THE GLOBE AND MAIL

ONLINE DEBATE

No, the Charter of Rights has not given judges too much power

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Special to The Globe and Mail
Published Thursday, Apr. 19, 2012 4:00AM EDT
Last updated Monday, Sep. 10, 2012 11:26AM EDT

For the counterpoint to this online debate, click here [http://www.theglobeandmail.com/news/opinions/opinion/yes-the-charter-of-rights-has-given-judges-too-much-power/article2407018/].

The attack on judicial activism in Canada is like a fake Florida tan: There may be a base of reality to it but it is covered in so much false coating it is hard to see.

When the Charter of Rights and Freedoms was enacted 30 years ago, an equally strong concern was judicial inactivism. The Supreme Court's feeble approach to the Canadian Bill of Rights led many to question whether the Canadian judiciary would be able to transform itself into a rights-protecting body under a constitutionally entrenched Bill of Rights.

Critics of judicial activism get it wrong by adopting the American discourse on the legitimacy of judicial review and attempting (unsuccessfully) to transplant it to Canada. It doesn't take.

The Charter is not the American Constitution. The text of the American Constitution is silent about the power of judicial review and it was not until 1803 in Marbury v. Madison that Chief Justice John Marshall declared that courts had the power to strike down legislation inconsistent with the Constitution.

Our democratically elected legislators went into the Charter with their eyes open. They knew what judicial review looked like, both in Canada and the United States. In Canada, our courts have exercised the power of judicial review since Confederation. Since then, courts have been the arbiters of federalism, deciding whether a power lies within federal or provincial jurisdiction. According to constitutional scholar Peter Hogg, the adoption of the Charter in 1982 "was a conscious decision to increase the scope of judicial review."

Our elected representatives explicitly gave the courts the power of judicial review under the Charter. Retired Supreme Court Justice Bertha Wilson gave expression to this reality in a 1999 article titled simply "We Didn't Volunteer." No, the judges did not. The people, through their elected representatives, "voluntold" the judges to get with the rights program. Much of the judicial activism critique seems to be "sour grapes" over the lost battle to retain parliamentary supremacy in 1982.

The judicial authorization could not be clearer. It is contained in section 52(1) of the Constitution Act, 1982, which provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Further, section 24(1) of the Charter provides that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

This express textual authorization clearly distinguishes Canada from the United States and on its own should really render much of the judicial activism criticism moot.

But some criticisms of judicial activism are more nuanced. It is absolutely legitimate to question the courts' exercise of power in the same way that we should question the exercise of power by any institution. It is legitimate to question whether there are some areas where courts may lack the institutional competence to adjudicate well. However, much of the criticism about judicial activism is like Jell-O – all too difficult to pin to the wall. Much of it seems distinctly political rather than principled.

There is not as much talk today about judicial activism as there was in the 1990s. There is more chatter lamenting the courts' failure to exercise its powers of judicial review more aggressively and more frequently.

It is time we moved beyond judicial activism. The concept has become dried up and old, like the skin of someone who has spent too much time in the Florida sun.

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