Just Words: Constitutional Rights and Social Wrongs

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Just Words: Constitutional Rights and Social Wrongs, by Joel Bakan.

JOEL BAKAN of the Faculty of Law, University of British Columbia, is one of the more sophisticated and respected members of a group of academics sometimes described as Charter¹ skeptics (as differentiated from Charter romantics, to which group the writer of this review is said to belong). Bakan’s reservations about the Charter (essentially criticisms from the left end of the political and philosophical spectrum) associate him with other “crits” such as Andrew Petter, Judy Fudge, Harry Glasbeek, Michael Mandel, and many others,² all of whom share his view that, for a variety of reasons having to do with the inherent limits of legal discourse as compared with political action in effecting a progressive transformation of society (limits rooted in the class nature of society and the consequent conservative nature of its institutions, including the judiciary), the Charter is “just words.”

Thus Bakan writes,

The Charter ... cannot protect and advance a progressive conception of social justice despite its just words; it cannot compensate for the systematic undermining of ideals of social justice by the routine operation of society’s structures and institutions. That is this book’s central argument.³ [Emphasis added.]

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³ J. Bakan, Just Words (Toronto: University of Toronto Press, 1997) at 11.
And, indeed, it is the book's central argument. But, it seems to me, it is an argument which is both repetitive (of his own previous writings about the Charter as well as that of other "left crits") and, despite an interesting but, in my view, failed attempt to give the same old arguments a novel jurisprudential spin, ultimately both defeatist and lacking in balance.

The Charter was never intended to be either a social Charter (as some would have it or like it to be) or a manifesto for a left-oriented social transformation project, the need for which I do not doubt. How could it otherwise be? The Charter was fashioned, essentially, by the political leaders of the establishment, some of whom were basically antipathetic to the very notion of a constitutional bill of rights, even one limited to the protection of individual rights, an antipathy (to the constitutionalisation of individual rights) echoed and re-echoed by the "left crits" in such seemingly clever aphorisms as "the Charter is a nineteenth-century liberal document set loose on a twentieth-century welfare state." My arguments underlying this review (an argument which, admittedly biases the review) are as follows: first, the Charter, for reasons partly rooted in the rather shaky support for civil liberties evident in contemporary Canadian history was clearly meant to be a shield and not a sword. As such it was strongly supported by "we the people" to a far greater extent than by the politicians and "the suits," a fact that adds some considerable legitimacy to the Charter's much criticised enhancement of the power of judicial review. Second, constitutional adjudication on rights issues can be and has often been an effective ally in the political struggles around many rights. Third, to use Alan Cairns's felicitous phrase, the Charter has furnished a "constitutional niche" for minority and marginalised groups. Fourthly, the Charter is and, despite some set backs, remains

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7 Note especially the October 1970 crisis in Quebec and the invocation of the War Measures Act followed by the summary arrest of over 500 French-Canadian writers, artists and political leaders: R. Haggart & A.E. Golden, Rumours of War (Toronto: Newpress, 1971).

8 A Gallup poll taken in February 1982 showed 80 percent of those polled supported the Charter. See also, R. Sheppard & M. Valpy, The National Deal (Toronto: Fleet Books, 1982).

9 "The polemical disjunction law or politics obscures the fact that constitutional adjudication at its best is both law and politics." M.J. Perry, The Constitution in the Courts (New Haven: Yale Univ. Press, 1994) at 204.

10 A. Cairns, "Ritual, Taboo and Bias in Constitutional Controversies in Canada" (1990) 54 Sask. L. Rev. 121 at 127.
a powerful symbol of the struggle for equality in a society in which inequality is still, and in some respects increasingly, pervasive.\textsuperscript{11} Fifthly, the attack on the "welfare state" (more accurately, I think, the social safety net and the power of organised labour), indeed a highly successful attack, comes not from the Charter as, for example, Petter proposed, but from a powerful right wing counter-revolution waged under the glitzy banner of fiscal restraint, and now, increasingly, under another banner, namely, "reign in the courts and find the political means to reverse any progressive Charter-based decisions."\textsuperscript{12}

The Charter, with all of its pimples and warts and yes with all too many troublesome decisions by the courts, is here to stay. In my view the continuing rear guard action against the Charter by the left "crits" places them uncomfortably, and I am sure most unwillingly, on the same side of this battle as Preston Manning and the religious right.\textsuperscript{13}

