

Book Reviews/Comptes rendus

RORY LEISHMAN, *Against Judicial Activism: The Decline of Freedom and Democracy in Canada*. Montreal and Kingston: McGill Queen's University Press, 2005, ix + 310 p., index.

This book is a polemic against judicial activism in Canada. It takes aim at judicial decisions said to represent a new era of activism ushered in by the entrenchment of the Charter of Rights and Freedoms in 1982 and further reflected in the expansion of the scope of federal and provincial human rights tribunals over the past two decades. The book's main theme is that human rights tribunals and the Supreme Court of Canada have circumvented the democratic process, restricted freedoms and, specifically where the Court is concerned, begun to actively revise and update the law via value-laden interpretation. The book's jacket, for example, warns that "the proclivity of judges and adjudicators to affect [*sic*] change from the bench compromises the rule of law." Leishman asserts that before the Charter era, other than rulings on federal and provincial jurisdictional clashes, "Canadian judges almost always exercised judicial restraint" (23).

Leishman illustrates this "activist" tendency and its deleterious effects via accounts of the details and effects of decisions of human rights tribunals and the Supreme Court of Canada. The former decisions include *Nixon v. Rape Relief Society*, 2002 BCHRT, that involved a rape crisis centre's refusal to accept a transsexual person as a volunteer counsellor, which led to a requirement to hire the person and pay a \$10,000 fine, as well as cases involving mayors of London and Kelowna in their refusal to make gay pride proclamations. The Supreme Court decisions detailed include *Vriend v. Alberta*, 1998 SCC and *Singh v. The Queen*, 1985 SCC. In the former, D. Vriend, who was fired by a Christian college, was prevented from using the Alberta Human Rights Commission to question his firing because gays were not included as a protected group. The Supreme Court later "read in" such protection into Alberta's human rights legislation. In *Singh*, the Supreme Court ruled that the Charter applied to everyone on Canadian soil including refugee claimants, who from then on were to be entitled to an oral hearing of their claims.

This book is well-written, provocative, and up to date, just as a polemic ought to be. There are, however, several problems with its main argument. Leishman is too selective in the human rights and Supreme Court decisions that he examines to make his case against judicial activism and the corresponding need to return to an era of judicial "restraint." While he notes that one of the Court's "rare right-wing" (8) decisions was *Chaoulli*

v. *Quebec (Attorney General)*, 2005 SCC 35, which rendered private health insurance legal in Quebec, little is said about similar decisions in the book that actually are not “rare.” Largely ignored, for example, are early Court decisions concerning an attempt by the peace movement to stop cruise missile testing in Canadian airspace (*Operation Dismantle v. The Queen*, 1985, SCC.) and several decisions which were setbacks to organized labour. Similarly, the Saskatchewan government’s decision to use the infamous notwithstanding clause to buttress back-to-work legislation in 1984 receives nary two lines of commentary since, according to Leishman, it was “properly invoked.” Given these and other omissions, the book’s target begins to appear not so much as judicial activism as decisions that lead to changes in existing legislation or policy that are at odds with the author’s conservative outlook. The familiar and predictable issues of Canada’s Right, namely issues centred on gay and lesbian “lifestyles” and, to a lesser extent, the availability of abortion, the ease of gaining immigration status via the refugee process, and the increased rights of those accused of criminal offences, are placed front and centre in this book. With few exceptions, conspicuous by their absence are those decisions, undoubtedly also resulting from judges’ activism, which have resulted in changes that fit a conservative ideology. Much of the book, for example, is devoted to criticizing judicial activism’s effect of increased rights for gays and lesbians, supposedly at the cost of freedom of expression and religion, especially of avowed Christians.

