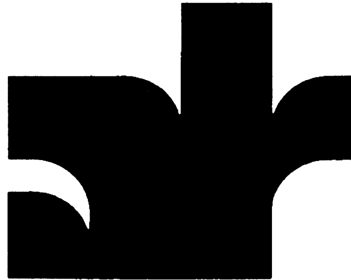

REVIEW ESSAY

*David Wiseman**

A JUST REPUBLIC OR JUST WORDS? CONSTITUTIONAL RIGHTS AND PROGRESSIVE SOCIAL JUSTICE**

INTRODUCTION

THE catchcry "A just republic, not just a republic!" urges Australians not merely to proclaim our political sovereignty by chasing the monarch out of our constitutional system, but also by founding our republic on a constitutionally expressed vision of progressive social justice. The form that expression might take ranges from proposals that would simply revamp the constitutional preamble to those that would entrench constitutional rights and responsibilities. The Reverend Tim Costello, for instance, has stated, on behalf of the Real Republic delegates to the 1998 Constitutional Convention, that constitutional rights "would be an important tool for building a fairer

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** A review essay of Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto 1997).

society."[1] Given that over the course of the last quarter century the overall poverty rate in Australia seems only to have worsened,[2] there is little doubt that Australians need to devote more attention to how we will build a fairer society. But would constitutional rights be such an important tool for this task?

Joel Bakan has recently shed some light on this question in an accessible, invigorating and thought-provoking book critiquing the impact of the Canadian Charter of Rights and Freedoms[3] on social justice in Canada. Bakan argues that the dominant (liberal-capitalist) ideology of Canadian society, as implemented in judicial conservatism and the liberal form of rights, thwarts any significant dismantling of social injustice by constitutional rights. His argument is thus potentially of relevance to the Australian debate, not least because Bakan correlates the dominant ideology of Canadian society to the structures and institutions of Western capitalist societies, of which Australia is one. In this review essay I first give a brief outline of Bakan's arguments and conclusions. I then elaborate those arguments as they relate to the relationship between the Charter and poverty before taking issue with Bakan's analysis of the limiting effects of the liberal form of rights. Ultimately I suggest that, whilst Bakan makes a strong case for a cautious and realistic pursuit of constitutional rights strategies, he overstates an important aspect of that case, giving the dangerous impression that any significant achievement of social justice through constitutional rights must await not merely a transcendence of the dominant ideology which rationalises capitalism (and sexism and racism and homophobia and so on) but also a transcendence of the liberal form of rights. Briefly put, my argument is that if the former can be overcome then the latter can be maintained. Indeed, the liberal form of rights must be maintained if legal rights as we know them, whether constitutional or legislative, are to play any part in constructing and sustaining social justice.

CONSTITUTIONAL RIGHTS AND SOCIAL INJUSTICE: PAUSE FOR THOUGHT

The central question addressed in *Just Words: Constitutional Rights and Social Wrongs* is: "Why has the Charter failed to advance a progressive vision of social justice?"[4] For Bakan, "progressive social justice" is a vision of the circumstances to which the Charter's ideals of freedom, equality and democracy might aspire. According to this vision:

> Equality entails elimination of major disparities in people's material resources, well-being, opportunities, and political power and social power,

1 "Time to Create a Country Fit for Our Children: Towards a Republic", *The Age*, 30 January 1998, p13.

2 See King, "Income Poverty Since the Early 1970s" in Fincher & Nieuwenhuysen (eds), *Australian Poverty: Then and Now* (Melbourne University Press, Melbourne 1998) Ch 4.

3 Part I of the *Constitution Act* 1982 (Can), being Schedule B to the *Canada Act* 1982 (UK).

4 Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, Toronto 1997) p9.

> and an absence of economic, social, and cultural oppression and exploitation. ...
>
> 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. ...
>
> Democracy means active participation of people in determining the conditions of their existence and association.[5]

Bakan does not explicitly say in what sense this vision is "progressive" but it seems safe to assume that it is so, at least in the sense that it contemplates a redistribution of wealth. Canadian constitutional law literature commonly approaches the question of whether the Charter has a role to play in the redistribution of wealth within a framework that distinguishes so-called civil and political rights from so-called economic and social rights.[6] This framework typically restricts the redistributive impetus of rights to social and economic rights and so, if the Charter is to play a redistributive role, then it must establish both categories of rights. Determining whether social and economic rights have been established thus becomes the first issue to be considered within this framework. The resolution of that issue, as with all issues of constitutional meaning, requires the application of a methodology of constitutional interpretation. Uncovering and assessing the interpretative approaches prevalent in Canadian scholarship on the Charter is where Bakan begins his analysis.

