Osgoode Hall Law Journal

Volume 49, Number 2 (Fall 2011)

Article 13

Book Notes: Against Judicial Activism: The Decline of Freedom and Democracy in Canada, by Rory Leishman

Lara Kinkartz

Book Note

Book Note

AGAINST JUDICIAL ACTIVISM: THE DECLINE OF FREEDOM AND DEMOCRACY IN CANADA, by Rory Leishman[1]

LARA KINKARTZ

AGAINST JUDICIAL ACTIVISM PRESENTS a scathing critique of judicial decisions under the *Canadian Charter of Rights and Freedoms*.[2] Rory Leishman argues that judges and members of human rights tribunals have embraced the *Charter* as an excuse for imposing their individual views on Canadians. Throughout his book, the author asserts that far from protecting democracy, human rights, and civil liberties, the *Charter* has threatened these ideals by opening the door to rampant judicial activism and subordinating the will of elected legislators.

The book opens with a discussion of the relationship between the rule of law and judicial activism. The author argues that by ignoring the plain language of the law, judicial activism unjustifiably usurps the role of legislatures, thereby introducing uncertainty and instability to the law.[3] The *Charter* poses unique challenges for judicial interpretation precisely because it uses broad and general language; however, Leishman argues that this language should not be used to grant rights that legislatures have not specifically authorized. Throughout the rest of the book, he examines specific circumstances in which the courts have recognized new rights, often in cases where the legislatures have intentionally declined to extend protection to the rights in question. He argues that these instances of judicial law making are inherently undemocratic because unelected judges are overriding the express intention of Canadians' elected representatives.

Decisions involving minority rights have often been controversial in Canada, and judicial law making in this area has had profound implications across the country. As an example, Leishman examines the role judges and tribunals

---

1. (Montreal: McGill-Queen's University Press, 2006).
2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
3. *Supra* note 1 at 19-46.

have played in creating rights for sexual minorities. From a human rights perspective, these judicially-created rights are laudable; indeed, many (if not most) Canadians likely approve of these decisions. However, Leishman's work is a reminder that these decisions have consequences beyond the realm of human rights. Indeed, these judicially-created rights (as Leishman characterizes them) have fundamental implications for Canadian democracy: they are indicative of the judiciary's willingness to make and modify laws in the post-*Charter* era.

To examine these democratic implications, the book canvasses a series of decisions in which minority rights came into direct conflict with freedom of religion and freedom of expression. Balancing competing rights is arguably one of the most delicate tasks a judge must perform, and Leishman probes the difficulties that arise when traditionally protected religion and speech rights come into conflict with new judicially-created protections for minority rights. Leishman questions whether it is legitimate to subordinate legislated rights to judicially-created rights—particularly since the role of judges is "to interpret law, and not to make law, or give law."[4]

This conflict between legal interpretation and law making culminates in an examination of the separation of powers in the book's final chapter. Leishman contends that the *Charter* has blurred the line between legal interpretation and law making. According to him, the *Charter*'s broad language has meant that judicial interpretation of the law has often had the effect of creating new laws. Based on this assessment, Leishman asserts that Parliament and provincial legislatures have been held hostage by these judicial interpretations and that they have been forced to bow to the will of the courts. He cautions that "[n]ow that the policy of the federal and provincial governments upon vital questions is routinely fixed by the Supreme Court, we, the Canadian people, must candidly confess that we have ceased to be our own rulers."[5]

As a journalist and former political science lecturer, the author's colourful style is a clear product of his background. Leishman presents his arguments in a direct manner, although some readers may be taken aback by his blunt delivery. He does not hold back with his trenchant criticism of judicial activism, even going so far as to remark of one eminent former Supreme Court justice that "[t]ruly, nothing in his career as a judge became him like the leaving of it."[6] Whether one agrees with his position or not, Leishman's controversial examination of the broader implications of post-*Charter* judicial activism is an interesting read for anyone interested in human rights and civil liberties.

4. *Ibid* at 3.
5. *Ibid* at 272.
6. *Ibid* at 151.