

SOCIAL RIGHTS: THE IMPLICATIONS OF SELECTIVE
CONSTITUTIONALISATION

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Abstract

This thesis is concerned with those 'social' rights that relate to the provision of the basic necessities of life; that is the right to an adequate standard of living (including food, clothing and shelter), the right to health and the right to education. The International Covenant on Economic, Social and Cultural rights (ICESCR) recognises obligations pertaining to the progressive realisation of these rights, whilst leaving the method of implementation within domestic discretion.

The *Canadian Charter of Rights and Freedoms* only accords domestic constitutional protection to civil rights, leaving the implementation of these social rights within government discretion. This study will examine what has, in the Canadian experience, proven to be the practical consequences of adopting such a policy of 'selective constitutionalisation,' that puts social rights by definition outside the ambit of legal enforcement.

Firstly, it will examine the court's approach to cases that have, in the absence of constitutionalised social rights, attempted to indirectly invoke social rights by encouraging a positive social interpretation of the right to equality and the right to life, liberty and security of the person, and will illustrate that the courts have failed to interpret these rights so as to indirectly protect social rights.

Secondly, it will consider the relationship between legal, political and social discourse, illustrating that, in light of the non-constitutionalised status of social rights, the values underlying these rights have been marginalised in political and social discourse, facilitating reforms that have restructured and eroded the welfare state, reducing the realisation of social rights within Canada.

Thirdly, it will consider the practicability of adopting the alternative approach of according equal constitutional protection and justiciable status to social rights, through an examination of the theoretical literature and the approach taken to social rights under the *Final Constitution of the Republic of South Africa 1996*. It will illustrate that the philosophical arguments that have been utilised to support the non-constitutionalised status of social rights are no longer sustainable and that the constitutional experience of South Africa provides evidence that a practical alternative to the position adopted in Canada exists.

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Chapter 1:

Introduction and Methodology

Introduction

The *Canadian Charter of Rights and Freedoms* accords domestic constitutional protection only to those rights traditionally interpreted as 'civil,' leaving the implementation of social rights within government discretion. This study will examine what has, in the Canadian experience, proven to be the practical consequences of adopting such a policy of 'selective constitutionalisation,' that puts social rights by definition outside the ambit of legal enforcement.

It will be shown, *firstly*, that, in light of the non - constitutionalised status of social rights, the courts have proven unwilling to interpret the rights contained in the *Charter* to their full potential, rejecting a positive social interpretation of the right to equality and the right to life, liberty and security of the person that would allow for the substantive realisation of both these 'civil' rights and the 'social' rights to which they are so intricately related.

Secondly, that, in light of the non- constitutionalised status of social rights, the values underlying these rights have been marginalised in political and social discourse, facilitating reforms that have restructured and eroded the welfare state, reducing the realisation of social rights within Canada.

Thirdly, that the philosophical and practical arguments that have been utilised to support the non-constitutionalised status of social rights are no longer sustainable. Theoretical developments within the area of social rights support according them equal status to civil rights, whilst the practical constitutional experience of South Africa provides evidence that a practical alternative to the position adopted in Canada exists.

Defining Social Rights

The terms 'social' rights, 'socio-economic' rights and 'social and economic' rights have been used interchangeably in academic discourse to refer to a set of rights that have in recent years been defined by their inclusion in the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ and contrasted with the 'civil and political' rights contained in the International Covenant on Civil and Political Rights (ICCPR).²

Whilst most rights can have social and economic dimensions and connotations, social and economic rights, as generally defined, are those rights that have been deemed to have a predominantly social and / or economic content and are often defined in terms of a specific social or economic end, for example the right to adequate housing.

¹ International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), UN Doc. A/6316 (1966) (Hereinafter referred to as ICESCR).

² International Covenant on Civil and Political Rights, GA Res. 2200A (XXI) 21 UN GAOR UN Doc A/6316 (1966) (Hereinafter referred to as ICCPR).

The ambit of social and economic rights is potentially broad and this study will focus upon a specific group of social and economic rights that are often referred to as 'social welfare' rights in that they relate directly to the provision of the basic necessities of life or provide for an adequate standard of living,³ that is the right to adequate food, housing, health and education.⁴

This study is concerned with social and economic rights as they work in their social welfare capacity, therefore, classical commercial economic rights such as freedom of contract or the right to property do not fall within the ambit of this study. Further, for the purposes of limiting the study the right to self determination, the right to development and labour related rights will not be specifically considered, although the issues raised may be of some general relevance.

For clarity, convenience and to reflect the social welfare capacity in which these rights are being considered the term '*social rights*' will be used henceforth in place of the

³ Craig Scott and Patrick Macklem 'Constitutional ropes of sand or justiciable guarantees; Social Rights in South African Constitution (1992) Uni Penn LR, 141, 1 at 9

"Social rights refer to those rights that protect the necessities of life or that provide for the foundations of an adequate quality of life. The necessities of life encompass at a minimum rights to adequate nutrition, housing, health and education. All of these rights provide the foundations upon which human development can occur and human freedom can flourish."

⁴ These rights correspond to articles 11-13 of the ICESCR.

Article 11.1 "The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions."

Article 12.1 "The States Parties to the present Covenant, recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

Article 13.1 "The States Parties to the present Covenant recognise the right of everyone to education."

term 'social and economic rights,' correspondingly the term '*civil rights*' has been adopted to denote those rights that have traditionally been categorised as civil and political.

An Overview of the Status of Social Rights in Positive Law

Social rights have historically existed as the 'poor relative' of civil rights. Despite affirmative rhetoric, their implementation in both international and domestic law has remained comparatively underdeveloped, constrained by a formalistic dichotomy between the 'political' and the 'socio-economic' domain.