According to Bakan, two interpretive approaches predominate in Canadian constitutional scholarship. By the first approach, which he labels constitutional truth, the constitutional text is thought to have a true and determinate meaning that can be revealed through a considered reading of constitutional materials (that is, text, cases, history).[7] By the second approach, which Bakan labels constitutional trust, constitutional materials are accepted as incapable of giving a true and determinate meaning to the constitutional text, but this causes no problem because, if judges adopt an appropriate methodology of judging, then they can be trusted to reach impartial results in constitutional cases.[8] Regardless of approach, Canadian constitutional scholars and adjudicators have differed on the issue of

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5 At pp9-10.

6 For an instructive discussion of this distinction and its presence in comparative constitutional law, see Scott & Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution" (1992) 141 *U Pa L Rev* 1.

7 Bakan cites Peter Hogg's work as an example of this approach: see Hogg, *Constitutional Law of Canada* (Carswell, Scarborough, Ont, 3rd ed 1992).

8 Bakan cites David Beatty's work as an example of this approach: see Beatty, *Constitutional Law in Theory and Practice* (University of Toronto Press, Toronto 1995).

whether the Charter includes economic and social rights.[9] Of course, for those who have found against such an idea, the answer to Bakan's question would be simple: the Charter has failed to advance progressive social justice because the constitutional text, when properly interpreted, simply does not include social and economic rights.

In beginning to formulate his own answer to the question of why the Charter has failed to advance progressive social justice, Bakan both rejects the interpretive approaches predominant in Canadian constitutional scholarship and largely refuses to adopt the taxonomy of civil-political rights versus economic-social rights. Bakan argues that constitutional adjudication is "political" in the sense that "it requires judges to determine how power should be exercised on the basis of indeterminate legal norms".[10] Bakan's analysis of this issue is put as a refutation of the most prominent theories of constitutional adjudication which, he argues, seek to deny, qualify or legitimate the political nature of such adjudication by relying either on a belief in constitutional truth or trust. In Bakan's view, the various guarantees established by the Charter are indeterminate at least in the sense that, whilst progressive social justice is a plausible and desirable vision of the circumstances to which those guarantees might aspire, alternative (non-progressive) visions are also plausible. Attention to constitutional materials cannot alleviate the need for judges to determine how to resolve this indeterminacy, and no judicial methodology, particularly given the composition of the judiciary, can be trusted to produce impartial resolutions. Therefore, the Charter will only advance progressive social justice if Charter adjudicators, whatever their methodology, determine constitutional politics in accordance with that vision. This raises the question of whether they have done so.

This question is considered through an examination of Charter adjudication on questions of equality, freedom of expression and freedom of association. Bakan's argument is that Charter adjudication reflects and perpetuates the dominant ideologies in Canadian society and that these ideologies are inimical to a progressive vision of social justice. Although the ideals upon which the Charter is based can be interpreted as ideals of progressive social justice, the politics of Charter adjudication are found to limit the extent to which the Charter's various guarantees implement progressive ends. Consequently, "[t]he Charter ... cannot compensate for the systematic undermining of ideals of social justice by the routine operation of society's structures and institutions".[11]

9 Arguments against the idea that the Charter guarantees economic or social rights can be found in Hogg, *Constitutional Law of Canada* pp44-48 and 1029-30; Beatty, *Constitutional Law in Theory and Practice* Ch 5 (although Beatty has always been in favour of labour rights which can be understood as falling within the category of economic and social rights); and *Egan and Nesbit v Canada* [1995] 2 SCR 513 at 631 per L'Heureux-Dubé J. Opposite arguments can be found in: Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 *Ottawa L Rev* 257 and *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at 633 per Dickson CJC.

10 Bakan, *Just Words: Constitutional Rights and Social Wrongs* p45.

11 At p11.

According to this argument, dominant ideologies enter and limit Charter adjudication at two points. First, in determining the appropriate form of the Charter's various guarantees, judges tend to an "ideological form of rights ... composed of the basic tenets of liberal discourse: anti-statism and atomism".[12] This "liberal form of rights", as Bakan calls it, focuses the Charter upon those social injustices whose cause and remedy are within its reach. But since, according to Bakan, the processes giving rise to social injustice are beyond the reach of the liberal form of rights, the adherence to that form limits the Charter's capacity to advance progressive social justice.