Bakan is keenly aware of the primary source for what he describes as the "serious erosions of democracy and social justice in Canada." Nevertheless, he contends that blaming the Charter for these developments is a "useful corrective to the exaggeration of the Charter's positive potential found in much constitutional scholarship."\textsuperscript{14} Paradoxically, he argues,

Though the Charter undoubtedly has some negative effects on Canadian politics and social relations, the erosion of democracy and social justice in Canada today is radically over-determined, driven by a wide array of economic, social, and political forces, of which the Charter is only one.\textsuperscript{15}

He goes on to argue that the overall effect of the Charter on Canadian society is probably not as substantial as either its supporters or its detractors believe, an argument reminiscent of Harry Arthur's sardonic comment that his only source of optimism (after reviewing the role of the courts in labour law, in particular in the labour law constitutional trilogy\textsuperscript{16}), was "the rather embarrassing

\textsuperscript{11} P. Williams, "Alchemical Voices: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. C.R.-C.L. L. Rev. 401 at 416. "For the historically disempowered, the conferring of rights is symbolic of all denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevate one's status from human being to social being."

\textsuperscript{12} See, for example, "The Supreme Court, Deaf to Reason" The Globe & Mail (14 Oct. 1997); "The Supreme Court, all over the Map!" The Globe & Mail (21 April 1998); and P. Manning, "Supreme Court Reform" The Globe & Mail (17 June 1998).

\textsuperscript{13} Some of these arguments were more fully developed by me in R. Penner, "The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom" (1996) Pub. L. 104.

\textsuperscript{14} Bakan, Just Words, supra note 3 at 145.

\textsuperscript{15} Ibid.

conviction that life will go on, as it does now and as it always has done, relatively unaffected by law."

It is, however, one thing to say, as Bakan does (and, on the whole, I would agree) that "the Charter has done little to advance social justice in Canada, despite its just words," and quite another to attack the Charter as negatively affecting the struggle for social justice or either denigrating or minimising the positive effect of a substantial number of Charter decisions, as he does—although to a much less extent than, for example, either Hutchinson or Mandel.

It should be noted that Just Words was written prior to the decisions of the Supreme Court in Vriend and Eldridge and the decisions of the Ontario Court of Appeal in M. v. H. and Rosenberg, all of which indicate that, at least in terms of equality rights, the positive role of the Charter has been greatly enhanced. Indeed I would go further and suggest that, for example, the holding of the majority per Iacobucci J. in Vriend with respect to s. 1 of the Charter (concerning the primary step of analysing the objective of the impugned sections of the legislation) goes a considerable way towards limiting the kind of subjective analysis of social values read into legislation by, for example, La Forest J. in Egan and Gonthier J. in Miron v. Trudel. In doing so Iacobucci J. emphasised a point made earlier by Dickson C.J.C. in Oakes, namely that it was the objective which the measures responsible for limiting a Charter right which must be considered and found to be pressing and substantial and not, at least not primarily, the alleged purpose of the legislation as a whole.

Certainly I would agree to some extent with Robert Sharpe's view that Bakan's skepticism about the Charter adds a healthy note "into the ongoing debate

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18 Bakan supra note 3 at 144.
24 Supra note 20.
on the promise of the Canadian Charter of Rights and Freedoms," at least in so far as Bakan argues that the Charter does not and cannot play a leading role in any project for social transformation. But, as Bakan himself admits, that is not at all the same as saying that the Charter makes no positive contribution whatsoever to the ongoing struggle for rights and freedoms, and particularly for equality rights. My concern is that on balance, as he develops his critique, Bakan tends to minimise that positive role of the Charter to an unsupportable degree. Let me first use his truncated treatment of the leading case of Big M as one example.

Bakan uses the Supreme Court's decision in Big M to advance his criticism that the Charter, as interpreted by the courts, has been used excessively and successfully to advance corporate interests thus, he argues, giving "power to the powerful."

In Big M a corporation used the freedom of religion guarantee of the Charter, s. 2(a) in a successful effort to strike down the anachronistic Lord's Day Act which limited Sunday shopping on religious, primarily Christian, grounds. On the preliminary issue in the case of the right of corporations to access the Charter, it seems to me that one would be hard put to challenge the Court's holding that no one, whether corporate or individual, should be convicted of a criminal offence under an unconstitutional law and that any accused, corporate or individual, ought to be able to raise a constitutional defence.

On the wider issue of regulating Sunday shopping the Court was already aware that it would be reviewing that issue when it came to consider a challenge to secular based legislation (The Ontario Retail Business Holidays Act) in Edwards Books.

