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CENTRE POINTS

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THE CENTRE IS AN INDEPENDENT, NON-PROFIT CHARITABLE ORGANIZATION HELPING CANADIANS AND THEIR LEADERS SHAPE A VISION OF A CIVIL SOCIETY BY FOCUSING ON THE COMPLEX CONNECTIONS BETWEEN PUBLIC POLICY, CULTURE, MORAL DISCOURSE AND RELIGIOUS CONVICTION. THE EDUCATIONAL ACTIVITIES OF THE CENTRE WILL BE DIRECTED TOWARDS THESE ENDS.

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When Injustice Uses the Law: The Missing Logic of the Claim for Same-sex Marriage

Virtually everyone is talking about whether Canadian society should recognize the marriages between people of the same sex. Some believe that the answer is an obvious "yes" because such people have the "same right to get married" as anyone else. Others think that to ask the question is rather like asking whether fish need bicycles (to re-apply a famous line from a distant age), or whether single people should get married (as was recently attempted in the Netherlands). Once sex is irrelevant then why should the number of people be relevant? Marriage, on this reading, just *is* male and female and one of each. Period.

The courts have been invited to determine the question due to the super-expertise they have granted themselves in recent years in answering such vexed social questions. Law can determine, so many judges appear to believe, the nature of the metaphysics of marriage better than can the democratic process. That the jurisdiction of law understood this way has become hugely over-inflated and poses serious threats to democracy itself seems not to concern them. Which is what one would expect, by the way, of those who pose a threat to democracy. Historically democracy has not usually been threatened most by democrats.

The common argument to justify this horrific expansion of the role of law from "the rule of law" to "the rule by law" is that "the Charter does it" or "this is what the Canadian people voted for when they brought in the Charter." Neither is true.

Read the Charter. Note that it says nothing of "sexual orientation" or "marriage" and precious little about the kinds of things that the courts have, for almost 20 years, been reading into its central provisions. In fact, the legislative history (which the Court will use or ignore as it sees fit) clearly shows that "sexual orientation" was not supposed to be in the equality provision (section 15). But that was then, this is now.

Today is better than yesterday in the new thinking of the law. Every day in every way, jurisprudence is getting better and smarter; or so the trendy contemporaries appear to think. It used to be said by those who appeared before the Supreme Court of Canada on a regular basis that the way to get then-Chief Justice Dickson's attention was to try and "outprogressive" the other counsel. It all started to seem a bit of a joke and they used to chuckle about it in the changing room at the Supreme Court building in Ottawa. Things are, if anything, worse now.

One example of this judicial inflation of powers is the courts' expansion in the area of remedies. Now a court can find a breach where it wants and then "read in" or "read out" what it wants – and justify what it is doing as simply "interpreting" the Constitution. But this is sleight of the judicial hand. Now it is the hand that wields the gavel that both rocks and rules the world. This is not law as it has ever been understood historically.

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There is another point that is being overlooked in the rush to judicially imposed same-sex marriage. The point that is not being dealt with – and needs to be – is the logic of the same-sex claim for marriage. In a word, gay claimants seek "recognition" of their relationships. Note, however, that those who object to "same-sex marriages" have said they will never recognize such marriages and indicate that they will never perform them (or attend them). In fact, they will seek to teach actively against the idea.

Before the courts in the recent cases in British Columbia, Ontario and Quebec the major religions – Christian (Catholic and Protestant), Jewish, Hindu, Sikh and Islam all expressed concerns that should the court force, as they have done, marriage to include "same-sex couples," then their religious beliefs would be disadvantaged in Canadian society. They argued that since the forcing would be deemed to be based upon the fundamental law of Canada – written as it were into the stone tablets of the Constitution – their religious beliefs would, in a sense, be *contrary* to that fundamental law. Prior to this, law recognized that marriage was historically and prototypically male and female; it did not *create* this fact.

The courts, with one exception, gave short shrift to religious concerns and the nature of democracy in relation to the law. The one exception was Mr. Justice Pitfield of the B.C. Supreme Court who held, until he was overturned by the Court of Appeal, that such a momentous change required a Constitutional amendment. With slight variations the other courts simply found that the Supreme Law of Canada required "same-sex marriage." Religions were not comforted by the judges' simply asserting that the marriage challenges were not about religious marriages. Why not?