Social rights are generally, though not uniformly, denied the status routinely accorded to civil rights; that of legal norms binding upon the legislature, backed by judicial enforcement. In both positive law and popular understanding the realisation of social rights continues to be portrayed, and perceived, as a moral prerogative rather than a legal imperative;

“ The shocking reality is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights would provoke expressions of horror and outrage and would lead to concerted calls for remedial action. In effect, despite the rhetoric violations of civil and political rights continue to be treated as though they were far more serious and more patently intolerable than massive and direct denials of economic, social and cultural rights”⁵

⁵ Statement of the World Conference on Human Rights on behalf of the Committee on Economic, Social and Cultural Rights UN Doc E/1993/22 Annex III cited in Philip Alston and Henry Steiner eds "International Human Rights in Context: Law Politics and Morals" (1996) Clarendon Press, Oxford.

- Domestic Law

Domestic provision of education, healthcare and social assistance is recognised, in differing degrees, throughout the developed world. However, in the majority of these countries, the welfare state is grounded in statutory not constitutional law. Although the norms underlying social rights may be realised to some extent, the accompanying *rights* and the legal obligations they impose are not themselves recognised. As Scott and Macklem have stated;

“A sharp distinction is often drawn, implicitly or explicitly, between civil and political matters and economic and social matters, with the former enjoying justiciable status, increasingly as constitutional rights, and the latter viewed merely as involving potentially legitimate legislative aspirations or policy goals, sometimes, but just as often not, constitutionally recognised.”⁶

In an age of constitutionalisation, civil rights frequently enjoy domestic constitutional protection, rendering them justiciable, that is binding upon the legislature and subject to judicial enforcement. The position of social rights generally takes one of two forms; firstly, they may be omitted completely from the constitution, as is the position under the *Canadian Charter of Rights and Freedoms*,⁷ as well as the United States Constitution. Consequently, constitutional challenges are restricted to attempts to indirectly invoke social rights by encouraging a positive ‘social’ interpretation of certain rights traditionally considered to be civil, notably the right to equality and the

⁶ Scott and Macklem *supra* note 3 at 18.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, 1982, c.11.

right to life. In the case of Canada and the United States, the absence of express social rights from the constitution has rendered constitutional challenges that have sought to realise the norms underlying social rights largely unsuccessful.⁸

Alternatively, social rights may be included in the constitution as 'directive principles,' as is the position in many European countries and increasingly in the developing world.⁹ Whilst directive principles should guide state policy they do not impose a legally enforceable obligation upon the state and are non-justiciable. In certain instances, most notably under the *Constitution of India*,¹⁰ directive principles have had a significant impact through judicial initiative in utilising them to interpret

⁸ For analysis of the Canadian situation see Chapter 3.

For analysis of the position in the United States see Joel Handler "Constructing the political spectacle: the interpretation of entitlements, legalisation, and obligations in social welfare history" (1990) 56 Brooklyn Law Review Fall 899.

⁹ A number of European constitutions, including Spain, Portugal, Sweden, Germany and Greece include directive principles of state policy in their constitutions, as do a number of developing countries, including India, Nigeria and Namibia. For a review of the countries including some reference to social and economic rights in their constitutions see 'The Protection of Social and Economic Rights; A Comparative Study' Constitutional Law and Policy Division Ministry of the Attorney General (1991).

Note that there is some argument that the *Canadian Charter of Rights and Freedoms* comes under the second approach to social rights on the grounds that section 36 of the Charter amounts to a directive principle. Section 36 states;

- (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments are committed to
 - (a) promoting equal opportunities for the well-being of Canadians;
 - (b) furthering economic development to reduce disparity in opportunities; and
 - (c) providing essential public services
- (2) Parliament and the government of Canada are committed to the principle of making equalisation payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of taxation.

¹⁰ *Constitution of India* (1949) articles 36 - 51.

civil rights positively. However, the impact or success of directive principles remains dependant upon government co-operation and / or extreme judicial activism.¹¹

The recently enacted *Constitution of the Republic of South Africa*¹² breaks with the traditional approach to social rights by including them in expressly justiciable form. The constitution takes a substantive approach to rights protection centring upon the realisation of social and economic transformation, as President Mandela has stated; “the rights in our constitution will be empty and our democracy will remain fragile if they do not bring with them an improvement in people’s lives especially those who bear the brunt of poverty and inequality.”¹³ The approach of the South African Constitution, a response to the socio-economic and political situation in South Africa, is a rare instance in which social rights are accorded equal status to civil rights, that of legal norms binding upon the legislature backed by judicial enforcement.

- International Law

In international law a similar distinction in the status and normative force of civil and social rights exists. The process by which this distinction emerged is well documented

¹¹ Directive principles have had some impact in India due to the stance of the Supreme Court in holding that they must inform the interpretation of civil and political rights; see Craig and Deshpande ‘Rights, Autonomy and Process: Public Interest Litigation in India’ 9 (1989) Oxford Journal of Legal Studies 356. For analysis of the variable success of directive principles, see the comparison of India and Ireland in Bertus De Villiers ‘Social and Economic Rights’ in Van Wyk, Dugard, De Villier and Davis ed ‘Rights and Constitutionalism; Rights and the South African Legal Order.’ (1994) Juta & Co. Ltd.

¹² *The Constitution of the Republic of South Africa 1996* as adopted by the Constitutional Assembly 8 May 1996, see Constitutional Assembly Database Project at www.law.uct.ac.za.

¹³ Reported in Rams Ramashia of SANGOCO ‘Survived an atrocious and morally vile system’ Independent online 3/6/1998 at www2.inc.co....998/9803/6pov.html.

elsewhere.¹⁴ Briefly, the Universal Declaration of Human Rights (1948) integrated social and civil rights within one 'human rights' document which, predicated on the concept of interdependence, contemplated no material distinction between rights. However, the adoption of the International Covenants in 1966 witnessed the formal bifurcation of these rights into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural rights (ICESCR).

The provisions of the two documents differ instrumentally, in terms of obligations and enforcement, exacerbating the perception of 'difference' and 'inferiority.'¹⁵ Firstly, the ICCPR imposes an obligation to "respect" and "ensure" civil rights to all individuals within its territory; that is a *specific* and *present* obligation of *result*.¹⁶ The ICESCR, however, imposes a more limited obligation to "take steps ... with a view to achieving progressively the full realisation of the rights."¹⁷ Whilst this does

¹⁴ See Farrokh Jhabvala "On Human Rights and the Socio-economic context" (1984) 31 Netherlands International Law Review 149; Craig Scott "The Interdependence and permeability of Human Rights Norms: towards a partial fusion of the International Covenants on Human rights" (1989) 27 Osgoode Hall Law Journal 769.

