

Judicial Activism and Its Impact on Political Development

Increasingly judicial decisions are shaping the development of our laws and thereby impacting politics. Drawing on his experience of the High Court of England and Wales, but also drawing on the developments at both the European Court of Human Rights at Strasbourg and European Court of Justice in Luxembourg, the speaker will help us to consider the impact of this rise in judicial activism in contemporary Europe and, especially, what affect it might have on the Christian's interaction with the political world.

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1) The role of a judge as seen in different European constitutions.

- a) Under Monarchy or Totalitarian regimes

- b) In democratic regimes

2) Who makes Law?

3) Judges make Law in a number of different ways.

- a) Development of non- statute law

- b) Kerbing the Executive by reference to statute

- c) Kerbing the Legislature by reference to the Constitution

4) The effect of adherence to International Conventions

- 5) Whilst there are differences between one state and another, Judges have considerable power in Europe:
- a) The ECJ
 - b) The European Court of Human Rights
 - c) National Courts
 - d) The ECHR is seen as “a living instrument”.
 - e) Judges have the opportunity, in interpreting it, to create law by reference to the changing social and moral conditions and the supposed consensus of increasingly secular states.
- 6) There is tension in some states over the balance of power.
- 7) The ECHR is now interpreted in a manner in which it could not conceivably have been interpreted when ratified by Western European states in the early 1950s.
- 8) There is a perceived danger of losing the plot, of subversion of the ordinary business of democratic government and common sense.
- 9) The Qualified Convention Rights. The qualifications to the rights set out in Arts 8 (private life), 9 (Freedom of thought, conscience and religion), 10 (Freedom of expression) and 11 (Freedom of assembly and association) variously provide for the exercise of the particular rights to be subject to limitations: *“There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of public order, health or morals as well as for the protection of the rights and freedoms of others”*. This was seen as an important qualification, but what has happened to the protection of morals?

10) Who decides what is necessary for the protection of morals? And on what basis?

11) The Approach of the Courts/The Ethos of the Convention towards Morality.

12) The influence of the Church

13) The Judicial Activist:

- a) Considerable impact, when there is a consensus amongst judges and that consensus is not so far removed from that of the Legislature/Executive as to give rise to amending legislation or amending Regulations.
- b) It is not easy for the Legislature or Executive to override the incremental decisions of judges because the process of getting law on to the statute book is cumbersome, although promulgating Regulations by Statutory Instrument is somewhat easier.
- c) That which supposedly reflects consensus, in fact is also opinion forming.
- d) An individual judge whose worldview is significantly out of kilter with that of his fellow-judges, and in particular that of the Appeal Judges will have only limited effect.
- e) The common judicial view:
 - i) The law should limit the freedom of action of the subject as little as possible.
 - ii) The law is not for the enforcement of any moral code.
 - iii) The rule of law is essential, but democracy connotes tolerance, broadmindedness and a liberal outlook.
 - iv) Individual interests must on occasion be subordinate to group interests but the majority view is not to be enforced. There is to be no tyranny of the majority.

14) Conclusions:

- a) Whether or not there is a written Constitution, the National Judiciary must hold the balance between other powers of the state. It alone guards the liberty of the subject.

- b) The national Judge's role continues in developing non-statute law.
- c) It continues to expand in interpreting domestic statute law in the context of overriding Constitutional and Convention Rights.
- d) As the prevailing view is that the ECHR is a living instrument, its interpretation and application will change with changes in the mores of society
- e) The European Court of Human Rights has a yet more powerful role in interpretation of the ECHR but, in theory, its role is only a supervisory one over the national courts.
- f) There is a tendency for the Courts to develop Convention rights and apply them to areas not previously thought to be involved.
- g) Morality has ceased to play much of a part in the interpretation of qualified Convention rights, because of the approach taken by the courts to the aims of a democratic, tolerant and broadminded society. Other rights trump Christian morality or Christian moral sensibilities.
- h) English courts, by reason of the growth of judicial review, the doctrine of precedent and stare decisis and a more literalistic and analytical approach, than some other national courts, may be thought to adopt a more consistent thoroughgoing application of Convention rights, but this is probably a result of seeing things through UK eyes.
- i) In a democracy, separation of powers is seen as beneficial, but where is the balance to be struck? Who rules?

15) Where does this leave a Christian Judge?

- a) What is the biblical role for judges? - Romans 13.
- b) What is the right attitude for a Christian Judge? -2 Chron 19 v 4-12.

16) The Christian Judge's duties