Two reasons stand out. First, that when the courts say "this case isn't about so and so," you can just about set your watch by the fact that the next case *will be* about just that. So, for years, the courts said, on cases dealing with benefit recognition for gays and lesbians, "this case isn't about marriage but about benefits." In every instance the courts (and those in Parliament and the legislatures) said, "this is just a benefits issue, it isn't about marriage…" One can see this in the case of *Egan and Nesbit*, for example, back in 1995. There, by five judges to four the Supreme Court of Canada did not extend "same-sex spousal status" (as it was called then) to the federal *Old Age Security Act*. But the key point is this: all the judges said the case was not about marriage at all – even those who thought that benefits should be extended. And this was so in all the major cases that prepared the ground for future challenges. When that piece of legislation (along with many others) was amended by the federal government to include same-sex relationships, a special section was added that stated the amendment should not be construed in any way as changing marriage from a "male/female" definition.

The courts have determined 'same sex marriage' to be a human rights issue and a constitutional issue and found it to be a 'right.' But 'don't worry,' the religious communities are told, this isn't about 'religious marriage'

Once same-sex couples had gained access to the marriage language categories ("spouse," "conjugal," etc.) – each time by judicial fiat, not by convincing the population – they then sought judicial assistance in getting access to marriage itself. Again, in the marriage cases, the religious communities all showed up expressing their fears. Just as surely the courts said "there is nothing to fear…" Now what has happened? The courts have determined "same-sex marriage" to be a human rights issue and a constitutional issue and found it to be a "right." But "don't worry," the religious communities are told, this isn't about "religious marriage." What basis is there to believe them?

What is it about marriage that allows it to be hived off into two completely different categories that contain two completely different and irreconcilable understandings about being male and female and "mom" and "dad"?

No lesbian couple can have children, no homosexual couple can have children without going outside the relationship. That is basic science. It is also, says the court, irrelevant. Yet the "same-sex marriage" claimants consider that the fact of *two* people is still relevant to the new marriages they seek. Why should *numbers* be relevant when procreation is irrelevant? And what is *bi-sexual marriage* (originally argued for in court by counsel for the same-sex claimants) anyway? So much for science, so much for logic.

What wins is the argument based upon feelings. Exclusion from marriage, so it is argued, makes gays and lesbians feel bad. Most importantly, the fact that society (that is, all of us) doesn't recognize their unions as "marriages" hurts their feelings and they need the law to change this. But note what is embedded in this assumption. That *everyone* (that is, society) should accept same-sex marriage – *the very thing that the courts suggest that religious people do not need to do.* Something doesn't add up in the logic, but the courts are content to accept the claims anyway. In doing

so they have set in motion a train of expectations that is so shaky and illogical that we can all sit back and watch as it eventually derails.

Who *will* recognize same-sex marriage? The many citizens who think it a bad idea and unfair to children who have a right to a Mom and a Dad? No, they will not. Will the majority of religious people of all sorts recognize it when they think it goes against the essence of their deepest held religious beliefs? No, they won't either. So at what price are the courts seeking to force recognition on Canadian society? How can the court say this isn't about religious marriage while forcing into position a situation where homosexual and lesbian marriages are deemed to be constitutionally required?

It makes no sense.

The logic of the claim – that it will produce acceptance of same-sex marriage – is the opposite both of the method chosen to achieve it (force-feeding by way of judicially created laws) and the purported acceptance of religiously motivated objections. Run the logic of the court's approaches through the process of thought and see where it leads. Consider the following points.

1) The majority of Canadians marry in religious ceremonies. The vast majority of religions and religious people do not believe that it is legitimate for two people of the same-sex to marry;

2) These religions will not perform same-sex marriages and will not recognize them as valid once performed – in fact, they will increasingly teach against the concept;

3) Many of these people have children in public schools;

4) The courts have increasingly seen "Charter values" as requiring that same-sex materials be approved as acceptable in public education, over the wishes of parents who may have objections (*Chamberlain v. Surrey School District No. 36*, Supreme Court of Canada, Dec. 2002);

5) Religious dogmas are excluded from public education because such matters should be private due to the fact that people don't agree and Canada is a tolerant and pluralistic society, etc. *Sexual dogmas* on the other hand are not private and should be welcomed into the public schools so as to advance historically disadvantaged same-sex people by making them feel more included. That religious people feel excluded by this inclusion is just the price we pay for … for what?

A couple of years ago, in an important book called *Humanism Betrayed*, Professor Graham Good wrote of the danger to genuine humanism from what he called the "new sectarianism" of race, gender and sexual orientation. He wrote of the intolerance of this new kind of non-religious sectarianism as he had perceived it at the University of British Columbia over many years of teaching. He ought to have added that the courts are fast becoming the vanguard of this new intolerant elite – all the while using the language of tolerance, equality and liberalism to bring about their opposites.

