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Didi Herman

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BOOK REVIEW

Just Words: Constitutional Rights And Social Wrongs

BY JOEL BAKAN

(Toronto: University of Toronto Press, 1997)¹ 230 pages

Joel Bakan has written an excellent book about the *Canadian Charter of Rights and Freedoms*.² He treats constitutional litigation as a problematic—a site from which to begin asking questions, rather than an end in itself, and his approach is sceptical (not cynical, he hastens to add). *Just Words* is fundamentally a skepticism about liberalism, and a plea for legal analysts, and anyone interested in law and politics, to take private power seriously. The *Charter*, Bakan argues, will not do this, and that is its most significant weakness.

The themes in *Just Words* may be somewhat familiar reading to those already acquainted with left analyses of the *Charter*. However, Bakan's approach is slightly different to some of this work.³ First, he is willing to acknowledge that some good may come out of constitutional litigation. Second, he makes the useful point that Charter critics often over-emphasize the importance of the *Charter* to "real life." Bakan suggests, albeit in his conclusion, that, at the end of the day, the *Charter* may have few effects on peoples' lived experience. Later in the review, I suggest that this position creates some tension for the book, and Bakan's project, as a whole. But first, I will set out the framework and key arguments of *Just Words*.

The introductory chapter is clear and forthright. Bakan's writing style is elegant, yet unadorned, and he pulls no punches here arguing that "the *Charter* is only paper, dead tree, with ink on it."⁴ What he means is that the *Charter* is meaningless in isolation from its social context, and that social context, to a large extent, determines legal possibilities. Bakan's approach is to test the *Charter* for its ability to further values he defines as key—equality, freedom, and democracy. These he interprets substantively, asking whether, in *Charter* discourse, they are advanced in a progressive fashion or merely words on paper.

¹ [hereinafter *Just Words*].

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

³ See, for example, M. Mandel, *The Charter of Rights and the Legalization of Politics* (Toronto: Wall & Thompson, 1989); and A.C. Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

⁴ *Just Words*, *supra* note 1 at 3.

Bakan begins with a closely argued engagement with those who defend, on various grounds, the legitimacy of judges judging.⁵ He concludes that the defenders' arguments exhibit more faith than reason. This chapter perhaps ought to have preceded or followed chapter 7, an analysis of judicial ideologies. Read together, these chapters persuasively argue the point that judging is deeply political and fundamentally constrained by social structures. While some readers might find this material familiar, those who teach law from a critical perspective will know how many students, and colleagues, need to hear it.

The "meat" of the *Charter* analysis is in chapters 3, 4, and 5, on equality, free expression, and freedom of association respectively. Bakan argues that section 15 of the *Charter*, the equality provision, "is unlikely to have a substantial effect on inequality in Canada because the Supreme Court of Canada's interpretation of it ... embodies anti-statism and atomism."⁶ His point here is that the form of equality rights engenders an approach to both litigation and adjudication that treats complex social issues as discrete phenomena that can be resolved without an understanding of wider institutions and practices. Bakan constantly reminds the reader that equality means nothing in isolation or, as he says with regard to Aboriginal rights,

[N]o matter how broadly constitutional protection of Aboriginal [fishing] rights is defined, its effects are still entirely dependent on there being salmon to fish. ... The Aboriginal right to fish can protect First Nations only from discrete restrictions on their ability to fish salmon, but not from related structures of political economy and colonialism that are destroying the fishery.⁷

Bakan's free expression analysis is largely focused on dispelling the *Charter*-induced illusion that the state is the main culprit when it comes to the silencing of speech. Instead, he shows how the primary forces denying free speech emanate from the deployment of private power, not state power. He also provides a very useful approach to the "censorship debates," arguing, more clearly than I have seen it done elsewhere, that some forms of speech are in themselves speech denials.⁸ Bakan reiterates a similar analysis in relation to freedom of association, contending that it is private economic power, not state action, that is the primary dissolver of workers' rights. While the author sees some small

⁵ *Ibid.* c. 2.

⁶ *Ibid.* at 45.

⁷ *Ibid.* at 58-59.

⁸ *Ibid.* at 72-76.

progressive potential in the *Charter*'s free expression provision, he sees none at all here. He suggests that even if the Supreme Court were more worker positive they could accomplish virtually nothing to alter the erosion of workers' rights, because the court's remit does not extend to policing private economic forces.