Second, in applying the Charter's various guarantees, judges tend to "value and support existing social arrangements and to stay within the bounds of society's 'dominant views'".[13] This "judicial conservatism", as Bakan calls it, has the effect of skewing the perspective of the Charter in favour of such arrangements, despite (or in ignorance of) the ways in which those arrangements manifest social injustices, such as poverty, sexism and racism. Thus, the Charter responds by perpetuating existing social injustice, rather than by amending, or by protecting the amendment of, such injustice.[14]

These arguments form the bulk of the book and are the most important to its conclusions.[15] Ultimately, Bakan concludes that "for progressive people and causes, constitutional rights strategies share with all other forms of political action some positive potential and various negative risks, yet their overall effect is unlikely to be substantial in light of the multitude

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12 At p47. It is arguable that Bakan should qualify his references to "liberalism" so as to account for the various differences in contemporary liberalism. For instance, whilst Jeremy Waldron's writings are avowedly liberal, it is difficult to see how they engage in anti-statism (see, for instance, the latter essays in *Liberal Rights: Collected Papers, 1981-1991* (Cambridge University Press, Cambridge 1993)). By the same token, Bakan's conception of atomism is not synonymous with individualism and so is not necessarily avoided by those contemporary liberals, such as Will Kymlicka, who accept the concept of group rights (see, for instance, *Multicultural Citizenship: A Liberal Defence of Minority Rights* (Clarendon Press, Oxford 1995)).

13 Bakan, *Just Words: Constitutional Rights and Social Wrongs* p103.

14 Bakan is not alone in finding judges to be guilty of judicial conservatism, particularly when it comes to capitalist social relations. But some others argue that this is precisely the role envisaged for them by the Charter's political champions: see Glasbeek, "A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality" (1989) 9 *Windsor Yearbook of Access to Justice* 293. Some even argue that protection of the status quo of wealth maldistribution might be the explanation behind the introduction of the entire institution of judicial review: see Mandel, "A Brief History of the New Constitutionalism, or 'How We Changed Everything So That Everything Would Remain The Same'" (1998) 32 *Israel L Rev* 250.

15 One further argument looks beyond the confines of Charter litigation to reveal the ways in which the deployment of rights discourse by social movements can leave them vulnerable to the regressive understandings of dominant ideology. Another argument considers the way in which the liberal form of rights has been co-opted by reactionary interests pressing a deregulatory agenda.

of factors that produce social injustice".[16] This, however, is not to endorse the claims of other critics of the Charter who argue that all uses of it are inevitably and irredeemably regressive, for the book expressly takes issue with such claims.[17] Rather, Bakan cautions that the value of the Charter as a tool for progressive social justice must be closely calculated because the "social constitution – historically rooted patterns of power relations among groups and individuals that profoundly affect and determine the nature and quality of people's existence – is largely beyond its grasp."[18]

If Bakan is right, and if what he says about the Canadian experience is likely to be reflected in Australian practice, then his book provides ample reason to be cautious about the actual effects of entrenching rights in the Australian Constitution. In my view, Bakan makes a convincing case for caution by situating constitutional rights strategies within the broader context of the difficult struggle against dominant ideologies. The capacity of the Charter to redress social injustice is captured and limited by such ideologies and this is why caution must be shown both in using and demanding constitutional rights as tools for achieving social justice. Indeed, Bakan's findings with respect to the effect of judicial conservatism upon the Charter reinforce what others have observed in different legal and constitutional rights contexts, namely, that the court system, as a political institution, is unlikely to be an agent for significant social reform of any type, let alone the progressive type.[19] However, Bakan's argument with respect to the effect of the liberal form of rights upon the Charter is more controversial and more problematic. This is because Bakan tries to argue both that the adoption of the liberal form of rights means that constitutional rights cannot advance progressive social justice and that legislative reform programs could arrange legal rights so as to do so. This is problematic because the quality of the liberal form of rights which Bakan regards as fatal to the capacity of that form to advance progressive social justice is a quality shared by, in fact inherent to, all legal rights as known to both the Canadian and Australian legal systems. So, if constitutional rights that adhere to the liberal form of rights limit the Charter, then the legislature ought to be similarly limited; since this is not Bakan's conclusion it seems something must have gone awry in his analysis. Where Bakan goes astray, in my view, is in mistaking a substantive limit imposed by judicial conservatism upon the liberal form of rights for a limitation inherent in that form itself. That this is so is most clearly reflected in Bakan's consideration of the relationship between the Charter and poverty. In what follows I therefore elaborate Bakan's arguments as to how the politics of the Charter limit its

16 Bakan, *Just Words: Constitutional Rights and Social Wrongs* p144.

17 In particular, Bakan addresses the arguments in: Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishing, Toronto 1994); Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (University of Toronto Press, Toronto 1995).

18 Bakan, *Just Words: Constitutional Rights and Social Wrongs* p145.

19 See, for a ground-breaking example, Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, Chicago 1991).

capacity to address poverty and then take issue with his analysis of the limiting effects of the liberal form of rights.

