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Examining the Role of Courts in Canada's Policy-Making Process

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The separation of powers proves to be an integral tenet of any liberal-democratic society. This notion asserts that the political executive, legislature(s), and judiciary of a nation should operate independent of one another in order to prevent the disproportionate concentration of power amongst a singular group in society. In most cases, the role of crafting public policy falls upon the legislature in those nations that subscribe to such principles, which is itself usually comprised of the peoples' elected representatives. While Canada has long held itself to be a liberal-democratic society, with respect for all that such a political philosophy entails**,** the entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982 saw the judiciary impede the legislature's sole right to pass legislation through its being explicitly instructed to conduct judicial review. Effectively, the Supreme Court of Canada has since been able to modify, and in some cases outright strike down, laws that have been passed by the legislature(s).

While many have objected to this development on the basis that it seems to run counter to the separation of powers principle, it remains a fact that such action is justifiable under the Canadian constitution (Leishman 2003, 73). Rather, the more pertinent issue becomes not one of normative judgment, but of descriptive assessment; namely, whether or not the courts are well-equipped to make effective policy regardless of the contention inherent in their doing so. To this end, the factors that inform the creation of good policy must themselves be considered, so that an analysis may be facilitated with respect to whether the judiciary satisfies such criteria or not. Following such an assessment it begs to be asked whether the present system, with its strong emphasis on judicial review, is misguided in regard to its faith in the courts' policy-making capabilities, or justified in such.

While a great many tend to agree that judicial review is a useful means of eliciting meaning from vague policy, such a recognition does not itself constitute an acquiescence of judicial supremacy over the legislature(s) (MacKay 2001, 37). As a result, the degree to which judicial review should be employed in conjuncture with the legislature(s) in crafting policy must too be considered. Specifically, the manner through which the judiciary and the legislature(s) themselves engage in dialogue must be examined, so as to ascertain whether any particular model of said dialogue proves more favorable in its implications both pragmatically and in principle. This paper will endeavor to examine those factors that have been mentioned in order to holistically assess the judiciary's effectiveness in its role as a policy-maker, and whether or not an alternative means of assessing Charter compliance is subsequently warranted.

In order to properly assess the effectiveness of courts as public policy-makers, the subject of good policy itself must first be elucidated upon. To this end, the subject of such elucidation must first be clearly understood, so as to easily facilitate the essential judgments of virtue that necessarily follow. Accordingly, the breadth of scope inherent in public policy as a concept must be narrowed in some way so as to enable a relatively general description of such to be clearly asserted. For the purposes of this paper, public policy will be examined with respect to its being the operationalization of laws within Canadian society; namely, public policy should be understood as being the means through which government – irrespective of the specific branches defined in the separation of powers – legitimizes its authority to rule through the passing of legally binding doctrine, or the implementation of some plan pursuant to such (Kirby, Kroeker, and Teschke 1978, 408). Integral to this understanding of public policy is its twofold nature; being that it is comprised of both the normative prescription of law in abstract, therefore begging the question

of what ought to be made into law, and the descriptive means through which such law is practically implemented and interpreted, therefore begging the question of what written law effectively is in respect to its interpretation (and how this interpretation should in turn be employed). This duality in nature has allowed for a distinction to be noted in regard to the meritorious judgments made about public policy in general (Kirby, Kroeker, and Teschke 1978, 408). Specifically, the means through which public policy is evaluated can be sorted into two distinguished groups: those that are normative in their nature, and those that are descriptive. Both will be considered to the extent that they have bearing on the matter of courts as effective policy-makers.

The matter of evaluating policy on normative grounds proves to be difficult due to the subjectivity inherent in such judgments. There exists little consensus as to what constitutes an objectively moral law, for the reason being that the concepts fundamental to such are intangible, and wholly abstract in their nature; philosophers and ethicists may debate the merit of laws on these abstract grounds, but their arguments are largely rooted in predilection and political-philosophical orientation, as opposed to empiricism (Leishman 2003, 73). This is not to say that such opinions should not be considered here, but rather that the contention inherent in such numerous evaluations would necessitate an entirely separate essay in order to properly assess their content. For the purposes of this paper, normative judgments of public policy will be considered with only general mention of their content, but with specific attention paid to their structural sentiment; namely, the measure by which policy ought to be considered objectively correct will be addressed, as opposed to the inherent virtues of such policy itself in full.

