Judicial Review

In Canada, as well as in many other constitutional democracies, there are two types of 'judicial review' – judicial review on administrative acts, and judicial review on the constitutionality of legislation. Both types of 'judicial review' are based on the idea of the rule of law. This idea means that not only citizens, but also governments' officials, are subject to the law. If these officials do something that the law does not allow them to do, the courts are allowed to nullify their actions.

The first type of 'judicial review' involves the actions of the executive branch of government. In the modern state it is impossible for the legislature to address every administrative decision (such as the decision to issue or to refuse to issue a business license), therefore, many statutes endow various governmental authorities with administrative powers. If a person believes that a certain governmental authority has exercised its power in an arbitrary, discriminatory, or otherwise unreasonable way, she can file a suit in a court of law and ask for 'judicial review', that is, to ask that the court review the administrative decision. If the court finds in favour of the plaintiff, it can annul the administrative decision.

The other type of 'judicial review' does not involve the actions of the executive branch, but rather the actions of the legislative branch. S. 52 of the *Constitution Act, 1982* provides that "the Constitution of Canada is the supreme law of Canada". S. 24 of the same Act guarantees the right for individuals to challenge legislation which does not conform with the Constitution thereby giving Canadian courts the power to engage in 'judicial review' on the constitutionality of legislation. The purpose of this type of 'judicial review', also referred to as "constitutional review", is to ensure that legislation conforms to the Constitution of Canada. The Constitution regulates two different areas – the division of powers between the federal and provincial government, and the rights guaranteed to every Canadian against both levels of government. Consequently, there are two ways in which an act of a legislature or of Parliament might be unconstitutional. First, when the act is enacted by a provincial government while the relevant subject matter of the act is under Federal jurisdiction (or vice versa) (see division of powers). Second, when this act violates the *Charter of Rights and Freedoms*.

When a court strikes down legislation on division of powers grounds, it does not mean that the content of law itself violates the constitution. Rather, it means that the institution which enacted the law (a provincial legislature or Parliament) violated the Constitution. Consequently, if there is a strong public interest in enacting this legislation, the appropriate institution can enact this act. Conversely, when a court strikes down legislation on *Charter* grounds, it means that the content of the law violates the Constitution, and no legislature could properly enact this law. For this reason, 'judicial review' on *Charter* issues is often criticized as illegitimate since it gives to the judiciary the power to block important legislative initiatives.

The obvious response to this criticism is that when the courts nullify legislation that violates

the Constitution, it enforces this document, not the judicial will. An objection to this response is that the language of the*Charter* is very open-textured, and refers to abstract concepts such as “freedom of expression”. People could reasonably disagree about the meaning of such concepts, and therefore courts would not really enforce “the *Charter*”. Rather, they impose their own subjective reading of the ambiguous language of the*Charter*. Since judges are not democratically elected, and cannot be replaced in office by the public will, their own view of the *Charter of Rights and Freedoms* has no legitimacy.

The question pertaining to the legitimacy of constitutional review is poignant for every constitutional democracy and is not unique to Canada. It has been the subject of a vast body of literature in the past century. The two most common responses to this question are as follows. First, precisely because the Constitution’s language is ambiguous, it needs interpretation by an authoritative institution. For the reason that part of the purpose of the *Charter*, indeed of the entire Constitution, is to protect minority groups and individuals, it should not be enforced and interpreted by majoritarian institutions such as the legislature. Judges are not elected and are not accountable, and therefore they are best capable of interpreting the constitution in a way that will protect minorities.

Second, while courts have the power to strike down legislation based on their reading of the constitution, in reality judicial decisions are not final, and legislatures have their ways to respond to a judicial decision with which they do not agree. The constitutional mechanisms for such legislative action are judicial appointments, constitutional amendments, and in Canada, the use of thenotwithstanding clause.