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Review of:
Joshua Rozenberg
Enemies of the People?: How Judges Shape Society
(Bristol: Bristol University Press, 2020)

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The title of this book is not an effort at raw sensationalism, nor an effort at achieving commercial success for Bristol University Press. The expression "Enemies of the People" is drawn from a November 4, 2016 headline in the *London Daily Mail*. The previous day, the High Court (equivalent to the Superior Court of Justice / Cour Supérieure / Court of (then Queen's, now King's) Bench, depending on the province, had issued a judgment which said that the result of the Brexit referendum was, by itself, not sufficient to take Britain out of the European Union. Rather, Parliamentary approval would be required to trigger Article 50 of the *Treaty on European Union*, engaging a legal process aiming to achieve the desired end. This now infamous headline of "Enemies of the People" was the reaction of a part of the media to the High Court judgment. It demonstrates the profound ignorance of the law itself, indeed of the role of law, among some members of the media and indeed among large segments of the population. It is also a sign that those same, unknowing, members of the media, are willing to use either their lack of knowledge or their deliberate obfuscation, to sow further confusion among the citizenry. For students of parliamentary and political law espousing any political world-view, and more broadly for members of the citizenry avid for a correct vision of the political-legal-judicial aspects of society, this book comes close to being indispensable. Indeed, it should be considered as a suitable companion piece to Lord Bingham's *The Rule of Law*.[1]

Analysis of the relationship between statute law and common law in the English (British) legal system, and more broadly, analysis of the relationship between legality and politics is a notoriously difficult and subtle exercise. Hence proper, meaning systematic and non-partisan, examination of the role of judges in the modern British system of government is vital. Joshua Rozenberg, best-known to North American audiences as a once longtime legal reporter for the BBC, brings to this exercise both a sharp mind and encyclopedic knowledge of the subject matter. This book may not be destined for all citizens, but those with an interest in the evolution of society will find it particularly interesting and worthwhile.

The best summary way to review this book is to first enumerate the major lessons learned from it.

- In the British constitutional system, Parliament is sovereign. It alone enacts statute law.
- The doctrine of the separation of powers applies. This means that courts should not exercise legislative power in the place of Parliament. To do so is not constitutionally proper.
- The principle of legality is a restriction on parliamentary sovereignty, which requires that fundamental rights cannot be overridden by ambiguous words in statute law.

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[1] https://www.penguin.co.uk/books/56375/the-rule-of-law-by-tom-bingham/9780141034539
https://www.amazon.ca/Rule-Law-Tom-Bingham-ebook/dp/B0057WLMTY

- In this regime of separation of powers, the role of judges is to adjudicate legal disputes. The body of judicial decisions so rendered over centuries is the common law. Along with statute law, common law forms part of the legal system. In most instances, common law follows precedent; in some circumstances, instead of saying what the law is, since 1966, courts may engage prospectively to indicate what it ought to be.
- Judges do not seek out the cases on which they make decisions. Controversies, indeed societal conflicts, are brought before them by litigants. On occasion, such matters comport political issues of the highest order.
- Judges are not free to decline to deal with the cases brought before them.
- Judges decide cases by looking at the law and applying it to factual circumstances. Here, the "law" should be understood to include both statute and common law. The actual basis on which judges decide cases is on their interpretation of the law, as it applies to their reading of the facts.
- Judges do not decide cases on the basis of personal opinion. The imposition of personal opinion lacks all constitutional legitimacy.[2]
- Judges decide cases even less on the basis of their agreement or disagreement with the government in office at the times of the hearing and of the ruling. In the Canadian context, borrowing the phrase sanctified in the *Canada Elections Act*, judges thus do not "support or oppose" the government of the day through their rulings.
- There are two relatively recent developments regarding judicial decision-making.
    - The first is the evolution of judicial review: judges took steps to ensure that ministers who were granted law-making responsibilities by Parliament kept within the powers so given. In 1977, the remedies aiming to accomplish this were unified into what is now comprehensively called judicial review.
    - In 2000, the *Human Rights Act* came into effect. This made it possible for British courts to ensure that public authorities comply with rights guaranteed by the *European Convention on Human Rights*.
- Judges are conscious of the influence and impact of their rulings on public policy. Where this occurs, it is with the aim of advancing the law, not public policy and certainly not the political success or failure of the government of the day.
- Those who believe that judges insert their personal political views, or use the occasion of a judgment to further a political outcome rather than to interpret the law simply do not understand how British democracy and the rule of law function. This may not be the reality in other democracies and in other circumstances.

Two comparisons are necessary for North American readers. First, the foregoing realities are explained here in the context of the public life of the UK, but they apply very similarly to Canada. Moreover, circumstances are, or at least can be, different in the judiciary of the United States, where the framework specifically renders constitutional review possible.

For this reviewer, the most interesting and instructive parts of the book are the introduction to the topic *New Readers Start Here* and chapter 2 *The Miller Tale*, read together with the concluding chapter entitled *Friends, Actually* in which the author comprehensively sets out his view on judicial power and looks at the variety of professional opinions among judges.

[2] A phrase borrowed from *R (Nicholson) v. Ministry of Justice* [2014] UKSC 38, cited at page 96

New Readers Start Here is a general introduction to the British legal system as the original common law jurisdiction and a discussion of the role judges play in it, within the context of the law-politics relationship in England. Lawyers from other common law jurisdictions are brought up to date with reminders of recent British legal history.