While the jury is proverbially out on the matter of what particularly constitutes an objectively moral law, notable opinions exist as to how such a matter may be decided upon (Leishman 2003, 73). Primarily, the concept of democracy itself acknowledges the inherent conflict in issues of abstraction, and definitively states that such matters should be resolved through popular vote of some kind; basically, the righteousness of a policy ought to be measured with respect to how many people are in favor of it (Flynn 2011, 237). Conversely, philosophical universalists believe that the righteousness of any law is inherent within it and remains as such regardless of popular opinion (MacKay 2001, 37). This is where the aforementioned matter of contention becomes too broad to consider, given that there exists a plethora of such universalists who prescribe their own rational tests to ascertain the virtue of any given law. In typifying such a demographic, it can be said that regardless of their subjective persuasions they all believe the righteousness of a law to be based on its qualification of some rational criteria as opposed to, say, popular vote (MacKay 2001, 37).

While evaluating policy on normative grounds proves to be - as demonstrated - justifiably difficult, there exists much more consensus when judging laws on a descriptive basis. This proves to be the case due to the element of subjectivity being replaced with one of objective empiricism; regardless of a policy's abstract intent, whether or not it succeeded in its practical purpose can seldom be debated with such zeal as can ideas (Kirby, Kroeker, and Teschke 1978, 411). Within this realm of evaluation, a policy can be considered good (or at least well crafted) if it satisfies such criteria as being cost efficient, or practically employable; for this reason, institutions that prove to be efficient policy-makers draw upon such things as knowledge pertaining to matters of finance, or the machinery of government available to them in their policy-making endeavors, in order to succeed (Kirby, Kroeker, and Teschke 1978, 412). Given that policy obviously has no

effect unless it is actually implemented, knowledge of the means that facilitate such implementation is wholly integral to a policy being descriptively evaluated as good.

In being cognizant of the means through which public policy is properly evaluated, one becomes better equipped to apply such evaluative criteria to the judiciary in their capacity as creators of such policy. In keeping with the structure outlined previously in this piece, the evaluation of courts as policy-makers will be considered with respect to both normative and descriptive judgments. Namely, the normative indicators of a policy's virtue as outlined prior will be applied to the matter of judicial review as a means through which to make policy, so as to qualify on a normative basis the aptitude of courts as policy-makers. Subsequently, the descriptive criteria listed as being sufficient measures of a policy's material integrity will be applied to the context of judicial review as a means through which public policy is produced, so that the aptitude of courts as policy-makers may be evaluated in a tangible sense as well.

With respect to the normative measures of a policy's goodness, the judiciary is seen as being either wholly appropriate, or wholly inappropriate in its role as a policy-making institution (Leishman 2003, 73). Recall that the normative measure for evaluating good policy lies within the apparent appropriateness of its method of being decided upon in the first place; this is to say that democrats – not to be conflated here as being an epithet of the Democratic Party of the United States of America, but rather as a moniker for one who subscribes to democracy in principle – believe a policy ought to be considered good if it is agreed upon by a majority of individuals in a given population. Conversely, universalists subscribe to the belief that any given policy's goodness can only be derived through the use of ethics, or reason (MacKay 2001, 37). Given this, some argue that the judiciary is acting irresponsibly in its creation of policy, due in large part to the reason that judges are not held to an elected mandate, while members of the legislature(s) are (Leishman 2003, 73). Specifically, proponents of democracy argue that judges cannot create good policy due to their not being representative of the majority's opinion; as this proves to be the primary normative criterion for such individuals in evaluating policy, they largely maintain that judges are not good policy-makers on a normative basis (Leishman 2003, 73).

Similarly, universalists have the capacity to individually view courts as being either an excellent or terrible means through which to create policy as well, depending largely on the subjective beliefs of the given individual at hand (MacKay 2001, 37). However, disagreement amongst various universalists as to the role of the judiciary in making policy pertains largely to whatever specific decisions are made by the courts, and less to the processes through which such decisions were reached. Basically, universalists may criticize a court's role in making policy when they dislike a specific ruling (and its implications on policy), but this criticism has more to do with the employment of reason or law by the courts themselves, and not with their capacity to actually affect policy through their rulings (MacKay 2001, 37). This is to say that, from a universalist perspective, if all judges employed reason as they deemed proper, there would be nothing wrong with their making policy, as it would be inherently good. Subsequently, they agree in principle with the notion of judicial review as a policy-making tool on a normative basis (MacKay 2001, 37).