¹⁵ Virginia Leary "Lessons from the experience of the International Labour Organisation" in Alston, Philip eds "The United Nations and Human Rights: a critical appraisal. Oxford: Clarendon, 1992.

"Since a weaker implementation system was provided in the Economic, Social and Cultural rights covenant, the impression was conveyed that civil and political rights were more important than economic and social rights."

¹⁶ ICCPR *supra* note 2, Article 2(1)

"Each State Party to the present Covenant undertakes *to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

¹⁷ ICESCR *supra* note 1, Article 2 (1)

impose a present obligation it is a *non specific* obligation of *conduct* not result; an obligation to take (undefined) action but not to ensure the right.

Secondly, whilst the ICCPR is supported by an optional protocol that provides for 'quasi judicial' enforcement through an individual complaints procedure, the ICESCR is monitored through the periodic examination of state reports with no provision for judicial style consideration of individual complaints. The position has been nicely articulated as follows;

“The ICCPR “has teeth” in ways that the ICESCR does not. The ICCPR has explicit requirements, explicit prohibitions and a procedure for responding to a state party that violates these requirements and prohibitions. The ICESCR, on the other hand, may be immediately binding, but what is binding is an aspirational standard: the ICESCR provides an ideal goal which the parties must work toward, but not necessarily achieve. How hard they work towards this goal is a matter that they determine for themselves, in accordance with their resources and national priorities.”¹⁸

- Regional Law

At *regional* level the position is somewhat less clear and in a state of change.

Generally, in practice, social rights have, and continue to, play a secondary role to civil rights. The European system, the oldest and considered the most efficient of the regional mechanisms, adopts a similar distinction to the United Nations, the two sets

“Each State Party to the present Covenant undertakes to *take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures.”

¹⁸ Joy Gordon “The concept of Human Rights: The history and meaning of its politicisation” (1988) 23 Brook. J. Int’l L. 689 at 709.

of rights bifurcated into the *European Convention of Human Rights*¹⁹ and *European Social Charter*.²⁰ The former is judicially enforced by the European Court of Human Rights, whilst the latter has traditionally been the subject of a periodic report system.²¹ This periodic report system is now complemented by a limited complaints procedure, which, although allowing challenges to specific violations, restricts standing to specified groups, not individuals, and to certain limited violations.²²

The African regional system, less influenced by the western tradition, does not formally distinguish between civil and social rights. All human rights are included in one document, the *African Charter on Human and People's rights*,²³ and are enforced by the same body, the African Commission on Human Rights. However, neither social nor civil rights are subject to judicial enforcement,²⁴ whilst the work of the Human Rights Commission has been almost uniformly focused upon civil rights.²⁵

The Inter- American system has two documents dealing with social rights: *The*

¹⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5.

²⁰ *European Social Charter*, 18 November 1961, Eur. T.S. 35.

²¹ Signatories are required to submit bi-annual reports to a Committee of Independent Experts. See Alexandre Berenstein 'Economic and social rights: their inclusion in the European Convention on Human Rights: Problems of formulation and interpretation' (1981) 2 HRLJ.

²² See E/CN.4/1997/105.

²³ *African (Banjul) Charter on Human and People's Rights*, June 27 1981, OAU Doc CAS/LEG/67/3 rev.5, 21 I.L.M 58 (1982) entered into force Oct. 21. 1986.

²⁴ See U.O Umozurike 'The African Charter on Human and Peoples rights' Am. J. of Int'l Law 77 (1983) 902.

²⁵ For details of the African case load see Claude E Welch Jr 'The African Commission on Human and Peoples rights: A five year report and assessment' Human Rights Law Quarterly 14 (1992) 43.

*America Declaration of the Rights and Duties of Man*²⁶ contains a series of social rights but provides no enforcement mechanism, whilst the *American Convention on Human Rights*²⁷ does not articulate specific social rights but includes only one general article dealing with social issues.²⁸

- International Institutions and Non-Governmental Organisations

International banking institutions, including the World Bank and the European Bank for Reconstruction and Development, adopt a similar distinction, placing emphasis only on civil rights. The most prominent non-governmental organisations, including Amnesty International and Human Rights Watch, structure their institutional priorities in the same way, for example, whilst the mandate of Amnesty International states that they are committed to protecting human rights as included in the Universal Declaration it then proceeds to list only civil rights, a bias that is reflected in its substantive work.²⁹

The Importance of Social Rights Today

Violation of social rights is widespread and systemic. Although this is more apparent in the developing world, it is also true of developed countries where poverty and

²⁶ *American Declaration of the Rights and Duties of Man* Adopted by the Ninth International conference of American States, Bogota, Colombia, 1948.

²⁷ *American Convention on Human Rights* signed at the Inter-American specialised conference on Human Rights, San Jose, Costa Rica, 22 November 1969.

²⁸ The American Convention includes only article 26, a general article dealing with social and economic rights that does not specify individual social rights. See William Schabas "Organisation of American States" in "International Human Rights Law and the Canadian Charter" (1996) at 97

²⁹ Joy Gordon *supra* note 18.

structural unemployment has created an underclass increasingly marginalised from mainstream society. This systemic violation of social rights has become an ordinary and largely uncontroversial aspect of life, as one commentator has stated; “among the most salient characteristics of violations of economic, social and cultural rights are the vast number of people they affect, their pervasiveness, and their very ordinariness. Because we are so accustomed to them, we do not always notice them, or define them as rights violations.”³⁰

This problem has and continues to be intensified by the process of market integration and economic liberalisation known as ‘globalisation.’ Firstly, the dense concentration of economic power in private corporations and the privatisation of formerly public activities has resulted in a significant increase in the power of non state actors, who lie beyond the scope of human rights treaties. Secondly, the prominence of free trade ideology has solidified a liberal perception of the role of the state, emphasising its function as the facilitator of private economic activity, and reducing its regulatory and redistributive role. This has resulted in the downsizing of the welfare state throughout the western world, a reality that makes the recognition and realisation of social rights all the more pressing.

