JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS, Joel Bakan (Toronto: University of Toronto Press, 1997)

Joel Bakan's *Just Words: Constitutional Rights and Social Wrongs*[1] makes a distinctive contribution to the growing body of literature on the theory and impact of the *Canadian Charter of Rights and Freedoms*.[2] The message of the book is captured by its title and the play on the phrase "just words." Bakan's thesis is that the lofty language of the *Charter* is little more than a hollow promise and that constitutional rights cannot correct the social wrongs of modern Canadian society. He describes the "book's central argument" as follows:

> The powerful ideals of equality, freedom, and democracy are ... only partly realized in Canada today. That is better than nothing — a point underlined by the fact that throughout history, and in many contemporary societies, these ideals are not even legitimate aspirations. The Charter, however, 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.[3]

Bakan's study is not the product of conventional legal analysis. Rather than consider discrete issues decided by particular cases and assess the reasoning of the judges, Bakan adopts an external perspective and measures the overall effect of the *Charter* in the quest for "social justice." This phrase is used repeatedly but never clearly defined. "Social justice" appears to consist of the political agenda of a leftist social democrat, schooled in but not wedded to Marxist analysis, leery of but not opposed to the institutions of the market and private property, and appalled by the prevalent neo-conservative, budget-slashing policies of the mid-90s. Bakan does tie "social justice" to "equality," "freedom" and "democracy" and his definitions are anything but narrowly legalistic: "Equality entails [the] elimination of major disparities in people's material resources, well-being, opportunities, and political and social power, and an absence of economic, social and cultural oppression and exploitation."[4] "Freedom involves the ability of people to develop their capacities, to determine, through deliberation, choice, and action, how to live their lives; and to participate in the democratic governance of social, economic, and political life."[5] "Democracy means active participation of people in determining the conditions of their existence and association."[6] It is against these ideals that he measures the impact of the *Charter*. Not surprisingly, he finds that the *Charter* fails to deliver us a society in which equality, freedom and democracy have been fully realized.

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1 J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 *Supra* note 1 at 11.

4 *Ibid.* at 9-10.

5 *Ibid.* at 10.

6 *Ibid.*

Certain aspects of Bakan's argument are familiar elements of left-wing and anti-liberal critiques of the *Charter*. He challenges the supposed neutrality and objectivity of law and judicial decision-making and contends that no intelligible distinction can be drawn between law and politics (Chapter 2, "Constitutional Interpretation and the Legitimacy of Judicial Review"). He sees the judiciary as an essentially conservative institution, committed to the preservation of the dominant views of society and an unlikely source for the inspired effort required to bring about the social changes he advocates: "They [judges], and the legal profession in general, are about the last group we should expect to act as agents of progressive social change."[7] He is ill at ease with the liberal values of the *Charter*, concerned that liberalism is bound to fixate upon relations between the individual and the state while ignoring what he considers to be the principal sources of social injustice, the inequality of private wealth and abuse of corporate power. Bakan observes that at least until recently, democratically elected legislatures had done far more to deal with these sources of injustice than the courts had. He worries that *Charter* rights and judicial review might impede positive steps taken by progressive legislators to limit private wealth and private power. Perceiving an "unfortunate symbiosis between the anti-government ideology of neo-liberal right wing politics and the deregulatory form of *Charter* rights"[8] Bakan fears that the *Charter* might encourage, perhaps even legitimate, conservative political forces intent on dismantling the social welfare state.

The distinctive feature of the book, however, is that Bakan is not simply repeating the arguments of other *Charter*-sceptics. He is at pains to distinguish his approach from that of Allan Hutchinson's *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) or Michael Mandel's *The Charter of Rights and the Legitimation of Politics in Canada* (Toronto: Thomson Educational Publishing, 1994). While Bakan demands skeptical scrutiny of what the *Charter* can achieve, *Just Words* is far from an "anti-*Charter*" tirade: "I reject the argument ... that the *Charter* and rights discourse are inherently flawed as forms of progressive politics."[9] Given the flaws he perceives in the existing political process as a means to realize the will of the people, Bakan welcomes judicial review in certain areas as a corrective. Legislation may no longer attract majority support, yet political forces are such that it will remain on the books unless the courts act. As an example, Bakan applauds the Supreme Court of Canada's decision in *Morgentaler*,[10] striking down the *Criminal Code* abortion provision, thereby enhancing reproductive choice for women. Bakan accepts the propriety of judicial review as a tool to ensure a more equitable electoral process (citing *Dixon* v. *British Columbia*).[11] He also supports judicial review to protect the rights of minorities whose voices often go unheard and whose rights, history shows, are often trampled on by the majority of the day.

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7 *Ibid.* at 113.
8 *Ibid.* at 4 and 86.
9 *Ibid.* at 6.
10 [1988] 1 S.C.R. 30.
11 (1989), 59 D.L.R. (4th) 247 (B.C.S.C.).

Bakan does not, then, share the view that the *Charter* is an unacceptable usurpation of the political power of the people's democratically elected representatives. He accepts that rights "can be an effective strategy in progressive social struggle" and that "[c]ivil rights and liberties are essential components of a just society."[12] He insists, however, that the *Charter* is but one source of political power, and like all other sources of power, must be critically examined in relation to the specific social, economic and political conditions in which it operates.

Although he does not dissect the decisions of the Supreme Court of Canada on each and every *Charter* right, Bakan does provide a lively, readable, and thought-provoking account of significant aspects of *Charter* jurisprudence putting his theoretical arguments into a more specific context. His focus is on equality (Chapter 3, "Equality and the Liberal Form of Rights"), freedom of expression (Chapter 4, "Freedom of Expression and the Politics of Communication"), and freedom of association (Chapter 5, "Freedom of Association and the Dissociation of Workers").

