THE GLOBE AND MAIL

ONLINE DEBATE

Yes. The Charter of Rights has given judges too much power

Grant Huscroft
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For the counterpoint to this online debate, click here [http://www.theglobeandmail.com/news/opinions/opinion/no-the-charter-of-rights-has-not-given-judges-too-much-power/article2406996/].

Canada was a free and democratic country prior to the Charter of Rights and Freedoms, committed to things such as freedom of expression, equality and the principles of fundamental justice. What changed with passage of the Charter was that rights and freedoms were given constitutional status, and judges were given the power to strike down laws that infringed on them.

In 1982, there was little reason to think this change would be momentous. The judiciary was considered a relatively conservative institution, cautious and incremental in its approach to the law.

But in fact, much has changed in the first 30 years of the Charter. Numerous laws have been struck down and many others altered substantially, often by novel statutory interpretation and remedial techniques the courts have developed.

Consider just a few of the recent Charter decisions made by Canadian courts. Same-sex marriage has been

established, along with abortion on demand; marijuana has been legalized for medical use (along with a requirement that the government grow and provide it) and prohibitions on private heath care have been struck down, along with laws banning tobacco advertising. Laws governing parental discipline of children and prohibiting the possession of child pornography have been rewritten by the court in the course of their constitutionality being upheld.

Alexis de Tocqueville once said that most political questions in the United States eventually end up as judicial questions. The same is now true of Canada. Our courts are currently involved in Charter litigation on everything from assisted suicide to prostitution and polygamy.

The problem in all of this is that the Charter is anything but self-executing. It is full of vaguely worded rights and the social science evidence that courts have at their disposal in adjudicating Charter claims is anything but determinative. As a result, judicial decisions interpreting and applying the Charter are bound to be controversial. Reasonable people can and do disagree about the interpretation and application of Charter rights. So do reasonable judges, as evidenced by the number of closely divided decisions in the Supreme Court.

That is why not everyone concerned about rights thinks that it is a good idea to give judges the power to strike down democratically enacted legislation. Canadians are proud to note the influence of the Charter internationally, but Canada's closest constitutional relatives – the U.K., New Zealand and Australia – deny their judges the power to invalidate legislation.

Many play down judicial power under the Charter, rationalizing it in terms of "dialogue" between the legislature and the judiciary. Writing on Monday, former Supreme Court justice Louise Arbour made the familiar dialogue claim, asserting that critics of judicial activism and the legalization of politics are simply wrong. "Charter litigation has provided a high-quality intellectual forum in which to debate issues that are not best left to majority diktat," she wrote.

The truth is that judges have no greater insights than the people when it comes to debating the important moral and social issues of the day. The basic tools of legal reasoning are not well suited to the resolution of complex moral and social issues.

Nevertheless, it is clear that Canadians have faith in judges and little respect for their politicians. Ms. Arbour wrote that Canada's political parties "have been impoverished by the rise of judicial prominence" and I agree. But this is a bad thing, and it cannot continue. Ms. Arbour's boast that the substance of the court's calendar "compares very favourably with the platform of the political parties" is nothing to be proud of.

The solutions to our economic and social problems, our health-care and education concerns and so much more must come from our elected representatives.

The courts' role in protecting Charter rights is profoundly important, but it is incumbent on the courts to act modestly in performing this role, promoting democratic resolution of our problems rather than imposing constitutional solutions. Thirty years into the Charter, the relationship between the legislature and the courts remains the most pressing problem in Charter litigation.

Grant Huscroft is professor of constitutional law at Western University.

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