CONSTITUTIONAL RIGHTS AND POVERTY: THINKING IT THROUGH

According to Bakan, one aspect of the prevailing "social constitution of injustice" which progressive social justice seeks to transcend is the "economic dimensions of social inequality, and poverty in particular".[20] As Bakan sees it, economic insecurity and inequality, of which poverty is merely the most obvious and cruel manifestation, are endemic to capitalist social relations. Most problematic in this respect is the primary capitalist social relation of property which allows owners to control the access of non-owners to most of the resources essential for human survival, necessarily creating a dependence of the latter on the former. Capitalist social relations are not, however, the only ones which produce and maintain economic insecurity and inequality; they are complemented by other discriminatory social relations, such as sexism and racism. So, poverty is but a symptom of the various (oppressive and discriminatory) social relations that produce and perpetuate it. In Bakan's view, it is precisely these social relations that constitutional rights must be able to reach if they are to enable any significant achievement of social equality. However, it is Bakan's argument that both judicial conservatism and the liberal form of rights limit the Charter's capacity to engage and reform the social relations that produce poverty.

Poverty and Judicial Conservatism

In identifying judicial conservatism as a limit upon the Charter's capacity to address economic inequality and poverty, Bakan argues as follows.[21] Judicial conservatism is in essence a resistance to conceptions or claims out of step with the status quo. In adjudicating Charter rights, judges label and process claims by reference to concepts given importance by the dominant ideologies that justify and perpetuate prevailing arrangements. For instance, if a claim relates to the legislative regulation of activity that can be labelled "coercive" or "self-interested" then judges tend to approve of such regulation and so it is unlikely that the Charter would be allowed to disturb such regulation. However, if a claim relates to the legislative regulation of activity that can be labelled "informative" or "freedom-enhancing" or "public-interested" then the opposite tendency emerges. Although not all judges label and process the same, most do so within the limits of the dominant ideological discourse and, moreover, they tend to do so at the conservative end of such discourse. And although the dominant ideologies perpetuated in judicial conservatism have something to say about all areas of life, in the economic realm their chief consequence is to justify and reinforce capitalist social relations.

20 Bakan, *Just Words: Constitutional Rights and Social Wrongs* p51.
21 See Chapter 7 "Judges and Dominant Ideology".

Judges thus tend to perceive social justice through the lens of capitalism, so that the enhancement of property-owner power is understood as consistent with social justice, whilst its hindrance is seen as unjust. And so, as Bakan illustrates, it should come as no surprise to see that in a comparison of cases on the right to picket (which according to dominant ideological discourse hinders capitalism) and the right to advertise (which according to dominant ideological discourse enhances capitalism), the coercive and self-interested aspects of the former are over-emphasised, as are the informative, freedom-enhancing and public-interested aspects of the latter. Judicial conservatism thus limits the extent to which the Charter can engage capitalist social injustice because, before a social injustice can be engaged, it must be recognised. But with respect to capitalist social relations judicial conservatism encourages a "recognition-failure": the economic dimension of social inequality is not recognised as social injustice and, indeed, some aspects of that inequality, such as restriction of the right to picket, are even mistaken for social justice.

The nature of Bakan's argument concerning judicial conservatism means that the force of the limit imposed by such conservatism is contingent upon the social context within which any particular set of constitutional rights are implemented. Advocates for progressive social justice minded to use constitutional rights must therefore calculate the degree of conservatism of presiding judges and assess the prospects for swaying them to a more progressive understanding. Such assessments then need to be weighed against parallel assessments of alternative strategies, such as political lobbying, in order to determine what strategy, or mix of strategies, looks most fruitful. As Bakan recognises, judicial conservatism is not a united front and occasional progressive victories may be, and have been, achieved - in particular where the progressive claim can be appropriately labelled and processed, as has been the case in some successful claims to equality in welfare benefits for lesbians and gays.[22] However, having surveyed a vast collection of Canadian constitutional rights decisions, Bakan is highly sceptical of the possibilities for systematically circumventing or transforming judicial conservatism to any great extent in Canada.

Moreover, even if the limit of judicial conservatism could be overcome, according to Bakan's argument it would still be necessary to tackle the limit imposed upon the Charter by the liberal form of rights, although the latter operates in a different way: whereas judicial conservatism discourages judges from recognising the full extent of social injustice, the liberal form of rights prevents judges from doing anything about it, even were they to recognise it. Therefore, if either limit is present in constitutional rights adjudication, then the social relations that produce poverty will not be reformed by the Charter. Consequently, where both are present, each must be overcome. And so, if Bakan

22 Bakan cites *Knodel v British Columbia* [1991] 6 WWR 728 (a case concerning spousal benefits) as an example, although he also notes that *Egan and Nesbit v Canada* [1995] 2 SCR 513 (also dealing with spousal benefits) may have gone too far in the opposite direction.

is right, then advocates for progressive social justice must break down both judicial conservatism and the liberal form of rights; they must force the adoption of an alternative vision of social justice *as well as* an alternative structure/form of constitutional rights. However, in my view, such advocates do not need to bear this double burden because Bakan goes too far in arguing that the liberal form of rights must be overcome. Such overstatement is worth identifying, not merely because it may in some sense reduce the workload of advocates for progressive social justice, but also because it is both untenable and dangerous. It is untenable because it leads to the conclusion that law reform, whether in constitutional or legislative guise, is ineffective to redress poverty and dangerous because it legitimates judicial apathy in the face of poverty.