In Canada, statistics illustrate a high divergence in the level of income between the richest and poorest citizens, and the existence of a class of persons who live in

³⁰ Audrey Chapman “Current Issues Affecting the Realisation of Economic, Social and Cultural Rights” Paper presented at the International Human Rights Workshop: Economic, Social and Cultural rights fifty years after the Universal Declaration, Oct 8-10 UBC 1998 at 13.

extreme poverty and whose social rights are routinely and systemically violated. In 1998 the 'Human Development Report' of the United Nations Development program (UNDP) ranked Canada first on the Human Development Index (HDI) described by UNDP as measuring the overall progress of the country in achieving human development. However, Canada was ranked tenth out of the seventeen industrialised nations on the Human Poverty Index (HPI), described by UNDP as indicating the distribution of the progress in human development; "measuring the proportion of people left out."³¹

The National Anti-Poverty Organisation estimated that in 1996 17.9% of Canadians, that is 5.3 million persons, were living below the poverty line.³² They further estimated that *all* social assistance recipients had an income well below the poverty line; the highest income of social assistance recipients was in the North West Territories where they received 76% of the income designated by LICO as representing the poverty line, whilst the lowest income was in Newfoundland where social assistance recipients received only 19 % of the LICO poverty level.³³

³¹ Cited in the National Anti-Poverty Organisation's submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the consideration of Canada's third report on the implementation of the International Covenant on Economic, Social and Cultural Rights, November 1998 at www.napo-onap.ca/napo-finaldoc.

Rank 1 on the HPI reflects the most equitable distribution of progress, rank 17 reflects the least equitable. The UNDP explains the difference between the HDI and the HPI as follows:

"while the HDI measures overall progress in achieving Human Development, the HPI weighs the distribution of that progress, measuring the proportion of people who are left out."

³² NAPO *ibid* para 53-73. These Poverty Statistics are based on the low income cut-offs (LICOS) published by Statistics Canada.

³³ NAPO *Ibid* para 53-37.

Countrywide, the use of food banks doubled between 1989 and 1997 and by March 1998 716, 496 people, that is 2.4 % of Canada's population, received assistance from a food bank, 75% of these persons were in receipt of social assistance.³⁴

Within Canada woman and children are disproportionately affected by poverty. NAPO has stated that "the poverty rates for women are higher than those for men regardless of demographic profile. In particular the poverty rate for female single parents is twice that of male single parents." In 1996 an astounding 60.8 % of single mothers in Canada were living below the poverty line. The number of children living in poverty increased by 58% between 1989 and 1995, such that 21.1% of children, that is one in five, were estimated to be living in poverty in 1996.³⁵

The right to adequate housing is also unrealised for many citizens. NAPO has stated that "by conservative estimates there are over 200,000 Canadians who are homeless,"³⁶ whilst the Canadian Mortgage and Housing Corporation (CMHC) estimated that in 1991 one in eight Canadian households lived below acceptable housing standards.³⁷ In relation to the right to health, Statistics Canada have highlighted the low realisation of health amongst the poorer sections of Canadian

³⁴ NAPO *Ibid* at Para 137 and 138.

³⁵ NAPO *Ibid* at para 40.

³⁶ NAPO *Ibid* at para 157.

³⁷ NAPO *Ibid* at para 145. CHMC's estimates are based on a number of indicators. Adequate housing has hot and cold running water, an inside toilet, shower or bath, requires only regular upkeep, has no more than two persons per bedroom, does not require children age 5-17 of the opposite sex to share, has a separate room for each lone parent and couple and does not cost more than 30% of the household's income.

society; "when examining the health of Canadians at different ages in relation to their socio-economic characteristics, the results were consistent; having a low level of educational attainment, being unemployed, being an unskilled worker or living in a household with a low income were all related to having lower health levels."³⁸

(V) Chapter Outlines

This chapter has introduced social rights, outlined their position within positive law and indicated their modern significance. *Chapter 2* will explore the question, at a theoretical level, of whether, social rights can and should be accorded equal legal status to civil rights through an examination of the philosophical and practical arguments that have been raised in political and academic debate. A range of materials will be considered to give a broad perspective, temporally and geographically, to the issue. The chapter will draw upon the academic literature, the political negotiations that preceded the adoption of the International Covenants (1948-66) as well as domestic constitutional deliberations in Canada (1992)³⁹ and South Africa (1990-96)⁴⁰

³⁸ NAPO *Ibid* at para 163.

³⁹ The materials reviewed concern proposals for the introduction of a Social Charter that were put forward in 1992 during the negotiations leading up to the adoption of the Charlottetown Accord, an agreement that amended the Canadian Constitution. Whilst proposals for the adoption of a Social Charter failed, much debate was generated. See for example Bakan and Schneiderman eds. "Social Justice and the Constitution; Perspectives on a Social Union for Canada" (1992) Ottawa; Carleton University Press.

⁴⁰ The materials reviewed concern the representations made and academic literature that surfaced during deliberations in South Africa leading up to the adoption of the Final Constitution in 1996. While Social rights were included in the Final Constitution, the issue was highly contentious. See for example Jeffrey Randel "Social and economic rights in the South African constitution: legal consequences and practical considerations" (1993) 27 Colum. J. L. & Soc. Probs. 1; Bertus De Villiers "Social and Economic Rights" in Van Wyk, Dugard, De Villier and Davis ed "Rights and Constitutionalism;

Chapter 3 and 4 will explore what have, in the Canadian experience, proven to be the practical consequences of pursuing a policy of selective constitutionalisation, that accords protection to civil but not social rights. *Chapter 3* will consider the narrow jurisprudential effect, analysing cases that have, in the absence of constitutionalised social rights, sought to challenge inadequacies and inequities in the provision of social programs, through the right to equality and the right to life, liberty and security of the person, thus, attempting to utilise these 'civil' rights to indirectly invoke social rights. It will illustrate that, in the absence of constitutionalised social rights, the *Charter* has failed to protect the interests underlying social rights, closely representative of the concerns of the poor.

