second lecturer in 1992. In 1994, Professor Joseph RAZ (Columbia) gave the third series of Lectures. The Fourth Lecture was extraordinary in that it was given in the form of the First Asia Symposium in Jurisprudence, the first international conference to be held under the program. The theme for the symposium, held in October 1996, was "Law in a Changing World: Asian alternatives." Professor Will KYMLICKA (Queens, Canada) gave the Fifth Lecture in 1998. The Sixth was given in the year 2000 by Professor Randy BARNETT (Georgetown). In 2002, Professor Emilios CHRISTODOULIDIS (Glasgow) gave the Seventh Lecture. IVR Japan and JALP decided to hold the Kobe Lectures every three years instead of two hereon in. The Eighth Lecture was given in the year 2005 by Professor Ulfrid NEUMANN (Frankfurt). Professor Cass SUNSTEIN (Chicago, then) gave the Ninth in 2008. The lectures are published in the *ARSP*. The proceedings of the Fourth and the Fifth Lectures are published as a special issue (Beihefte 72 and 96, respectively) of the journal, as is this Lecture.

The Kobe Lecture aims to advance our understanding of legal, social and the political spheres of life. Important theoretical issues are explored from a perspective that is philosophical yet sensitive to problems of implementation and administration. Through this program we hope to arrive at a deeper mutual understanding of both the similarities and differences among various cultures.

The editors wish to thank Cass SUNSTEIN for his willingness to reply to the commentators and for his patience and cooperation in preparing the publication. We would also like to express our appreciation to the commentators for insights Professor SUNSTEIN himself must have enjoyed. It is a pleasure to express our gratitude once again (*vide* Beihefte 72 and 96) to Prof. Veronica TAYLOR, whose

5 Sunstein (note 2), 12.

team has come through yet again to do a great job of editing for grammar, style and effect the papers written by our Japanese colleagues.

For the Ninth Lecture, the editors were themselves heavily involved in its organization. MORIGIWA Yasutomo (Nagoya), the then acting president of IVR, served as the chair of the organizing committee as well as the manager and translator of the Nagoya seminar, and TAKIKAWA Hirohide, was the most active member of the committee as well as being a brilliant contributor. The editors would like to thank KAWAMI Makoto (Aoyama Gakuin Women's Junior College), for managing the Tokyo lecture and seminars, and HATTORI Takahiro (Kyoto), representing the project funded by Grant-in-Aid for Creative Scientific Research "Law and Ordering of Market and Society in the Post -'Structural Reform' Era: A New Legal System for Liberty and Communality" for co-sponsoring the Kobe Lecture, held at Kyoto University.

We would also like to express our deep gratitude for all those who had contributed their time and effort, working with the organizers to make this Lecture as fruitful as it has turned out to be. The editors express their appreciation to the then President SHIMAZU Itaru and the executive board of JALP for their unflinching support of the program. On behalf of the contributors to this volume, as well as JALP and IVR Japan, we wish to express our appreciation to the managing editor of *ARSP*, Richterlin am Bundesgerichtshof Dr. Annette BROCKMOELLER, for accepting our proposal. Thanks are also due to Ms. Sarah SCHÄFER of Franz Steiner Verlag for her ever quick and positive response and help in the publication process.