In my view, it is not the conceptual form (structure) of liberal rights which impedes a constitutional rights-based response to poverty. Rather, it is the substance of dominant capitalist (and sexist and racist and so on) ideology, imposed upon that form by judicial conservatism, which has the most significant limiting effect. Where Bakan primarily goes wrong, as I argue in the next section, is in focussing upon the complex set of interrelated oppressive social relations that constitute poverty without paying due regard to the fact that such set is nonetheless an accumulation of discrete social relations. Consequently, he underestimates the extent to which the liberal form of Charter rights can engage each discrete oppressive social relation and so overstates the extent to which that form incapacitates the Charter's response to poverty as a whole.

Poverty and the Liberal Form of Rights

In Bakan's analysis the liberal form of rights imposed upon the Charter limits the extent to which it can engage social injustice in three ways, each of which derive from liberalism's tenets of anti-statism and atomism:

> First, only state action is caught by the Charter's rights. The Charter differs in this way from most regulatory legislation, including human rights legislation, which imposes legal obligations on non-governmental actors. Second, because only state action, not inaction, triggers rights, they limit what the state can do but do not require that the state do anything. Third, a rights claim must be framed in dyadic terms (a feature that follows from rights' atomistic form), as a challenge to a discrete state action with specific effects on a particular individual or group: the right of an individual or group (to do, not do, or have something) imposes a specific correlative duty (to allow, not require, or give something) on the state.[23]

Although Bakan finds all of these elements present in Charter adjudication and traces the extent to which they limit the Charter's capacity to engage social injustice, to his mind it is

23 At p48.

the third element, the dyadic form of rights, that is most problematic, so much so that even if the Supreme Court of Canada rejected the first two elements that would not suffice to enable the Charter to adequately engage social inequality.[24] It is therefore this aspect of Bakan's argument against the liberal form of rights that I will focus upon.

As Bakan sees it, the problem with the atomistic/dyadic form of liberal rights is that it constructs social conflict "as an accumulation of discrete clashes between rights-bearers and duty-holders, each clash potentially resolved by adjusting the relationship between the two disputants".[25] This is a problem because:

> This exclusive focus on the actions of two actors in relation to one another (whether individual/state, individual/private organization, or individual/individual) leaves out the complicated and ongoing processes through which relations among multiple actors and actions combine to construct people's actual life conditions and shape their choices, capacities, identities, and desires. Equality rights claims are thus unable to get at the causes of inequality and other social ills; they deal only with discrete symptoms, leaving underlying social structures untouched.[26]

In order to illustrate this problem Bakan discusses the example of the economic dimension of social inequality, arguing that poverty is produced and perpetuated by more than just the accumulation of discrete (actor-to-actor) injustices in that deeper structural and institutional processes - for instance, capitalist property ownership, the pursuit of profit and sexism in hiring and remuneration - play a fundamental role. Bakan then goes on to relate how, despite this, activist lawyers and academics have put forward arguments claiming obligations of governments to provide poor people with various social welfare benefits and to do so in a non-discriminatory fashion. However, as Bakan sees it, such arguments, even if successful, typically "do little more than address some of the symptoms of poverty".[27] He continues:

> They do not touch the background causes, in particular the constellation of social and legal relations through which wealth and resources are created

24 Again it must be said that Bakan's use of the term liberal should perhaps be qualified as there are prominent contemporary liberal theorists who would reject the state action and negative duty limits to rights, for instance, Waldron (see above, n11). Furthermore, as it happens, with its recent decisions in *Vriend v Alberta* [1998] 1 SCR 493 and *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624, handed down after the publication of Bakan's book, there are signs that the Supreme Court of Canada is prepared to review its commitment to, or at least its application of, these two elements. For illuminating discussion of these cases, see Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*" (1998) 9(3) *Constitutional Forum* 59.