My argument goes further: the long-term effect of Dickson C.J.C.'s holding on the meaning of religious freedom, particularly that it had to include freedom from any form of a coerced adherence to a particular religion, was directly responsible for the ultimate and long-over-due disappearance from all governing provincial legislation of the requirement of or authority for religious observances in public schools.

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30 Bakan, Just Words, supra note 3 at 87-100.
32 R.S.O. 1980, c. 453.
Bakan uses the Supreme Court decision in *Hunter* as another example, of "power to the powerful" but does not note, as I believe he should have, that the decision in *Hunter* related to the power of search and seizure in criminal proceedings with respect to which, one would have thought, not only should there be a reasonable expectation of privacy, but that the privacy threshold in criminal matters should be very high. *Hunter* is a decision of considerable importance in the strengthening of checks and balances in the area of criminal law generally. At a later point, Bakan does refer to the subsequent decision of the Court in *Potash*. In this case concerning regulatory offences controlling, for example, business practices and fair employment requirements, the Court held that the expectation of privacy is lower and the search and seizure requirements less—surely not a pro corporation decision!

Another of Bakan's examples of "power to the powerful" (and, I think, a much better one) is the decision in *RJR-Macdonald* in which the Charter was used to strike down major provisions of the then existing *Tobacco Products Control Act*, limiting the advertising of tobacco products. The balance which I suggest is missing from this particular critique is twofold: first, the basis of McLachlin's decision was, as she argued, the requirement that governments be held strictly to account for limits on guaranteed rights and freedoms and that any infringement should be both minimal in scope and justified by the Crown on the evidence, (the evidentiary requirement of s. 1 as per *Oakes*). Second, what is missing here and elsewhere is the fact that without using the notwithstanding clause, a government, acting through either parliament or a legislature, can, usually without great difficulty, re-design impugned legislation to meet Charter requirements. (Peter Hogg and Allison Bushell have made a very useful contribution to a balanced view of the Charter and its effect by pointing out how often parliament and legislatures have in fact responded positively to Court challenges.)

Finally, I agree in general with the argument of Bakan and others that there is a symbiotic relationship between the shifting power balance in society and, at least in the long term, trends in the Court. That is perhaps more readily apparent in analysing decisions made by the United States Supreme Court since

38 S.C. 1988, c. 20.
39 *Supra* note 27.
40 Section 33 of the Charter.
41 P.W. Hogg, & A.A. Bushell, "The Charter Dialogue Between Courts and Legislatures (or perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75.
about the end of the "Warren Court." The decline in the effectiveness of the political strength of labour and minority groups generally in the U.S. is reflected, penultimately, in the balance in Senate where the dominant position of neo-conservatives virtually guarantees the appointment to the U.S. Supreme Court conservative judges wedded to doctrines of textualism and original intent. However that may be in the U.S., the same argument is much more difficult to make in Canada. Certainly with respect to equality rights I would agree with a recent note by Raj Anand in The Lawyers Weekly: in Eldridge and now in Vriend, the Supreme Court has put substantive equality on a firm and explicit foundation. Whether these, and other Charter decisions, together with some positive if ambiguous developments on Aboriginal rights, are likely to be quickly or seriously eroded must remain a matter of some speculation. However, arguing as one should from a "current account" agenda, the case for rights erosion by the courts in Canada is not at all easy to make. Nevertheless, Bakan predicts that future decisions of the Court will reflect the political trend to neo-conservatism, much as he deplores that possibility, a thoroughly defeatist view in my opinion.

Bakan's critique of the Charter lacks balance by minimising the many positive aspects of Charter jurisprudence. In a kind of argument from desperation he predicts that things Charter-wise are likely to go from bad to worse. My concern is that if indeed critics from the left, particularly thoughtful and articulate ones such as Bakan, keep up this rear-guard attack on the Charter there is a greater likelihood that the prediction (and Bakan does hope that he is wrong) will materialise. This is a concern most articulately expressed by the late E.P. Thompson, a Marxist historian, whose analysis of class and society in Britain remains unsurpassed:

But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle about law, and within the forms of law where continuity can never be fractured without bringing men and women into immediate danger.43

42 R. Anand, "Vriend Will Affect Charter Equality Rights and Remedies" The Lawyers Weekly (9 June 1998) 12. See also B. Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend," (1998) 9 Const. Forum 71 at 82, where he argues that in these two cases the Court "has taken an important initiative toward forming a new paradigm of substantive equality" but substantive rights "must become part of public as well as legal discourse"—a view expressed by Bakan in the conclusion to Just Words at 152.
