JUDICIAL ACTIVISM AND THE THREAT TO DEMOCRACY

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The expression "judicial activism" has been bandied about with increasing regularity in Canada since the introduction of the *Canadian Charter of Rights and Freedoms*.[1] In Canada, this accusation is most frequently brought up in the context of rulings by courts on lesbian and gay equality, such as last year's decision on marriage in *Halpern*.[2]

The expression "judicial activism" is rarely defined. What is really meant by judicial activism? It is usually intended to assert that unelected judicial activists pose a threat to democracy by making rather than interpreting the law. This reflects a fundamental failure to understand our legal system. The Canadian legal system is based on common law,[3] which is frequently defined as "judge-made law." Judges have been making law for centuries under this system. They build the law through precedents and ensure equal justice through the application of the principle that like cases should be decided alike. Indeed, until recently, judges made most law under the parliamentary system. In contrast, the Roman or civil law system strictly limits the role of judges to interpreting the text. That is not our system in the common law provinces. It is not the legal tradition in the English speaking world.

Those who advocate the passive interpretation of laws call themselves conservatives, but the label is inappropriate in this context. Conservatives theoretically favour conserving tradition. To embrace the civilian approach would not be conservative; it would be radical, indeed nothing short of revolutionary. It would, in fact, undermine the rule of law in our country.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Charter*].

[2] *Halpern v. Canada (A.G.)*, [2002] 60 O.R. (3d) 321 (Div. Ct.), aff'd [2003] 65 O.R. (3d) 161 (C.A.) [*Halpern*]. The author acted as lead counsel in the case on behalf of the intervener Metropolitan Community Church of Toronto.

[3] Apart from matters falling under Quebec's civil law system.

There are those who suggest they oppose "judicial activism" because they say judges should have no role in making law. Judges making law is undemocratic in their view, and in a democracy laws are made by the government.

However, the judiciary is not alien to government, nor is it some sort of nemesis of government. The judiciary is one of the three branches of government. Those who constantly promote the notion that judges are usurping their proper role in a democracy by making law are either abysmally ignorant of the nature and history of our legal system or are being willfully dishonest. Unfortunately, the latter is too often the case.

Recent developments in the law governing same-sex marriages are sometimes cited as examples of "judicial activism." Even a member of the US Supreme Court, Justice Scalia, who ought to know the principles and tradition of the common law, described the Ontario Court of Appeal's ruling in *Halpern* as "imposing" same-sex marriage. However, the *Halpern* decision is an example of the common law at its finest.

The critics of the Court of Appeal's decision fail to grasp, or acknowledge, that the so-called traditional legal definition of marriage was itself a common law rule. It was judge-made law, created by an English judge, Lord Penzance, in 1866.[4] It is noteworthy that this nineteenth century "judicial activism" is never criticized by opponents of same-sex marriage. The reason for that will become clear when we understand what is really meant by them when they use the term "judicial activism."

Like Lord Penzance in the 19th century, our 21st century judges were doing their duty by developing the common law. Neither the original definition of marriage nor the new definition was a product of power hungry judges overstepping their bounds.

Judges for centuries before the *Charter* acted to control excesses by public officials, elected or otherwise. *Magna Carta* contained demands that the rights of the King's subjects be

[4] *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 at 133.

protected through a right of recourse to the Lord Chief Justice of England. Do "conservatives" feel the writ of *habeas corpus* is "activist?," or "undemocratic?"

Sometimes judicial activism is used to mean that "unelected" judges are acting out of partisan political motives. This type of accusation reached its nadir when the Leader of Her Majesty's Loyal Opposition accused the Federal Government of rigging the Ontario marriage case, given its power to appoint judges, to ensure that the same-sex marriage arguments would prevail.

The Ontario Court of Appeal consists of dozens of judges. These judges are all appointed by the Federal Government, but thereafter are completely independent. The Chief Justice determined which three judges would sit. Two of the judges had no political background, but have distinguished careers, including having been deans of law faculties.

In fact, there was one member of the panel who was a former politician, Chief Justice Roy McMurtry. The argument that this jurist is under the control of the Liberal Government, or that he had a political track record that clearly established a bias in favour of gay rights is laughable. The Chief Justice was appointed by a Conservative administration. He was an Attorney General under a Progressive Conservative Government. In fact, his record as an elected Attorney General hardly established a political disposition to being "pro-gay", but was rather marked by complete absence of gay rights initiatives topped off by several prominent prosecutions of gay bathhouses and some leading members of the lesbian and gay community.

However, those of us advocating for equal marriage did not ask for the Chief Justice to recuse himself. Unlike Mr. Harper, we knew that the Chief Justice and his colleagues were independent judges whose duty was to apply and develop the law, not to carry out any partisan political agenda.

Sometimes judicial activism is used to contrast it with judicial restraint, or deference to the legislature. Anyone who has actually argued a *Charter* case, or any other case against government for that matter, knows that there is tremendous deference given by our judges to the

elected legislatures. Most *Charter* cases against the government fail. Those that succeed almost invariably result in the impugned law being referred back to the legislature for further action.