In chapter 6, Bakan extends his analysis to argue that the *Charter* is not simply or only a no-hoper for progressive movements. The *Charter*, he suggests, has actually furthered business and racist interests through courts providing such interests with free expression rights. Furthermore, Bakan demonstrates how left-leaning governments are in fact reined in by the *Charter*, and unable to carry out radical social policy alternatives due to accusations of rights violation (the NDP government in British Columbia being one example). At the same time, Bakan provides a thorough critique of one form of progressive initiative—the idea of social rights.⁹

Chapter 8 operationalizes Bakan's analysis in a fascinating study of the women's rights discourse flying about during the *Charlottetown Accord* debates.¹⁰ His goal is to show how rights-talk constrained communication, strategy, alliances, and results, and he does this persuasively. I would have liked to see more of this in *Just Words*; for someone who recognizes the importance of context, many of Bakan's remarks, including those with which I agree, are made in the abstract. Bakan acknowledges that his book is not a study of "extra-litigation effects."¹¹ But, *Just Words* is a study of the *Charter*, and the *Charter*'s effects, and Bakan makes some very clear statements about the *Charter*'s potential. More "on the ground" analysis, such as that on the *Charlottetown Accord*, would have added to the book's strength.

Similarly, I would have liked to see Bakan engage, not just with liberal and marxist critics, but also with the postmodern discourse analysis that he clearly finds wanting. Ernesto Laclau and Chantal Mouffe are mentioned,¹² but perhaps in future work Bakan could deal more directly with the claims made by Canadian and American constitutional rights theorists, for example those working in the queer

⁹ *Ibid.* c. 9.

¹⁰ See *Consensus Report on the Constitution: Charlottetown, 28 August 1992, Final Text* (Ottawa: Supply & Services Canada, 1992) [hereinafter *Charlottetown Accord*]. On the debate that surrounded it see, for example, K. McRoberts & P.J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993).

¹¹ *Supra* note 1 at 153, n. 3.

¹² E. Laclau & C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985) at 131, 148.

theory area. I got the sense throughout *Just Words* that Bakan was tip-toeing around the progressive rights-defenders.

But perhaps Bakan's own perspective is an ambivalent one, and that is responsible for some of his hesitancy. On the one hand, Bakan is clear that capitalist relations prevent the *Charter* from being anything other than just words. On the other hand, throughout the book, the author suggests that the *Charter* could be put to progressive use.¹³ Perhaps Bakan is simply saying that if we lived in a different world, with different social relations, the same *Charter* could be a very different thing. But if that is what he means, then he is suggesting that it cannot be much of anything in this world, and certainly many progressive movements would disagree.

I also wondered whether Bakan himself put too much emphasis on words. For example, he spends some time showing how the *Charter's* restriction to state action, not inaction, is a huge constraint upon the demands of social movements.¹⁴ But I am not so sure. Constitutional gay rights claims, for example, may be based on state action—legislation—but the actual claim is about state inaction, about exclusion, about denial. The dichotomy of action/inaction may not be as stark as Bakan suggests. I also find the argument that the *Charter* has no effect at all on private interests to be unpersuasive. Not only do human rights laws, bound by the *Charter*, apply to private actors but Bakan does not really engage with ideas about the symbolic power of constitutional rights. *Just Words* hints at a compelling critique of these ideas, and I would have liked to see it developed here.

In his conclusion, Bakan suggests the *Charter* has not had much effect on peoples' lives at all. Why then should we care about it? Having been too long outside Canada now, I cannot answer this with reference to Canadian political developments. Perhaps a different response is provided in Britain at the moment. The Labour government is about to incorporate the *European Convention on Human Rights*,¹⁵ and this will effectively create quasi-constitutional rights within the United Kingdom for the first time. Living in Britain, as I do now, I am struck constantly by a sense of *déjà vu*. Debates that have been ongoing in Canada for many years are being played out here, with wheels reinvented and, seemingly, little learned from experience elsewhere. Joel Bakan's *Just*

¹³ *Supra* note 1 at 6-7, 55, 62.

¹⁴ See, for example, *ibid.* at 48.

¹⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5.

Words should be compulsory reading for rights-talkers here. And his comments on citizenship, social rights, and democracy should be read by all those involved in the Blairite project and its discourse of exclusion/inclusion.

Didi Herman
Reader in Law
Department of Law
Keele University