25 Bakan, *Just Words: Constitutional Rights and Social Wrongs* p47.

26 At p51.

27 At p54.

> and distributed in society. Charter arguments against poverty, if accepted by the courts, would only impose obligations upon governments to provide groups with particular remedies; they would not affect the social and economic conditions that produce poverty.[28]

In sum then, Bakan's argument is that, due to the atomistic basis of the liberal form of rights imposed upon the Charter, such rights are only capable of addressing discrete (actor-to-actor) injustices and providing discrete (actor-to-actor) remedies. But since poverty is produced and perpetuated by structural and institutional processes, even where discrete remedies are won, as in the case of improved social welfare benefits, these will not be sufficient to address those processes and so will address only the symptom of poverty and not the disease of capitalist property ownership and associated discriminatory relationships. Consequently, advocates of progressive social justice must be cautious in their use of constitutional rights unless and until the liberal form of rights, and most particularly the dyadic form of rights, is abandoned.

But if Bakan is correct in arguing that constitutional rights will be largely ineffective so long as their dyadic form is retained, then that raises doubts as to whether any legal rights (for instance, legislative rights) could be effective. In short, his argument proves too much. This is because the orthodox understanding of legal rights holds that they operate through the allocation of dyadic legal entitlements (for instance, rights/duties, powers/liabilities) constituting dyadic legal relationships. How law works, whether as articulated by judges under a constitution or by legislators through legislation, is by creating, defining, enforcing and altering those entitlements and relationships. The difference between constitutional rights and legislative programs does not lie in the form of rights they use but rather in the negotiability of the entitlements they establish: the dyadic rights/entitlements established by legislative programs can be changed by ordinary legislation, whereas constitutional rights cannot. Whilst the protection of any one constitutional right, as well as the achievement of a particular legislative program, may require an arrangement of multiple and complementary dyadic legal entitlements, nevertheless, the dyadic form of rights remains an essential building block in both cases. So if Bakan is correct in arguing that the dyadic form of rights limits the extent to which constitutional rights can achieve progressive social justice, then a similar limit should apply to legislative programs. Yet at a number of points in his book, for instance in the context of a discussion of the dyadism-induced ineffectiveness of the right to strike, Bakan himself advocates various ways in which poverty and other aspects of social inequality might be redressed through the alteration, by legislation, of dyadic legal relationships.[29]

This apparent contradiction in Bakan's argument raises the suspicion that he overstates the extent to which the dyadic form of rights is a problem. Ultimately, I think this is precisely

28 As above.

29 At p85. See also Bakan's affirmation that the progressive exercise of "state power" could further genuine social security at p54.

what he does and that his doing so can be attributed, at least in the first place, to his argument that poverty is the product not merely of discrete injustices but also of structural and institutional processes. As I have outlined, Bakan questions the effectiveness of using constitutional rights to impose duties upon governments to make welfare payments and he does this in part by emphasising the role of property ownership in the production and perpetuation of poverty: "The power of property owners to exclude people from the means necessary for their existence is at the root of poverty's presence in capitalist societies."[30] For Bakan, it appears that the exclusionary rights of property-owners are an "institution" of capitalism, in the sense that capitalism legitimates the exclusion of people in need, and so most property-owners exercise their exclusionary rights in this way. Therefore, the mere pursuit of a discrete dyadic duty upon governments to provide welfare misses the point that poverty is attributable to the more fundamental institution of property ownership. So much could be conceded, but it does not follow that the dyadic form of rights can only treat the symptom and not the institutional causes of poverty. For what Bakan seemingly overlooks is that property-owner power, the power to exclude even people in need, is a quintessentially dyadic right held by the property-owner against, generally speaking, all the world, and its exercise is a paradigmatic example of a discrete (actor-to-actor) injustice. And so, regardless of whether or in what sense property is an institution, it contributes to poverty through discrete, albeit multiple, instances of exclusion. It is therefore difficult to understand Bakan's conclusion that poverty, insofar as it is produced and perpetuated by such exclusion, is beyond the reach of the dyadic form of liberal rights. This is because, if poverty is constructed through the accumulated exercise of discrete dyadic rights, such as those of a property-owner, then it can, at least in theory, be deconstructed through the redefinition of such rights under the Charter.[31]

Bakan moves on to point out that poverty is not merely produced and perpetuated by the exclusionary power of property owners but also by the discriminatory distribution and exercise of that power along sexist and racist lines. But even then I am not sure in what sense such discrimination manifests itself other than in discrete, albeit multiple, injustices. Again, it may well be that the dominant ideology in Canadian society rationalises, if not promotes, such injustice, so that in some sense the injustice can be described as structural and institutional, but how does that mean that the injustice does not ultimately manifest itself in an accumulation of discrete situations?[32] Bakan needs to explain more fully how

30 At 52.

31 Bakan might argue that, because the power to exclude people in need from property is primarily wielded by private actors, rather than the state, it cannot be brought within the reach of the liberal form of Charter rights. However, not only does such an argument run counter to trends in contemporary liberalism which seek to abandon the state-action constraint (see, for instance, Waldron at n11), but it also contradicts Bakan's contention that the dyadic constraint upon the liberal form of rights will thwart progressive social justice even in the absence of the state-action constraint.