Bakan applauds the "fine ambition" of the goal of equality as formulated by the Supreme Court: "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."[13] While Bakan concedes that positive gains have been made in areas of equality jurisprudence, particularly in the recognition of the rights of women, gays and lesbians, he contends that despite the Court's commitment to "substantive equality," judicial review of legislation simply cannot reach the basic and structural causes of inequality of wealth and power. Judicial review is limited to the relationship between the individual and the state. By ignoring the serious threat posed to equality by the uneven distribution of private wealth power, by focusing on government action rather than inaction, and by defining equality in dyadic rights-duties terms, Bakan warns that *Charter* litigation simply cannot deal with "the complexity of social inequality,"[14] it cannot root out the "intersecting relations of class, gender and race," nor deal with the fact that "in most capitalist societies ... a minority of people own the bulk of productive property."[15] *Charter* litigation deals with "discrete injustices ... yet social inequality is more than an accumulation of discrete injustices."[16] Moreover, he warns, because of its liberal foundation, the *Charter* may be used to defeat measures favoured by "progressive" forces. He cites challenges to anti-hate laws, sexual assault legislation, and the risk that a successful equality attack on an underinclusive welfare scheme opens the door to an overall reduction of benefits.

The message from Chapter 4, "Freedom of Expression and the Politics of Communication," is similar. Bakan perceives unequal access to the means of expression and deeply rooted repression of the voices of certain groups and interests to be a more serious threat to freedom of expression than government censorship, yet the latter is the

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12 Bakan, *supra* note 1 at 56.

13 *Ibid.* at 47, quoting *R.* v. *Swain*, [1991] 1 S.C.R. 933 at 992.

14 *Ibid.* at 53.

15 *Ibid.* at 51.

16 *Ibid.* at 53.

exclusive focus of the *Charter*. He argues that affirmative state measures to redress these extra-legal imbalances are required, yet challenges to election spending laws attract the scrutiny of the *Charter* while government inaction does not. Bakan also rejects the presumption of content neutrality that underlies the constitutional protection of freedom of expression and contends that not all speakers or messages deserve equal respect. But here again, he does not argue that the protection of the *Charter* is meaningless. He agrees that "it is an effective tool for resisting discrete examples of legislative and administrative repression of ideas — censorship — which certainly exists in Canada."[17]

Bakan does not explore areas of the *Charter* where the *Charter* has undoubtedly had a major impact, especially the procedural rights of those accused of crime or minority language education rights, perhaps because he does not see these as having anything to do with "social justice." Oddly, he also leaves largely unexplored the s. 7 right to "life, liberty and security of the person," a right on which many advocates of substantive justice pin their hopes. Bakan is clear, however, that he is not a supporter of including "social rights" in the constitution (Chapter 9, "What's Wrong with Social Rights"). Here he is consistent with his analysis of what constitutional rights can and cannot achieve. Bakan fears the risk of regressive interpretation of social rights by a conservative judiciary, and argues that even if given wide interpretation, legal rights still would not deal with underlying social, economic and political causes of poverty and social injustice.

At one level, the argument advanced in *Just Words* is anything but surprising. Did anyone really believe that the *Charter of Rights and Freedoms* would solve all the ills of society? Would it not be astonishing to find, fifteen years after its enactment, that the *Charter* had entrenched the particular view of "social justice" espoused by Bakan? The very liberal foundation upon which the *Charter* rests, and which so troubles Bakan, distinguishes the goal of constitutional democracy from the array of possible social-economic outcomes — right, left and centre — that democratic government is capable of producing.

I do not wish, however, to minimize the contribution Bakan's book makes to the ongoing debate on the worth of the *Charter*. It is important for all, including those of liberal, pro-*Charter* persuasion, to keep in mind the inherent limitations of the *Charter* and of *Charter* litigation. The liberal aspiration of the *Charter* has far more to do with ensuring a fair and open process, receptive to all points of view from all corners of the polity, than with particular social or economic outcomes. Advocates of social causes would do well to remember that while much can be achieved through the *Charter*, it does not replace public debate and persuasion as the way to achieve political ends. As Bakan states in the concluding paragraph of *Just Words*: "The struggle for social justice is much larger than constitutional rights; it is waged through political parties and movements, demonstrations, protests, boycotts, strikes, civil disobedience, grassroots activism, and critical commentary and art."[18] While many, myself included, would

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[17] *Ibid.* at 70.

[18] *Ibid.* at 152.

contend that the *Charter* has had a more beneficial impact upon Canadian legal and political life than Bakan allows, his message remains an important one. He may well be right when he states "the overall effect of the *Charter* on Canadian society, whether positive or negative, is probably not nearly as substantial as either its supporters or its detractors believe."[19]

In many ways, the thrust of Bakan's argument is captured by a passing reference to Aboriginal rights: "...no matter how broadly constitutional protection of Aboriginal rights is defined, its effects are still entirely dependent on there being salmon to fish."[20] Neither constitutions nor judges can put fish in the stream or a chicken in every pot. It is just as well to be reminded of that. *Just Words* injects an articulate and healthy note of skepticism into the ongoing debate on the promise of the *Canadian Charter of Rights and Freedoms*.

Robert J. Sharpe
Judge of the Ontario Court
of Justice (General Division)
Toronto, Ontario

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19 *Ibid.* at 145.

20 *Ibid.* at 58.