Judicial Activism and the Rule of Law

One of the basic pillars of western civilization is the rule of law in a political system wherein a sovereign parliament – composed of elected representatives of the people – makes laws, and an independent judiciary enforces the laws. Today, however, we have lower court judges who are abusing their independence by refusing to enforce a law which they find personally objectionable in its impact on an offender. Such a situation undermines the entire judicial system, brings the criminal courts into contempt, and is destructive of our Canadian tradition of rule by law. What is to be done?

In Canada, the problem of judicial activism is particularly acute in the criminal justice system where the present controversy has arisen over the sentencing of criminals. In 1989, the Conservative government of Brian Mulroney enacted in the Criminal Code a "victim fine surcharge" whereby judges were given the discretion to impose an additional penalty -- a financial surcharge – upon sentencing a criminal. The surcharge was intended to help fund services and programs for the victims of crime in the province or territory wherein the particular crime was committed. Many lower court judges, however, neglected or refused to impose the surcharge penalty. Other judges imposed a surcharge of only $1.00, or gave the criminal an inordinate length of time to pay, so as to render the surcharge inoperable.

In the face of a failure on the part of criminal court judges to impose the 'victim fine surcharge', in 2000 the Liberal government of Jean Chrétien introduced two amendments in the Criminal Code which made the imposition of the surcharge mandatory "unless it would cause undue hardship for the offender", and set a fixed amount for the surcharge. Judges responded by employing the undue hardship clause to avoid imposing the surcharge in sentencing criminals. To close that loophole, the Conservative government of Stephen Harper secured the enactment of the "Increasing Offenders' Accountability Act" (October 2013).

The new law made the victim surcharge mandatory – through eliminating judicial discretion in cases of undue hardship – and increased the amount of the surcharge to 30% of the amount of any fine imposed on an offender upon conviction and, where no fine was imposed, to $100 for conviction of a summary offence, and to $200 for conviction of an indictable offence.

In defiance of the law, criminal court judges have continued to refuse to impose the mandatory victim fine surcharge in cases where the offender was found to be indigent, and judged to be unable to pay the surcharge. How a judge can justify, in law, the setting aside of the Criminal Code based on the perceived social circumstances of an offender, remains unexplained. It sets a dangerous precedent, and is destructive of the principle of equality before the law. When did a perceived inability of an individual to pay a surcharge – or a fine, or a financial award for that matter -- excuse a judge from imposing such penalties in a court case? Apparently, activist judges believe that there are two laws – a law for the rich and a law for the poor – and the indigent are not subject to the Criminal Code if it poses a supposed hardship for them.

More recently, an Ottawa Court judge refused to impose the mandatory victim surcharge in

convicting an indigent drug addict of nine Criminal Code offences, including assault against a police officer. The judge found the mandatory victim surcharge – in the Shaun Michael Case – to be unconstitutional under the Canadian Charter of Rights and Freedoms as it constituted "a cruel and unusual punishment" in that the surcharge – a total of $900 – was "grossly disproportionate" to the supposed "nuisance crimes" committed by the offender, and that the indigent offender was "being treated more harshly because of his poverty than someone who is wealthy". In sum, a lower court judge ruled that the mandatory victim surcharge was unconstitutional, despite the lack of any argument being presented before his court on that issue.

Whatever the motives or sympathies involved, no society can long be sustained under a judicial system wherein individual lower court judges can refuse to enforce the laws of parliament, and can render laws inoperative by declaring them unconstitutional based on a personal judgement. It will result in judicial anarchy, public disrespect for the law and the judiciary, and ultimately a breakdown in the rule of law.

One possible solution is for the Conservative government to use the "notwithstanding clause" of the Constitution Act of 1982 to overrule the courts and establish that only the Supreme Court can render a judgement as to whether a particular law is unconstitutional in being contrary to the Charter of Rights and Freedoms; and that lower court judges have a sworn duty and obligation to enforce the Criminal Code as enacted by parliament. A lower court judge would still be free -- in sentencing a criminal -- to offer an opinion that in the judgement of his/her court a particular law is in violation of the Charter of Rights and Freedoms and ought to be referred to the Supreme Court for a ruling, but in the interim the court judgement would have to be made in accordance with the Criminal Code: the laws enacted by parliament.

If some lower court judges object to enforcing a particular law because it violates their conscience and/or personal sense of social justice, then they can either recuse themselves from criminal cases where they might well be required to impose a particular law which they find personally objectionable, or they can take the honourable course and resign from the bench on the grounds of conscience. For a judge to remain on the bench and to refuse to carry out his/her sworn duty to uphold the law, is inexcusable and intolerable.

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