32 It is worth noting that at a couple of points Bakan makes reference to arguments of Iris Marion Young to the effect that power should be seen as a relation and a process rather than merely as a possession and a pattern. When this is done, Young argues that the sense

poverty, even when complemented and exacerbated by sexism and racism, is more than an accumulation of discrete injustices (be they individual/state, individual/private organisation or individual/individual or some combination). For if Bakan cannot make clear in what sense poverty is produced other than through an accumulation of dyadic conflicts, the Charter's incapacity does not appear to arise from judicial adherence to a dyadic form of rights but, rather, from judicial adherence to a particular application of those rights, namely, one supportive of a capitalist (and sexist and racist) way of life. Which is to say that Bakan is left with his first argument as to the Charter's incapacity, that based in judicial conservatism.

Furthermore, even if it does make sense to say that poverty is produced and perpetuated by more than an accumulation of discrete injustices, this may not mean that it cannot be remedied dyadically. For instance, even if claims to improved social welfare benefits do not transcend the dyadic form, if such claims were actually upheld, and upheld to the point that the resultant wealth transfers eliminated need, what does it matter if the background social/legal relation of property is not itself transformed? Moreover, if welfare benefits claims were actually upheld on an ongoing basis, over time would that not amount to, or at least force, a transformation of the dominant capitalist ideology's conception of property and poverty? These questions need answers before Bakan's critique can succeed.

In fact, some claims to improved welfare benefits have been upheld on equality grounds, but, in response to such successes, Bakan points to examples in which this has led to both the withdrawal of benefits altogether, as well as to the trade-off of benefits against each other. Such results do not, however, inevitably flow from the dyadic form of rights, rather, they flow from the opportunistic exploitation by governments of what might be called "litigation gaps" and the dominant capitalist ideology which sanctions this abuse of the poor. For instance, in response to a decision impugning an unequal welfare benefit a government may exploit the fact that another entitlement has not been the subject of litigation to trade that entitlement off in order to finance an equal benefit for all. However such a trade-off can only occur so long as that other entitlement falls into a litigation gap; once the other entitlement has been litigated, and found to be constitutionally mandated, the trade-off must stop. And once enough entitlements are litigated, and mandated, governments would be forced to acknowledge the inevitable outcome of future cases and so the problem of trade-off, which does not in any event result from the dyadic form of rights, would disappear.

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in which a particular instance of institutional power does not simply conform to a ruler/subject model, but is reinforced and mediated by the related actions of multiple third parties, can more easily be seen. But it is difficult to see how this poses a problem for the dyadic form of liberal rights, once it is accepted that the (dyadic) behaviour of more than one institutional actor may need to be regulated. See Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton 1990) Ch 1.

Nevertheless, even if the dyadic form of rights does not in theory contradict the redistributive impetus of progressive social justice, Nancy Fraser points out that the apparent contradiction of welfare redistribution in fundamentally capitalist societies may inevitably cause a backlash against such redistribution and so undermine its effectiveness.[33] Echoing Fraser, Bakan identifies Jennifer Nedelsky's work on the reconception of rights as relationship, and as sites of dialogue, as a possible alternative conception of rights, only to point out that mere reconception cannot overcome the "solid historical and social foundations"[34] of liberal capitalism. According to Bakan, such foundations, which separate and protect a private social and economic sphere from a delegitimated public political sphere, and rationalise governmental apathy in the face of poverty, would still remain as a significant practical obstacle *even if* the dyadic form of rights was transcended. If Bakan's point is that theory does not determine practice then so much might be conceded, and his point would be valid even if, as I have argued, the dyadic form of rights does not, in theory, contradict progressive social justice and so need not be transcended. But what is most telling about Bakan's discussion of this point is how he mistakes a revitalisation of the dyadic form of rights for a transcendence of it, for Nedelsky takes the dyadic form of rights as given: what she reconceives, or seeks to resuscitate, is the sense in which this dyadic form structures relationships.[35] In seeking a movement from the conceptualisation of rights as trumps to one of rights as relationship, Nedelsky argues not for an abandonment of the dyadic form, but for an abandonment of the impoverished mind-set that cannot see beyond the relationships that have presently been constructed out of that form. In other words, Nedelsky argues for a revitalised discussion of what sorts of relationships we want the dyadic form to underwrite. In my view, and in Bakan's terms, Nedelsky is thus arguing against judicial conservatism and the substantive content given to the liberal form of rights, rather than that form of rights itself.