Chapter 4 will consider the broader effects of selective constitutionalisation, in terms of the marginalisation of the interests underlying social rights within political and social discourse. *Part (I)* will consider, from a theoretical perspective, the inter-relationship between legal, political and social discourse, in terms of the constitutive effect of the marginalisation of social rights within legal discourse upon the development of political and social discourse. *Part (II)* will illustrate how this constitutive relationship has materialised in political discourse and policy formation within Canada. In so doing it will review recent welfare reforms that suggest a de-prioritisation of social rights in policy formation, together with the concluding

observations of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in reviewing Canada's third periodic report on its implementation of the International Covenant on Economic Social and Cultural Rights, that highlight the deleterious impact of these reforms upon the realisation of social rights.

Chapter 5 will outline the approach taken to social rights under the *Constitution of the Republic of South Africa*.⁴¹ The South African Constitution includes social rights in expressly justiciable form, and is instructive in illustrating the real as oppose to theoretical possibility of rendering social rights justiciable; that is binding upon the legislature, backed by judicial enforcement. Analysis will take place on three levels; the first will consider the formulation of rights in the constitution, the second will analyse the case-law and the jurisprudential impact of constitutionalised social rights and the third will consider the broader political and social impact of constitutionalisation. At points the analysis will be backed up with materials analysing the political and social impact of the Supreme Court of India's approach to social rights, as the *Constitution of India*⁴² has been in operation for a longer duration and has raised a number of parallel issues.

⁴¹ *Supra* note 12.

⁴² *Supra* note 10.

Chapter 2

The Theoretical Debate

This chapter will take a theoretical perspective, outlining and assessing the arguments that have, and continue to be, employed to justify denying social rights the status routinely accorded to civil rights; that of legal norms binding upon the legislature, backed by judicial enforcement.¹ In so doing it will consider modern theoretical and practical developments that have elucidated the nature and normative force of social rights, and will construct an argument that, given such developments, the retention of an artificial distinction between civil and social rights is unjustifiable.

An examination of political deliberations, international and domestic, illustrates that the status of social rights has consistently proved contentious. During the negotiations (1948-66) that preceded the drafting of the International Covenants, the United Nations, via the Human Rights Committee and the General Assembly, readjusted its position several times before deciding on two covenants.² The issue remains as

¹ A range of materials will be considered in this chapter to give a broad perspective, temporally and geographically, to the debate. As noted in chapter 1, analysis will draw upon the academic literature, the political negotiations that preceded the adoption of the International Covenants (1948-66) as well as domestic constitutional deliberations in Canada (1992) and South Africa (1990-96).

² Farrokh Jhabvala 'On Human Rights and the Socio-economic context' (1984) 31 Netherlands Int'l L. R. 149 at 153

"The decision of the General Assembly to develop two Covenants one for civil and political rights and the other for economic, social and cultural rights, was neither easy nor straightforward."

The Commission on Human Rights, at its sixth session in 1947, proposed one draft Covenant containing only Civil and Political rights. The issue was referred to the General Assembly who, at their sixth session in 1950 resolved to include in the covenant "a clear expression of economic, social and cultural rights in a manner that related them to the civic and political freedoms proclaimed in the

contentious today, illustrated by the fact that a similar equivocalness prevailed over the recent constitutional debates in South Africa; initially the Interim Constitution adopted in 1993 excluded social rights from constitutional protection but this position was reversed by the time the Final Constitution came into force in 1996.

In both the political debates and the academic literature, the objections to according social rights justiciable status are formulated in one of two ways; either social rights are expressly declared to not be 'human rights' at all, or, whilst considered to be 'rights,' it is argued that they are so different in character from civil rights that they cannot be legally implemented in the same manner.³ These two assertions propound conclusions as to the status of social rights not an explanation for that status, and are not analytically distinct lines of argument in that the same substantive objection has been used to reach either conclusion.⁴

covenant." (Res. 421E(V)). This decision was then reversed by the General Assembly at its seventh session in 1952 when it resolved, after a heavily split vote, to request the Human Rights Commission to draft two covenants (Res. 543 (VI)).

³ GJH Van Hoof "The legal nature of Economic Social and Cultural Rights: a rebuttal of some traditional views" in Alston, Philip and Tomasevski Katarina eds. "The right to Food" (1984) Boston: M Nijhoff; (Utrecht): SIM Netherlands Institute of human Rights

"Either the position is taken which expressly denies a legally binding character to economic, social and cultural Rights or those rights are alleged to differ from civil and political rights in such fundamental respects that it becomes impossible to escape the conclusion that the former are inferior from a legal point of view."

⁴ Philosophical objections generally lead to the conclusion that social rights are not human rights, however, arguments relating to the practicality of implementation have been used to argue either that social rights are not rights (as rights by definition are enforceable), or that they are too different to civil rights to be legally enforced in the same manner. See below Part (II).

Examining the arguments that have been utilised to reach these conclusions, it is apparent that the debate centres around a number of consistently reoccurring objections that can be loosely categorised as either '*philosophical*' or '*practical*';⁵ the former take exception to the 'social' content of the rights, bringing into question the origin and definition of 'human rights' and the appropriate role of the state, whilst the latter relate to concerns about the practicability of implementation.⁶ Simply stated, one set of objections deals with the question of whether social rights '*should*' be accorded binding legal status and the other with whether they '*can*' be.⁷

⁵ Various other terms have been employed to describe the two types of objections, for example Scott and Macklem use the terms 'legitimacy dimension' and 'institutional competence dimension'. See Craig Scott and Patrick Macklem "Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African constitution" (1992) 141 Uni Penn LR 1.

⁶ Schwartz, Herman: 'Do economic and social rights belong in a constitution' Am. Uni. J. of Int'l Law and policy 1233.