On a descriptive basis however, the matter of judicial capacity to make policy becomes notably less contestable. While judges oftentimes have an extremely sophisticated knowledge

regarding matters of law, this same level of knowledge is not readily apparent in their consideration of factors beyond the legal discipline (Hiebert 2012, 89). This is not to say that it is inconceivable that a given judge possess knowledge of economics, or science, but rather that it cannot be taken for granted that they do in fact possess such knowledge, either. Simply put, while a detached position from which to rule on matters of law is useful insofar as it pertains to matters of law, it does little to aid in the creation of policy which must account for those things that are not abstract or purely legal in their nature (Hiebert 2012, 94). Due to the inability of judges to play an active role in the execution of their policy, and a general lack of expertise in dealing with the machinery of government through which policy is implemented, courts generally are seen as being deficient in satisfying the material criteria deemed as being necessary to formulate sound policy (Hiebert 2004, 1967).

Having considered the applicability of such normative and descriptive criteria (each being necessary to engender good policy in their respective contexts) to the case of judicial review as a policy-making tool, it must be ascertained whether or not the degree to which judicial review is applied in Canada presently is justified through the application of such evidence. As has been the case throughout this paper, such an evaluation will consist of both a normative and descriptive analysis, conducted in succession of one another. Given that such analyses are bound to call into question the proper means through which policy should be produced, the judiciary will be juxtaposed with the legislature(s) in both cases, so that some discernible solution may be derived from the pursuant discourse - and itself in turn made available for examination.

Given the ambiguity inherent in the evaluation of judicial policy-making on normative grounds, the matter as to whether or not such action is justifiable becomes equally difficult to ascertain. However, on a practical basis, common normative arguments can be fielded still to garner the juxtaposition that is necessary to compare the policy-making capabilities of the judiciary to the legislature(s). There exists three primary varieties of normative critique that are frequently levied against courts in their capacity as policy-makers; these regard the undemocratic nature of courts, the subjectivity of their rulings, and the constitutional mandate for them to affect policy whatsoever (MacKay 2001, 37). All three will be considered here, in turn.

First, arguments of a democratic nature will be examined. Simply put – and in line with what has been listed prior in this piece – there exists a belief that the judiciary is an undemocratic institution, unfit to make policy due to its being appointed and not elected (Leishman 2003, 73). Conversely, the legislature in either case is an elected body, and so from a democratic perspective (with respect to the criteria listed earlier), it proves more fitting to make policy than do judges (Leishman 2003, 73). Yet simultaneously, there also exists proponents of judicial policy-making within this same democratic framework. Some maintain, for example, that democracy is a system of governance that relies upon the protection of minority rights in order to function; simply, that democracy is not synonymous with simple majority rule, but rather exists as a paradigm through which voting can only be safely exercised should basic rights be protected regardless of such (MacKay 2001, 37). As a result, judicial review as a policy-making tool is justified under such belief, being necessary to protect minority rights regardless of the majority opinion - and thus facilitating the democratic paradigm's continued existence. Also interesting to note is that the legislature, while being an elected body, does not itself conceive of most of the legislation that it is theoretically tasked with creating. Rather, the largely unelected political executive is responsible

for drafting legislation, which is then passed through the legislature for approval - even then, not all policy must be granted the legislature's approval anyhow (MacKay 2001, 37). So even if one does conceive of democracy as being simple majority rule, the mere dismissal of judicial review does nothing to remedy the legislature's' failure to satisfy this very same normative criterion in either case.

With respect to arguments regarding the subjective nature of judicial rulings, it is commonly maintained that there is no mathematical precision with which judges analyze policy (Leishman 2003, 73). Basically, that even if policy should be subject to review outside of a simple democratic framework, that there is no guarantee that judges will make the correct decision anyhow. This can be evidenced through the simple admittance of fact that judicial rulings are often overturned due to judges utilizing uniform methods to scrutinize law, but in different ways (Leishman 2003, 73). That being said, there exists no guarantee that the legislature(s) would prove more effective in this scenario themselves, being that the issue at hand is not one of the individuals evaluating law, but of the ambiguity of law itself (Hiebert 2012, 95). It should also be mentioned that a great many of the critiques within this section fall under the purview of the universalist position listed prior in this paper; namely, that the criticism begins and ends with the decision itself and not the method through which it was reached (MacKay 2001, 37).

