An Argument for Policy-Making

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Abstract

This paper was originally written for Dr. Clare McGovern's Political Science 151 course *Law and Justice*. The assignment asked students to argue for either the adjudicative or policy-making model in the Canadian judicial system, while referencing the 2024 R. *v.* Bykovets case. The paper uses APA citation style.

There has been much debate in recent years over how much influence the judicial system should have on Canadian policy. Those who subscribe to the philosophy of the adjudicative model believe that it should limited, as opposed to the policy-making model which states that judges should have greater influence. In this paper, I will be arguing in favour of the policy-making framework with the perspective that Canada is a malleable and evolving society. I will be reviewing the BC's 2011 Insite Case, R. v. Bykovets 2024, Justice Rosalie Abella's writings on judicial influence and the Charter, and Emma Cunliffe's reflections on expert testimony and scientific evidence. While there are indeed drawbacks, the positive aspects of policy-making far outweigh the negative.

Introduction

According to Canadian Supreme Court Justice, Rosalie Abella, "judges have always been involved with public policy" (1989, p. 1022). This came as a response to the institution of the Canadian Charter and the concerns raised regarding the Supreme Court's influence on policy; a topic still frequently debated today. In March of 2024, this was once again at the forefront, when the Supreme Court of Canada was split in its judgement of R v. Bykovets, the majority and dissent clearly illustrating the difference between Paul Weiler's two models of judicial decision making: adjudication and policy-making. Though many argue that the powers of the judicial and legislative bodies should be clearly defined and separated, as in the adjudicative model, I believe that the policy-making model is necessary for a judicial system in a dynamic and evolving Canadian society. In this essay, I will support my argument by exploring the 2011 Insite case, R v Bykovets, while also addressing some of the drawbacks of policy-making.

Analysis

To begin with, I will differentiate between the models in question. In his reflection of judicial philosophy, Paul Weiler coined two opposing frameworks: adjudication and policy-making. Adjudication posits the role of the judge as the "adjudicator of specific, concrete disputes, who disposes of the problems within the latter by elaborating and applying a legal regime to facts" (Weiler, 1968, p. 100). It is the traditional model and is concerned with legal facts and precedents to form judgements. In contrast, the policy-making model states that "judges make policy, or legislate, through essentially the same mode of reasoning as other actors in the governmental system" (pp. 103-104). Those who follow this model advocate for the inclusion of information outside of the legal world, such as scientific evidence and current social climate, to aid in ruling. Understanding these two models is essential to navigating the debate between them.

Vancouver readers will find the 2011 Canada (Attorney General) v. PHS Community Services Society case a particularly interesting example of the courts using a policy-making perspective. To briefly summarize, the Insite project was a reaction to B.C. 's drug crisis. Supervised injection sites were created and granted an exemption on the prohibition of possession and trafficking of controlled substances under s. 56 of the Controlled Drugs and Substances Act by the Minister of Health. However, the Minster did not approve of the request for an extension of this exemption, prompting extensive legal action and a Supreme Court case in which the entire court ruled in favour of Insite, forcing the Minister to comply (*Canada (Attorney General) vs. PHS Community Services Society*, 2011, pp. 4-6). At the crux of the argument was s. 7 of the charter granting the right of life, liberty, and security of person. The Supreme Court stated that it was the denial of an exemption that infringed s. 7. In their ruling, the Supreme Court cited scientific evidence about Insite's impact. They found that it "prevented overdose deaths and risky injection practices without increasing public disorder" and that the negative effects on drug users would be "grossly disproportionate" to the benefits of having a united stance on narcotics across Canada (Hyshka et al. 2013, p. 471). They considered that Insite was "associated with reductions in public disorder (public injecting and injection-related litter) and increased uptake into detoxification and addiction treatment" (p. 470). This case clearly demonstrates why policy-making is important to a judicial system that protects Canadians. In their ruling, the court reaffirmed the importance of science and addressing societal problems over strict laws.

R v. Bykovets is also a useful case when discussing Weiler's models in the context of technological innovation, by providing distinct arguments within both frameworks. The issue lay in whether IP addresses were protected by s. 8 of the Charter, which grants freedom from unreasonable search and seizure. The case came as an appeal from Andrei Bykovets, who challenged police access to his IP address, revealing his Internet Service Provider (ISP), and, subsequently, evidence of fraudulent online purchases. What ensued was discourse over what constituted the "search" (*R v Bykovets*, 2024, pp. 4-5). The dissent argued that the subject matter, or intended object, of the "search" was the IP address itself. IP addresses are not private, as they can be found by anyone and one's ISP can change them at any time. Hence, they would not be protected under s. 8 (p. 12). However in the eyes of the majority, the subject matter was not only the IP address, but also the information that it could reveal. They viewed the IP address as a gateway to the intimate details of a person's lifestyle and choices that s. 8 is designed to keep private (pp. 7-8). With this in mind, the majority ruled that IP addresses should be protected. The majority saw a gap in Canadian law due to technological advancement, and sought to clarify a question that would affect all Canadians, displaying a policy-making perspective. In comparison, the dissent followed more the adjudicative model, dismissing the majority's arguments as "answer[ing] a question that [was] not asked… in order to address a social problem that [was] not in issue here" (p. 82). While there was much disagreement, I believe that a policy-making perspective was appropriate for this case due to the technological aspects and the apparent blind spot in Canadian law. Especially in a time when artificial intelligence is developing rapidly, and technology is integral to our day-to-day lives, it is imperative that the courts are able to react and change along with the rest of society.

Central objections to the policy-making model are the effects on their neutrality and the perceived diminishing of the legislature's power: "since the adoption of the Charter of Rights and Freedoms in 1982, the Supreme Court justices had been even more activist in their interpretations of it than was originally expected" (Songer & Johnson, 2007, p. 389). Having said that, the judicial relationship to law can never be completely free of politics. The very way in which the court interprets and applies laws conveys a specific understanding of them. Justice Rosalie Abella, in response to concerns about the Charter, once asked, "Do not the areas of family law… sentencing, damages in tort, contractual interpretation, and the entire history of common law represent processes whereby judges evaluated which values or policies ought to be operational?" (1989, p.

1026). True neutrality does not exist. Judges are people with preconceived notions and opinions. Since most cases are ones where either side could be justified legally, their decisions are dependent on individual values (p. 1027). Lastly, particularly with regards to the Charter, the judicial system does take some power away from the legislature, but not arbitrarily. Judicial decisions have always reflected the values of their time, and with the Charter, this includes certain concepts about human rights (p. 1032). The policy-making model does not hugely alter the traditional role of judges.

Finally, a more pressing concern surrounding policy-making is the nature of scientific evidence and expert testimony. In her article, Emma Cunliffe discusses how racial biases can inadvertently be perpetuated in technology, as well as the fact that technology is not always reliable (2020, pp. 369-370). Judges generally do not have specialized knowledge of science and technology. While this kind of evidence is important to many cases, it must be ensured that the evidence permitted in court is in fact reliable since "in the absence of information to the contrary, courts tend to presume that such specialist knowledge is neutral, well-grounded in research, and suitable for judicial purposes" (p. 387). With this in mind, the policy-making perspective, while useful, must also be wary of the validity of the outside information it advocates for.

Conclusion

To conclude, policy-making is vital to a judicial system within an ever-changing society. In this essay I discussed how Canada (Attorney General) v. PHS Community Services Society and R v. Bykovets demonstrate the importance of adaptability, while also addressing some of the issues associated with the model. Society is not static, and our judicial system should not be either. All in all, when considering Paul Weiler's models of judicial decision-making, the Supreme Court of Canada should primarily use the policy-making model.

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