"The competing arguments can be roughly divided into what might be called practical and philosophical. The former focuses on whether economic and social rights are judicially enforceable, the latter on whether placing economic and social rights in a constitution is consistent in principle with the establishment of a free, democratic, market orientated civil society. Put another way, the first question turns on a supposed dichotomy between positive and negative rights, the second on the kind of society that is most desirable."

⁷ Craig Scott, 'The Interdependence and permeability of Human Rights Norms: towards a partial fusion of the International Covenants on Human rights' (1989), 27 Osgoode Hall Law Journal 769 at 839

"There are two essential elements in the determination of whether a right or rule is justiciable; the value or normative component and the expertise or empirical component. By the former it is argued that a matter *should not* be subjected to adjudication, and by the latter that it *can not* be."

Part (I): Philosophical objections to Social Rights

The 'western conception of rights' is generally considered to have had the most profound influence on the development of human rights law.⁸ An admixture of liberalism and the natural law tradition,⁹ the western conception of rights is most commonly traced to the writings of philosopher John Locke.¹⁰ According to Locke, when autonomous individuals voluntarily form a society a social contract is created under which the individual forfeits, but also retains, some inherent autonomy or liberty. The retained autonomy creates a private sphere, of individual freedom from state interference, that the government must respect as a condition to its legitimacy. Thus the individual possesses a number of rights that can be negatively enforced to prevent state encroachment upon private liberty. Derived from inherent autonomy, these rights are themselves considered to be 'natural' or 'inherent' to the individual, as well as 'antecedent' and 'superior' to governmental rule.¹¹ As De Villiers has stated;

⁸ See Alan Rosenbaum eds "The philosophy of Human Rights; International Perspectives" (1980) Greenwood Press, Westport, Connecticut at 34

"the modern human rights dialogue has evolved in a context that has been politically dominated by Western powers."

⁹ For detailed exposition of the relationship between natural law, liberalism and the western foundation of human rights see Rosenbaum eds *ibid* at 9.

¹⁰ John Locke 'Two Treatises of civil Government (1690)' cited in Louis Henkin 'Economic and social rights as 'Rights'; A United States Perspective' 1981 2 HRLJ 223. For an account of the philosophical development of the western human rights tradition, through Locke, Kant, Rousseau and Montequieu, see Rossenbaum *supra* note 7 at 9-41.

¹¹ Bertus De Villiers "Social and Economic Rights" in Van Wyk, Dugard, De Villier and Davis ed "Rights and Constitutionalism; Rights and the South African Legal Order" (1994) Juta & Co. Ltd at 599 at 601.

“The latter (social pact) constitutes a framework in terms of which individuals agree that a government is instituted with the duty to protect the natural rights of everyone. This means that the execution of the powers and functions of government are limited by the supreme will of the people and the provisions of natural law. The government therefore may not, in terms of the social contract that exists between it and the people, misuse its powers to encroach upon the fundamental rights and freedoms of the individual.”¹²

The two fundamental tenets of the western rights paradigm; the natural law origin of rights and the liberal pre-occupation with the restriction of state power, provide for the recognition of civil rights, which, traditionally interpreted, amount to a list of freedoms against the state. However, the recognition of social rights is considered antithetical to the western rights paradigm on three related grounds; firstly it is argued that social rights are not inherent ‘natural rights’ of man, secondly, that their recognition detracts from the protection of ‘genuine’ civil rights and, thirdly, that they mandate an inappropriately interventionist role for the state.

(i) Social Rights are not inherent rights of man

Under the western conception of rights, human rights are considered natural or inherent to the individual ‘by reason of being human.’ They therefore have a moral force independent of positive law and are universal, adhering to all individuals irrespective of geographical location or societal membership.¹³ It has been argued

¹² *Ibid* at 601.

¹³ R.S Downie ‘Social Equality’ Chapter 7 in Alan Rosenbaum eds “The philosophy of Human Rights; International Perspectives” (1980) Greenwood Press, Westport, Connecticut at 127

“Developing out of natural law, the central idea of natural rights is that, underlying the legal and moral rights a person has as a consequence of belonging to a given society at a given time, there are rights that belong to him simply because he is a human being.”

that, whereas civil rights are inherent rights of man, social rights are constructed or granted by the positive law of particular, and indeed not all, societies.

Such arguments were evidenced in the political debates; during the negotiations preceding the drafting of the International Covenants a number of delegates put forward the idea that “civil and political rights were ‘inherent’ in the human person and were the *only* ‘fundamental human rights.’”¹⁴ Similarly at a national public hearing on social and economic rights held in South Africa in 1995 one participant stated that “social and economic rights are not fundamental and inalienable rights and thus cannot be entrenched.”¹⁵

The instrumental question, upon which the legitimacy of these claims is dependant, is how, if at all, can we rationally determine the content of ‘natural rights.’ A number of philosophers have put forward tests or definitions of natural rights that seek to explain why civil but not social rights are inherent. The most often cited of these, proposed by the philosopher Maurice Cranston, will be taken as an archetypal example to illustrate the flaws in the natural rights line of reasoning.¹⁶

¹⁴ Jhabvala *supra* note 2 at 157 adverting to references made by the delegates from Canada, United Kingdom, Brazil and Pakistan.

¹⁵ The Free Market Foundation, Minutes of the national public hearing on social and economic rights August 1995 National Assembly Cape Town, at www.constitution.org.za.

¹⁶ See Maurice Cranston “What are Human Rights” (1972) Taplinger Publishing Co. Inc, New York.

Cranston proposes a three tier test of practicability, paramount importance and universality, and argues that social rights fail to comply with each ground.¹⁷ Cranston defines paramount importance as something that is “supremely sacred” to human life, in the absence of which life is not entirely human, and concludes that social rights do not fulfil this criteria;

“In considering cases of this kind (arbitrary deprivation of physical liberty) we are confronted by matters which belong to a totally different moral dimension from questions of social security and holidays with pay. A human right is something of which no one may be deprived without a *grave affront to justice*. There are certain deeds which should never be done, certain freedoms which should never be invaded, some things which are *supremely sacred*.”¹⁸

Cranston justifies his conclusion that social rights “belong to a totally different moral dimension” by drawing a distinction between the “relief of distress” and the “giving of pleasure.” He confines paramount duty (a correlative of paramount importance) to the relief of distress and concludes that social rights, by conveying benefits, are orientated to the giving of pleasure.¹⁹

¹⁷ The test of practicability goes to practical / implementation concerns not philosophical issues and will be considered below in Part II.