If the liberal form of rights is therefore not the problem Bakan thinks it is, there is, nevertheless, some truth in his view that using constitutional rights merely to claim improved welfare benefits risks leaving the underlying problem of property-owner power unaddressed. But, in focussing his attention upon the setbacks and disadvantages associated with such use, Bakan seems himself to have overlooked the fact that such claims are merely one way in which the social inequality of poverty might be redressed. Indeed, he seems to assume that there is something inherent in the liberal form of rights which makes that form incapable of reaching below the surface to address the underlying problem. But there is nothing in the form of dyadic rights that leaves it incapable, for instance, of disabling the general power of property owners to exclude others when those

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33 Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge, New York 1997) Ch 1.

34 Bakan, *Just Words: Constitutional Rights and Social Wrongs* p61

35 Nedelsky, "Reconceiving Rights as Relationship" in Hart & Bauman (eds), *Explorations in Difference: Law, Culture and Politics* (University of Toronto Press, Toronto 1996) p67.

others are in need.[36] Of course, establishing such an exception as part of a constitutional right may have all sorts of repercussions giving rise to further constitutional rights adjudication on related issues, but that is just the ordinary consequence of changing any dyadic relationship. Furthermore, such establishment could only be practically achieved once judges escape dominant capitalist ideology, but that is the problem of judicial conservatism, not the liberal form of rights.

CONCLUSION

There is ample reason to doubt the willingness of law-makers, whether judges or legislators, to create, define, alter and enforce dyadic legal entitlements and relationships, such as those constitutive of property, so that poverty and its companion forms of discrimination and exploitation are eliminated. Ultimately, as Bakan argues, such resistance may be founded on an allegiance to dominant capitalist (and sexist and racist and homophobic and so on) ideology which rationalises the economic dimension of social inequality and, through judicial conservatism, incapacitates the Charter's engagement with such social injustice. Bakan concludes that such conservatism reduces constitutional litigation to just another, and not a particularly promising, strategy in the broader political struggle against dominant ideology. I have not sought to argue his conclusion, rather, I have argued that, even if it is correct, the dyadic form of rights has little to do with it. Which is just as well because, given the prevalence of the dyadic form of rights in the Canadian and Australian legal systems, it is difficult to see how social justice could be built with anything else.

Nonetheless, Bakan's work raises and constructively considers many important issues for those in Australia who would pursue constitutional rights as tools for progressive social justice. For instance, if the approaches to constitutional interpretation predominant in Canada are prevalent here as well, and if there is to be an Australian Charter, and if advocates for progressive social justice want to try to use it to advance their ends, then at the very least the interpretive question of whether so-called economic and social rights have been established by that Charter must be made as plain as possible in the text itself; that would at least improve the chances of getting past the first barrier put in the way of progressive social justice claimants in Canada. However, as Bakan's analysis shows, such words of justice (or, to adopt Bakan's word-play, just words) would remain mere words (or just words) unless complemented by judicial understanding of progressive social justice and judicial commitment to its advancement. Unfortunately, such episodes as the striking down, in *Australian Capital Television Pty Ltd v Commonwealth*,[37] of legislation designed to improve the quality of elections suggest that Australian judges may not always recognise what progressive social justice consists of or may thwart seemingly genuine

36 As a matter of common law courts have generally refused to create such exceptions, eg *Southwark LBC v Williams* [1971] 1 Ch 734.

37 (1992) 177 CLR 106.

efforts to advance it. Moreover, the decision in *Mabo v Queensland (No 2)*,[38] which gave symbolic recognition to native title whilst practically negating it through the doctrine of extinguishment without compensation, though not one concerning constitutional rights, suggests that the Australian court system, as a political institution, is unlikely to be an agent of significant social reform under an Australian Charter.

Consequently, even if Bakan's argument as to the incapacitating effects of the liberal form of rights can be left aside, his analysis of Canadian experience under the Charter dictates a cautious approach to the pursuit of progressive social justice through constitutional rights in Australia. Which is not to say that the Real Republic delegates to the 1998 Constitutional Convention, and their allies, are necessarily mistaken in seeking an Australian Charter as one of the means of realising a just republic, rather than just a republic. It is to say, however, that they must be equally vigilant in seeking a just Charter, and not just a Charter, and they must be aware of the factors that can prevent just words from realising a just society. Of course, this warning will leave unperturbed those Australians who are not convinced that progressive social justice is something they want either of a republic or a Charter. But whilst it may be worthwhile to establish an Australian republic without seeking to advance progressive social justice or, more particularly, to eliminate poverty,[39] it is not at all clear that the same can be said for the establishment of an Australian Charter.

38 (1992) 175 CLR 1.

39 I make this clarification because, given that Bakan's definition of progressive social justice includes a democratic dimension, the mere movement from a monarchy to a republic, even if ultimately only of symbolic significance, may nevertheless be an advancement.