Chapter 2, *The Miller Tale*, offers not only the most intricate saga of highest-level decision-making in a democratic state but is also the core of Rozenberg's argumentation. Miller 1[3] dealt with the issue of whether, in 2016 and following the vote in the Brexit referendum, based on the *European Communities Act of 1972*, Brexit required the involvement of Parliament. It was the decision in this case that gave rise to the infamous headline about judges as enemies of the people. Miller 2[4] focused on whether, in 2019, a five-week prorogation of Parliament at a time when the UK's withdrawal agreement from the EU was being negotiated, was constitutionally valid. In this treatment of the Miller cases, the issue at hand is not the legal correctness of either of the decisions, but the question of whether it was legitimate for the High Court and the Supreme Court to adjudicate on these matters.

The title of *The Miller Tale* may be intended as an allusion to the relationship of reality to perception, drawing on Chaucer's *The Miller's Tale*. The current-day saga, however, leaves no room for doubt. Those who believe, or pretend to believe, that judges insert their personal political views into such fundamental judgments, or use the occasion of rendering judgments to support a political faction or opinion, rather than interpreting the law, just do not understand how democracy, the democratic system of governing involving three branches of government, and especially the role of law, work. In this connection, it bears mention that the phrase quite often used in such contexts, namely "unelected judges", as if only elected officials of the state could legitimately be involved in public decision-making, is myopic.

In this connection, Rozenberg cites from a July 29 speech by then Attorney General David Gauke to underscore the point.

> Those grappling with complex problems are not viewed as public servants but as engaged in a conspiracy to seek to frustrate the will of the public. They are "enemies of the people". In deploying this sort of language, we go to war with truth; we pour poison into our national conversation……
> We must all have the courage to disagree on the facts and the good sense to appreciate that language can have powerful effects. That is why I deprecate the careless use of language which can undermine our admired and renowned institutions.[5]

The moral of this *Miller Tale* is that judicial review is not a self-arrogated power intruding on the work of politicians, but rather an integral part of the comprehensive fabric and work of democracy. It bears repetition that an independent judiciary is a function necessary for democracy to exist.

Chapter 10, entitled *Friends, Actually*, offers the writer's perspective on judicial decision-making and power as if it were from inside the judiciary, using judges' own thoughts. This starts with a most appropriate quote from Lord Burnett of Maldon, lord chief justice of England since 2017.

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[3] *R (Miller) v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); November 3, 2016

[4] *R (Miller) v. Prime Minister* [2019] EWHC 2381 QB; *R (Miller); Cherry v. Advocate General* [2019] UKSC 41; September 24, 2019

[5] P. 35

> All judges called on to decide cases that occupy the intersection between judicial power and that of parliament and the executive must work out for themselves where in the spectrum of judicial activism they lie.[6]

What is most important to understand in choosing a position on this spectrum is that wherever one determines one's position to be, judicial review is in fact not, and should not be thought of as being, politics by other means. Much of this reality emerges from the fact that whatever decision judges having to engage in judicial decision-making come to, they are not making it up, as if on the basis of their personal views or opinions. They are building on centuries of legal learning. This brings us to the ultimate response to the "Enemies of the People" headline, one that comes from inside the judiciary.

> The objection to judicial interference in politics is that it undermines the democratic legitimacy of public decision-making. The problem that we have here is that the government itself has sought to undermine the democratic legitimacy of public decision making by dispensing with a central feature of our constitution: that ministers are answerable to parliament. What the Supreme Court has done is to invent a brand-new…. constitutional rule, the effect of which is to reinstate parliament at the heart of the decision-making process. This is not undermining democracy at all; nor is it a coup. It is simply replacing what ought to have happened [through constitutional] convention by law – in circumstances where the government has tried to kick away the conventions.[7]

Between the introduction and the conclusion which focus on the two Miller cases, the infamous headline and Rozenberg's response to it, chapters 2 through 9 deal with the work of judges in a variety of specific domains of law: crime, family relations, the right to death, discrimination, religion, privacy, and access to justice. Each chapter illustrates how judges have advanced the law and influenced public life without engaging in politics. In all of these domains, the importance of the lessons of this book comes through in a warning that the author summarizes in a single sentence: "If the public really believes that judges are enemies of the people, democracy itself will come under threat."[8]

There is in this book one sidebar of particular note for Canadian readers. Our law schools tend to treat the issue of whether women are "persons" as having been dealt with only once, by the Judicial Committee of the Privy Council, in 1929, on appeal from the Supreme Court of Canada.[9] It is in the context of the relationship between common law and statute that this issue of "personhood" arises in this book. Canadian lawyers will be interested in being reminded of a 1908 case[10], in which the law lords had held that for purposes of voting, the *Representation of the People (Scotland) Act 1868* excluded women. Without judicial involvement in the development of public life, the principle underlying that ruling might have held back the Privy Council some two decades later.

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[6] P. 168
[7] Pages 187-188
[8] P. 96
[9] Edwards v. AG Canada [1930] AC 124.
[10] Nairn v. University of St.-Andrews [1909] AC 147.