REVIEW

Just Words: Constitutional Rights and Social Wrongs

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Just Words: Constitutional Rights and Social Wrongs, by Joel Bakan. Toronto: University of Toronto Press, 1997, x + 230 pages.

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 *Charter*[1] 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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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

2 An extensive bibliography of the critical books and articles by the "Crits" may be found in R. Sigurdson, "The Left-Legal Critique of the *Charter*: A Critical Assessment" (1993) 13 Windsor Y.B. Access Jus. 117.

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")[4] 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)[5] 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 constutionalisation 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."[6]

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[7] 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.[8] Second, constitutional adjudication on rights issues can be and has often been an effective ally in the political struggles around many rights.[9] Third, to use Alan Cairns's felicitous phrase, the *Charter* has furnished a "constitutional niche" for minority and marginalised groups.[10] Fourthly, the *Charter* is and, despite some set backs, remains

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4 For example, see J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want" (1991) 70 Can. Bar Rev. 307.

5 For example, M. Jackman, "The Protection of Welfare Rights under the *Charter*" (1988) 20 Ottawa L. Rev. 257.

6 A. Petter, "Immaculate Deception: The *Charter*'s Hidden Agenda" (1987) 45 Advocate 857.

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.[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."[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.[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."[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.[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[16]), was "the rather embarrassing

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[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."

[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).

[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.

[14] Bakan, *Just Words*, *supra* note 3 at 145.

[15] *Ibid.*

[16] *Reference Re Public Service Employee Relations Act and Police Officers Collective Bargaining Act*, [1987] 1 S.C.R. 313.

conviction that life will go on, as it does now and as it always has done, relatively unaffected by law."[17]

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,"[18] 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.[19]

It should be noted that *Just Words* was written prior to the decisions of the Supreme Court in *Vriend*[20] and *Eldridge*[21] and the decisions of the Ontario Court of Appeal in M. v. *H.*[22] and *Rosenberg*,[23] 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*[24] 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*[25] and Gonthier J. in *Miron* v. *Trudel*.[26] In doing so Iacobucci J. emphasised a point made earlier by Dickson C.J.C. in *Oakes*,[27] 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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17 H. Arthurs, "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the *Charter*" (1988) 13 Queen's L.J. 17.

18 Bakan *supra* note 3 at 144.

19 A.C. Hutchinson, & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38 U.T.L.J. 278; and M. Mandel, *The* Charter of Rights *and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994).

20 *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

21 *Eldridge* v. *British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

22 M. v. *H.* (1997), 142 D.L.R. (4th) 1 (Ont. C.A.).

23 *Rosenberg* v. *Canada (Attorney General)* (1998), 158 D.L.R. (4th) 664 (Ont. C.A.).

24 *Supra* note 20.

25 *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

26 *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.

27 *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

on the promise of the Canadian *Charter of Rights and Freedoms*,"[28] 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 on-going 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*[29] 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."[30]

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*[31] 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*)[32] in *Edwards Books*.[33]

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.[34]

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[28] R.J. Sharpe, Book Review: *Just Words: Constitutional Rights and Social Wrongs* (1997) 36 Alta. L. Rev. 307 at 311.

[29] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

[30] Bakan, *Just Words*, *supra* note 3 at 87–100.

[31] R.S.O. 1980, c. 253.

[32] R.S.O. 1980, c. 453.

[33] *Edwards Books and Art Ltd.* v. *The Queen*, [1986] 2 S.C.R. 713.

[34] For example, see *Zylberberg* v. *Sudbury (City) Board of Education* (1988), 52 D.L.R. (4th) 577 (Ont. C.A.); and *Russow* v. *British Columbia (Attorney General)*, [1989] 4 W.W.R. 186 (B.C. S.C.).

Bakan uses the Supreme Court decision in *Hunter*[35] 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*.[36] 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*[37] in which the *Charter* was used to strike down major provisions of the then existing *Tobacco Products Control Act*,[38] 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*).[39] Second, what is missing here and elsewhere is the fact that without using the notwithstanding clause,[40] 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.[41])

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

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35 *Hunter* v. *Southam*, [1984] 2 S.C.R. 145.

36 *Potash* v. *R.*, [1994] 2 S.C.R. 406.

37 *R.J.R. Macdonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199.

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.[42] 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]

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[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 Constit. 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.

[43] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane,1975) 266.