¹⁸ Cranston *supra* note 16 at 68.

¹⁹ Cranston *supra* note 16 at 69

“It is a paramount duty to relieve great distress, as it is not a paramount duty to give pleasure... Common sense knows that fire engines and ambulances are essential services, whereas fun fairs and holiday camps are not. Liberality and kindness are reckoned moral virtues; but they are not moral duties.”

As regards universality, Cranston defines universal rights as “rights of all people at all times in all situations”²⁰ and argues that social rights are not universal by isolating the right to ‘holidays with pay’ that is included in the Universal Declaration of Human Rights and the ICESCR. Cranston argues that by its inherent nature the right to ‘holidays with pay’ is a right that can only be enjoyed by a limited class of persons, the employed, and proceeds to generalise that social rights are therefore not universal.²¹

Arguments, like those of Cranston, that are based on the natural law tradition, have come under attack, and have been significantly discredited, due to their unscientific and unworkable nature. Advocates of social rights have taken two alternative approaches that equally invalidate these arguments; they either attack the definition of inherent rights or they attack the entire concept of inherent rights.

- Social Rights are Inherent Rights

Proponents of social rights have argued that social rights *are* inherent rights,²² emphasising the irrationality of a definition of rights that declares all civil, but no

²⁰ Cranston *supra* note 16 at 21

“Human rights are a form of moral right, and they differ from other moral rights in being the rights of all people at all times in all situations.”

²¹ Cranston *supra* note 16 at page 67

“The so-called human right to holidays with pay plainly cannot pass. For it is a right that is necessarily limited to those persons who are paid in any case, that is to say the employed class. Since not everyone belongs to this class, the right cannot be a universal right, a right which in the terminology of the Universal Declaration ‘everyone’ has.”

²² Michael McMillan “Social Versus Political rights” (1986) XIX:2 Canadian Journal of Political science 283 at 284

social rights, to be supremely sacred to human life. It has been correctly pointed out that some social rights, most notably subsistence rights, are more sacred to life, in the sense of being necessary for its continuance, than some civil rights, for example freedom of expression or association, and clearly involve the relief of distress rather than the giving of pleasure;

“The dominant conception has a curious structure; it gives the same status to political and civil rights - including those which enhance ones life, but are not necessary for survival - as it does to the rights relating to extreme acts of physical brutality. At the same time, it excludes economic rights, even those which have implications for life and death, or the necessities required for basic health and physical safety.”²³

It is fallacious to generalise about the status of social rights from the inappropriateness of one, as Cranston does in reference to the right to holidays with pay.²⁴ Correctly applied a paramount importance and universality test does not give rise to a straight civil / social rights division but creates clusters of rights cross cutting the traditional categories. As McMillan has stated, “(t)he criterion of paramount importance does

“Political rights and social rights form the two subsets of the broader concept of human rights, which are species of moral rights which are universal, fundamentally important and held by all individuals simply by virtue of being human,”

²³ Joy Gordon “The concept of Human Rights: The history and meaning of its politicisation” (1988) 23 Brook. J. Int’l L. 689 at 720.

²⁴ McMillan *supra* note 22 at 285

“Some candidates, such as holiday with pay, may well be found wanting. But the failings of such particular candidates do not impugn the entire category of claims to the status of social rights. Any categorical rejection of social rights at this stage must be suspect.”

McMillan points out that a number of proponents of social rights agree that the right to ‘holidays without pay’ is the least defensible of the social rights, and treat it as a “derivative rather than a fundamental right”.

not in and of itself distinguish the political rights from the social ones. A strict application of the criterion might well cluster certain political rights and social rights of a higher-order importance (life, adequate living conditions, liberty) and others of a lower order (property, education).²⁵

In a similar vein, the re-orientation of human rights around a very basic concept such as the minimal requirements necessary for the 'maintenance of life' or 'basic needs' is supported by a number of proponents of social rights. R.J Vincent argues that human rights should be based on basic needs and what is required to fulfil these needs, and centres his theory on the right to life "in the sense of both a right to security against violence and of a right to subsistence."²⁶ Henry Shue proposes that the basic rights of man are security, sustenance and liberty, on the basis that these are those rights that are essential for the enjoyment of all other rights, which are considered derivative.²⁷ Notably Shue's basic rights, like those of Vincent, cross cut the social / civil rights division by focusing upon what is minimally needed to live as a human being.

- All Rights are Social Constructs

The second approach of proponents of social rights is to deny the very existence of 'natural rights' and assert that all rights, whether social or civil, are social constructs.

²⁵ McMillan *supra* note 22 at 286.

²⁶ R.J Vincent 'Human Rights and International Relations' at 125 cited in Rhoda E Howard 'Human Rights and the Search for community' (1995).

²⁷ Shue, Henry "Basic Rights: Subsistence, affluence and U.S foreign policy (1980) Princeton, N.J: Princeton University Press, c 1980.

This approach is taken by Jack Donnelly, who argues that “human rights are a social phenomenon, a creation of human kind” through which “human beings create their own sense of a morally worthwhile life.”²⁸

“Human rights arise from human action (and) represent the choice of a particular moral vision of human potentiality and the institutions for realising that vision The evolution of particular conceptions or lists of human rights is seen in the constructivist theory as the result of the reciprocal interactions of moral conceptions and material conditions of life, mediated through social institutions such as rights.”²⁹

Accordingly, it is argued that the inclusion or exclusion of social rights is a blatant moral choice about the type of society that is desired and the types of interests that are worthy of protection. The arguments in favour of updating our conception of rights to include social rights are twofold, firstly, “as societies change, peoples moral norms and values also change,”³⁰ as we move towards a more egalitarian society than that of the Lockean era, the content of human rights should evolve in line with contemporary social change. Secondly, if the content of human rights is indeed a moral and social choice, then it should reflect the interests of *all* members of society. The interests and concerns of the less privileged are more realistically represented by social rights and

²⁸ Rhoda E Howard “Human Rights and the Search for community” (1995) Westview Press, Inc Harper Collins Publishers, Inc. at 15.