In regard to the constitutionality of the courts' role in policy-making, some maintain that the judiciary has utilized judicial review as a pretense upon which to increase their own power; namely, that they have interpreted their permission to interpret the constitution itself as being justification for their policy-making role, when it may not in actuality have been intended as such (Hiebert 2004, 1967). The problem with this critique has been echoed in the section prior, being that it boils down to a matter of subjective interpretation of the constitution itself. While admittedly heavily influenced by the judiciary, it would be beyond the scope of this paper to fully address such a complex issue here. Rather, this critique illustrates the importance of fairly interpreting the constitution as a means through which to assess all subordinate policy; given this significance, there likely should be some consensus as to how such interpretation is undertaken.

With regard to the descriptive evaluation listed earlier, the matter again becomes more straightforward. The mechanical criteria listed as being necessary to create good policy will be examined with respect to the ways in which both the judiciary and the legislature(s) address them. Quite simply, the consideration of these factors is engendered by knowledge of them in the first place and so the capacity of either institution to possess such knowledge will be examined specifically (Kirby, Kroeker, and Teschke 1978, 412). This renders the matter rather simple, as the probability of the judiciary's collective knowledge on all matters relevant to the practical processes of policy-making exceeding that of the legislatures' is highly unlikely. Through their reciprocal relationship with the civil service, diversity in membership, and through sheer numbers alone, the legislatures prove themselves more informed regarding matters of policy formulation than the judiciary by virtue of their necessarily concerning themselves with more than written law itself (Flynn 2011, 238).

Additionally, while it is true that judges may account for a great many of the things that go into formulating descriptively sound policy in their rulings, there is no guarantee that they will consider them to an extent that is greater than that of the legislature(s) (Hiebert 2012, 97). Simply

put, a judge is no better equipped to assess the practical implications of his/her ruling on the field of, for example, monetary policy than is the collective body of a legislature that has practical experience pertaining to the matter at hand. This is to say that while the courts may be constitutionally permitted to make public policy through their second-order duty to conduct judicial review, it is not then correct to assume that they are well-suited for such a task in turn (Roach 2006, 350). That judges are not required to have extensive knowledge of economics, social science, medicine, or any other such field, serves to demonstrate that they cannot possibly satisfy the mechanical criteria necessary to make good public policy**,** especially when compared to a legislature that is largely composed of individuals hailing from multivariate vocational backgrounds (Hiebert 2012, 97).

In directly applying these evaluative criteria to both institutions of policy-making as they currently exist in Canada, two things become readily apparent. First, as a matter of normative principle, the judiciary is no more qualified than the legislature is to make policy; the inverse holds to be true as well. Secondly, in a practical sense, it is ignorant to assume that a small panel of judges can realistically possess the vast amounts of knowledge which are necessary to produce good public policy. Having arrived at such a conclusion, it must be considered whether or not an alternative system would engender better public policy. With respect to what has here been written of, a coordinate (or cooperative) model between the judiciary and the legislature(s) appears to be the most beneficial (Hiebert 2004, 1966).

Where a coordinate model is meant to be a system wherein judges retain their ability to review policy, but do so with respect to the legislatures' own interpretations, it proves superior to simple judicial supremacy (Hiebert 2004, 1967). Such a model proves favorable due to it necessitating that all policy be interpreted in light of *the Charter* before being passed; it no longer remains sufficient to view such action as being the sole venture of the courts (Hiebert 2012, 98). Perhaps most importantly, it addresses a significant discrepancy of value in the current model, being that legislators are currently viewed as being responsible for creating policy, whereas judges are viewed as discerning its righteousness (Hiebert 2012, 104). Simply, the proposal of a legislature in creating policy is seen as just that; a proposal. As such, the opinions of legislators are largely devalued when compared to those of judges, who are often assumed to be the progenitors of objectivity itself, and not merely informed opinion (Leishman 2003, 73). Setting the standard that the judiciary is to defer to the legislature(s) where appropriate would do much to remedy this issue, and ensure the creation of better public policy (Hiebert 2004, 1972).

Of course, such a thing is easier said than it is done. If this paper should assert any sort of recommendation, it would be that some convention be agreed upon so that a working coordinate model may be recognized in Canada; given the variability inherent in matters pertaining more to either the courts or the legislatures in capricious contexts, constitutional convention may serve to be the best means through which to approach such an issue in the future (Hiebert 2004, 1976). As has been expressed throughout this piece, courts alone do not make for peerless policy-makers; but in tandem with a mutually respected legislature, policy is bound to be crafted and honed with more care than if either institution were to be solely responsible for its formation at the expense of the other.

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