There should be a balance, and mutual respect, between the roles of judges and legislatures. Any fair reading of our jurisprudence reveals that our judges are very conscious of this issue. How to strike this balance varies from case to case, but it is unquestionably true that judges have consistently demonstrated respect for the proper role of the legislature. I am not certain that that the same could be said of the respect due by legislators for the proper role of the judiciary.

There is a great deal of selective, even dishonest use of the expression "judicial activism". In its ruling in *Trinity Western,* the Supreme Court overturned the decisions of the democratically chosen lawmaker.[5] Of course, in that case the judicial "interference" protected the rights of evangelical Christians. This was not decried as a case of judicial activism. Why not?

This example highlights the true meaning of the coded expression "judicial activism" as used by some critics of our courts. "Judicial activism" actually describes situations where the Courts refuse to enforce the conservative Christian religious values that have historically been reflected in our society and its laws. The "judicial activism" accusation is most common when the legal issue concerns homosexuality, a topic with which the religious right seems to have an almost pathological obsession.

The persecution of homosexuals in Western civilization has unfolded in the context of the millenia-old efforts by the Church to use the power of the state to enforce orthodox dogma on the recalcitrant.[6] The efforts of the Vatican to control the actions of Canada's Prime Minister and other elected Catholic politicians over same-sex marriage is in keeping with a well-established tradition of ecclesiastical interference in secular affairs.[7] Although thus far we have dispensed with reviving the tradition of burning heretics at the stake, it should be acknowledged that much

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[5] *Trinity Western University* v. *British Columbia College of Teachers,* [2001] 1 S.C.R. 772. The author acted as co-counsel for the intervener, *EGALE Canada.*

[6] See e.g. K. Armstrong, *The Battle for God: A History of Fundamentalism,* (New York: Knopf, 2000).

[7] See e.g. Congregation for the Doctrine of the Faith, "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons," online: Vatican <http://www.vatican.va/>.

blood has been shed over the centuries in the name of state enforcement of the "correct" religion. One such victim was the patron saint of lawyers, St. Thomas More. In the past, this state enforced religious intolerance extended to legal recognition of marriage. Catholic marriages had no recognition in England (nor in pre-Confederation Ontario), and Protestant marriages were legal nullities in France (and New France, of course).[8]

The Enlightenment brought with it the notion that religious tolerance, democracy and a separation of Church and state were the antidotes to this bloody history. Canada's Catholic residents were among the first beneficiaries of this new philosophy with the religious tolerance of the *Quebec Act* of 1774.[9] This era also witnessed the introduction of the concept that rights were inherent, not bestowed by the king, and that constitutionally entrenched rights would act as a check on the tyranny of the majority.

These three concepts of religious tolerance, inalienable rights and constitutional protection from the tyranny of the majority have become the foundation for most Western democracies. They are in the process of being persistently discredited by religious extremists. Their efforts are being abetted by those whose conscious or unconscious totalitarian tendencies would sacrifice everything and anything on the altar of the will of the majority. Edmund Burke's famous warning about the "tyranny of the majority" is too often forgotten.

Early 20th century Christian fundamentalists in the USA began to point to judges as being in league with the Antichrist in undermining Christian civilization. They did not believe in religious tolerance, inalienable rights or the protection of minority rights. The wellspring of this movement in the USA was a belief that patriotism was a sacred duty, and that duty meant being faithful to the Puritan vision of America as a biblically based utopia, not a pluralistic

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[8] Justice LaForme summarized some of this history: "Originally in Canada only those marriages performed by the Church of England, and not all Christian marriages were given legal status. It adds that it was not extended to all faiths until 1857. In 1950 marriage was permitted in Canada through a purely civil ceremony." *Halpern, supra* note 3 at para. 41. See generally *Reference re: Marriage*, [1912] 46 S.C.R. 132. See also Boswell, *Christianity, Social Tolerance and Homosexuality*, (Chicago: University of Chicago Press, 1981) and *Same-Sex Unions in Premodern Europe*, (Toronto: Random House, 1994).

[9] David M. Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of *Charter* Rights" (2000), 33 U.B.C.L.Rev. 551 at 554.

democracy.[10] This view that so clearly conflicts with Jefferson's notion of separation of Church and state now casts a large shadow over the White House. The coded language of religious "conservatives" uses "judicial activism" to mean that judges are making decisions that they do not like, decisions that they see as defying God's will.

Real conservatives are people like President Eisenhower, who sent troops into Little Rock to force the desegregation of the school system. At that time, there could have been no doubt that Governor Faubus represented the majority's will in his opposition to desegregation. But President Eisenhower believed and publicly stated that the rule of law and respect for judicial orders were fundamental to democracy. He was right.

The creeping totalitarianism of some conservative Christians who expect and demand the state to enforce their religious views on the rest of society represents a real threat to democracy in the USA, and perhaps even in Canada. Those who irresponsibly attack our judges with the currently popular accusation of "judicial activism" are complicit in an agenda that threatens the very foundation of our democracy.

The alternative to an independent judiciary is a judiciary that takes its orders from God or the Government. Canada is neither a theocracy nor a totalitarian state, and it must not become one. To preserve democracy we must have an independent judiciary that has the courage to act to protect our Charter rights against all forms of tyranny.

[10] *The Battle for God*, *supra* note 7 at pp. 84-90, 216-18.