There are other weaknesses. The repeated claim that human rights tribunals ultimately possess coercive power to jail (12, 14, 70) those who are non-compliant with rulings is overstated, since most rulings described involve but a few thousand dollars and there is no certainty that jail will result from non-payment. The book’s subtitle is “the decline of freedom and democracy.” Freedom is viewed narrowly as freedom of expression (usually for Christians) and association rather than more broadly as freedom from want or poverty. Leishman similarly equates democracy with Canada’s current antiquated system of representative democracy as the ideal with which to blithely contrast judicial activism of “unelected and unaccountable judges” (9). To do so is to disregard much recent public debate in Canada and in other Western nations about the need for proportional representation, campaign financing reform, and increased citizen participation in policy formulation, all of which call into question the legitimacy of the current system. It is also well known that in the current system, federal Deputy Ministers – powerful senior bureaucrats who often stay in positions for years while their political masters come and go with regularity – exercise more influence on policy and are more unaccountable than Supreme Court judges. The assumption that Canadian democracy was in fine shape prior to the Charter is, at best, nostalgic wishful thinking, and, at worst, mistaken. As well, it should be noted that when the Supreme Court of Canada is put into the position of having to respond to policy-oriented questions, the examination that follows is far less broad and more issue-specific than policy formulation and reviews normally carried out by provincial and federal legislatures and their bureaucracies.

Furthermore, Leishman neglects to mention that through regular administrative review, the courts, including the Supreme Court, have influenced policy since before the 20th Century. Leishman's claims about the undemocratic nature of decisions of human rights tribunals are equally problematic. If the provincial legislatures and federal parliament are as democratic as he suggests, and are the proper place for deliberation of public policy, would the tribunals as creatures of both not also be legitimate on this score? In other words, are Parliament and legislatures democratic ideals or not? Along the same lines, at times Leishman's criticisms seem directed at (not quite Right-wing enough) democratically-elected governments such as the "Chretien government that capitulated to the courts" (7), thus implying not that the legislative branch no longer possesses power in the new activist era – that its power has been "usurped" by judges – but that they have not exercised this power in the (i.e., Leishman's) preferred direction. Moreover, the book's argument is dependent on the related dubious assumption that Parliament and provincial legislatures do not operate with the Charter and its potential for a narrow activism in mind. It presumes that legislation is *not* written with full knowledge of the likelihood of Charter challenges but, in the interim, is used for a designed political purpose while allowing responsibility to be cleverly shifted to the courts when the time is right.

Perhaps the single most significant deficiency of the book is its failure to convincingly show that the state of the Canadian judiciary prior to the Charter era was one of "restraint" in order to justify a claim of "decline" resulting from judicial activism in the first place. To be sure, select cases are mentioned to illustrate judicial restraint, several scholars are quoted, and, drawing on others' scholarly research to support the claim of activism, it is noted that only one of the thirty cases relevant to the 1969 Canadian Bill of Rights led to a provision in federal legislation being struck down (269). But this is hardly solid evidence of an entire era of restraint spanning more than a hundred years, evidence on which the book's argument greatly depends. Indeed, since introduction of the Charter, observers would be struck not by how *many* but how *few* significant decisions the Court has rendered. Leave to appeal, it might be noted, is regularly denied. Thus the Court clearly has not been as "active" as it might, which raises the question: why not? Drawing support or quotations from neo-liberals and conservatives such as von Hayek (27) and Thomas Sowell (118) or writing at length about supposed linkages among gay men's sexual behaviour, alleged illicit drug use, and purported increases in cases of AIDS (190) are poor replacements for original empirical research and nuanced theorizing that might provide an answer.

This book is the latest in a growing number of works critical of the post-Charter legal landscape in Canada. Usually written by legal scholars from across the political spectrum, these books include, from the Left, Michael Mandel's *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing Inc.), first published in 1989; and from the Right, Robert Martin's (2003) *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined Our Law and Our Democracy* (McGill-Queen's University Press). Leishman, a journalist by trade, adopts

themes and an ideological outlook more similar to the latter book than any other. While Mandel's earlier argument about the "legalization of politics" may have been problematic, he at least drew on theory – a variant of Marxism – to postulate why this apparent change had occurred by linking it to the onset of Late Capitalism. In contrast, Leishman leaves readers wondering why this sudden shift to activism, if this era can be fairly characterized as such, has taken place. Blaming the tendencies of *individual* judges and the reticent politicians who fail to confront them will not, of course, satisfy sociologists and socio-legal scholars as explanations. Indeed, it is especially for this reason that this book will likely be of little interest to such scholars.

Randy Lippert, *University of Windsor*.

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