Religious people know where the next stages of this one-way battle are going to be fought because they have been monitoring and opposing (unsuccessfully) these developments for many years. It is the courts that seem not to notice or to be concerned. The gay marriage cases are, at base, really about the place of the religious conception of marriage (male/female) and about defeating that concept. Only the courts seem to be in denial on this point. In recent years we have all seen a carefully plotted strategy (for the most part funded by federal money under the Court Challenges Program) that has attacked religious individuals, colleges, schools and school trustees. The people of Canada will not have to wait very long for new cases that further attack religion.

It will be alleged, if it is not already, that religions and their projects (charitable, health and education) should not receive tax or charitable benefits because they are discriminatory ("homophobic") or that private religious schools should have their (already minimal) funding cut because they don't teach a sufficiently "homosexually positive" program: teaching respect for all citizens is not enough, you have to advocate the normality of homosexual and lesbian *conduct*! Most religions will not do so, however, because the understanding of sex (male and female) as important to marriage and parenting, and of offspring as the direct result of male/female sexual relations, is deeply embedded in comprehensive religious worldviews that will not change, despite the wishes of same-sex advocates and a few of their supporters in the judiciary.

Whether Canada decides to

Promoting Tolerance and Diversity

"Fundamentalist Christian and Roman Catholic doctrines are incompatible with provincial, national and international human rights laws. It is for this reason alone that they have no right to be in the classrooms of the nation. … [T]he beliefs and practices of the Roman Catholic Church and fundamentalist groups which subvert the equality rights of groups protected under human rights laws are reason enough to remove them from the classroom."

— Dr. Ailsa Watkinson, Faculty of Social Work, University of Regina ("Public Education and Religion: The Good News?" April, 2003)

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the uncanny script of the double helix. In spite of genetics' actual inability to account for the great majority of what makes us human, what seems to matter is that people increasingly *believe* that DNA foretells all. And since beliefs shape our culture, these beliefs cry out for our attention. We cannot permit, Visser suggests, human beings to imagine themselves as snarled up in the fatal bonds once again.

A problem that is implicit here, but which Visser never quite faces head on, is that human rights discourse persists in the half-life of Christian principles, and therefore in a kind of vacuum. Often, the very people who speak of nature's blind, indifferent processes, and claim that human beings are no more responsible for their conduct than are aphids, will be the first to appeal to Justice and other transcendent notions when it suits them politically. Humans as nature's robots, possessing no more free will than any other animal; human beings held to account for their actions before the tribunal. Which is it to be?

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maintain "marriage" as the category the state recognizes or gets out of the marriage business entirely, as some suggest, remains to be seen. It is about time that the courts begin to recognize that forced acceptance of matters deemed to be fundamentally against many people's conscience and religion is a mark not of a free and democratic society, but one that is fast on the road to totalitarianism – whatever language is used to justify it.

This coming Canadian totalitarianism is driven in large part by the courts at their invitation. The use of law to accomplish social engineering (sorry, "equality advancement") is repeated like a mantra at conferences and in speeches. And why not use the courts? Given the hugely expanded jurisdiction the courts have given themselves only a fool would take the long (and perhaps unsatisfying) road of trying to convince fellow citizens and – in any case, there is federal money available to help you get that judicial stamp of approval on your "equality advancement" case! As those of us on the other side of the courtroom on these cases often said to each other, it is hard to paddle against the waves. Our friends for "progress" are surfing the *Zeitgeist* and it is obvious to all that, as beach bums have long shouted, "surf's up!"

Many now think that the current approach to law as social engineering in the name of "equality" is becoming embarrassing and dangerous to the relationship between law and democracy. It is time for a much more mature and sober kind of law and judiciary.

Benson Blog

Sharia Law Arbitration in Canada

All those who think religion matters should applaud the initiative of the Islamic community in establishing its own Sharia law tribunals in Canada. Such "religious rule administration" is well established and allowing arbitration to bind those who agree to such rules is a good thing. Believers, religious or non, ought to be able to do so amongst themselves outside of judicial review – or what is diversity and tolerance about?

I would much rather have Christian things decided by Christians than some judge who is likely both ignorant about them and powerful. In Ontario a judge's decision to completely ignore the internal rule-making authority of a Catholic Bishop (in the Durham Catholic School Board "gay prom partner" case – which is on appeal) is worrying. The attempt there is to extend the law and therefore the State to what ought to be an "internal" matter for the authority of the separate school Board (protected by the Constitution as that right is). A very bad thing.

The sole exceptions to having a complete exclusion of the courts would be regarding rules of exit from, and fair application within, religious tribunal proceedings. There must be freedom of belief such that one can exit a community without fear of reprisal, confiscation of property etc. and confidence that, with respect to procedures before such tribunals, rules of natural justice etc. are followed. This would have to be reviewable by appeals to the courts. Beyond those two areas I think courts should mind their own business.