²⁹ Jack Donnelly ‘The concept of human rights’ (1985) at 31 and 35 cited in Howard *Ibid.*

³⁰ Donnelly *Ibid.*

to exclude these rights from protection is to discriminate against this section of society.³¹

(ii) Social rights detract from the protection of genuine human rights

The argument that social rights are not inherent rights of man is generally coupled with the assertion that attempts to incorrectly include them within the definition of human rights dilutes this definition, deprives it of distinction³² and brings “the whole concept of human rights into disrepute,” as the authority of human rights as universal natural principles is questioned.³³ Cranston states:“(t)hus the effect of the Universal Declaration which is overloaded with affirmations of so called human rights which are not human rights at all is to push *all* talk of human rights out of the clear realm of the morally compelling into the twilight world of Utopian aspiration.”³⁴

This dilution is considered to have the practical effect of detracting from the protection accorded to genuine human rights in three ways; firstly, it has been argued

³¹ Jackman, Martha “Constitutional rhetoric and social justice: reflections on the justiciability debate” in Bakan and Schneiderman eds. “Social Justice and the Constitution; Perspectives on a Social Union for Canada” (1992) Ottawa; Carleton University Press 17.

³² Tom Campbell “The left and Rights” cited in Nigel Simmonds ‘Rights, Socialism and Liberalism (1985) 5 Legal Studies 1

“it deprives us of what is distinctive about rights as a concept and submerges that concept into a mass of undifferentiated general terms of approval.”

³³ Vierdag ‘The legal nature of the rights granted in the ICESCR; 9 Netherlands yearbook of Int’l L. (1978) 69

“it detracts from the effectiveness and force that legal norms should have and thus it may have a negative effect on the legal system a whole.”

³⁴ Cranston *supra* note 17 at 68.

that it “tends to create a growing confusion of priorities in the human rights area and a growing dispersion of energy in ending human rights violations,”³⁵ as resources are diverted away from the protection of genuine civil rights.

Secondly, it is argued that the state interference necessitated by social rights is incompatible with the protection of individual liberty, the centre piece of liberalism. Consequently, social rights directly conflict with civil rights, in particular the social redistribution inherent in social rights interferes with the civil right to property.

Thirdly, there is a more general concern that the elevation of social ideals to the status of human rights allows them to be “easily exploited to excuse violations of civil and political rights”³⁶ in the name of social and economic development. The latter argument demanded credence during the cold war era when those who opposed the recognition of social rights drew attention to the violations of civil rights taking place in Soviet countries. One commentator stated in 1988 that “the soviet effort to list desirable social and economic goals as ‘rights’ is nothing but an effort to obfuscate the absence of the fundamental ‘rights of man’ in their society.”³⁷

³⁵ United States former Secretary of State Elliot Abrahams before congress defending the government’s exclusion of social rights from its definition of human rights, cited in Philip Alston “US Ratification of the covenant on Economic, Social and Cultural Rights: The need for an entirely new strategy” (1990) 84 American Journal of International law 365.

³⁶ Abrahams in Alston *ibid*.

³⁷ Max Kampelman ‘Social and economic rights in the soviet bloc; A documentary review seventy years after the bolshevik revolution’ cited in Philip Alston “US Ratification of the covenant on Economic, Social and Cultural Rights: The need for an entirely new strategy” (1990) 84 American Journal of International law 365.

As well as utilising the argument that social rights *are* genuine human rights, proponents of social rights assert that the recognition of social rights actually *increases* the protection of, firstly, traditional civil rights and, secondly, individual liberty, in the following ways;

- *The indivisibility and interdependence of Rights*

The concept of the indivisibility and the interdependence of rights has always been present in the work of the United Nations, and is indeed evident in the wording of the international covenants.³⁸ It has, however, come to the fore in recent years, leading to the official declaration of the United Nations at the World Conference in Vienna in 1993 that “all human rights are universal, indivisible and interdependent and interrelated.”³⁹

Scott argues that the terms ‘indivisibility’ and ‘interdependence’ do not necessarily have distinct meanings as they have been used interchangeably by the United Nations.⁴⁰ Scott thereby brings together all related arguments under the umbrella of ‘interdependence,’ alluding to the fact that it takes two forms; organic and related

³⁸ The Preamble to each of the Covenants recognises the interdependence of rights. See Scott *supra* note 9.

³⁹ Vienna Declaration and Programme of Action, para 5, U.N Doc A/CONF.157/23 (1993).

⁴⁰ Craig Scott “The Interdependence and permeability of Human Rights Norms: towards a partial fusion of the International Covenants on Human rights” (1989) 27 Osgoode Hall LJ 769 at 779

“While it might appear that ‘indivisible’ and ‘interdependent’ must have distinct meanings, an overview of the relevant General Assembly resolutions warns against tying too much to semantics.”

interdependence. However, on closer analysis the former bears the characteristics of what is commonly understood as 'indivisibility,' whilst the latter the characteristics of 'interdependence.'

Organic interdependence (or indivisibility) refers to the inability to clearly separate civil and social rights. Scott states that some rights are "inseparable or indissoluble in the sense that one right (the core right) justifies the other," in that either one right is a derivative of the other, or the effectiveness of one right depends on the other. The relationship between the right to life and the right to an adequate standard of living is an illustration of indivisibility, in that the right to an adequate standard of living forms part of the right to life, and the effectiveness of the right to life is dependent upon it. Consequently, if the 'civil' right to life is to be protected to its fullest capacity then the 'social' right to an adequate standard of living must also be protected.

Related interdependence refers to rights that are analytically separable, but are related in the sense that protection of one will increase protection of the other, as Scott states the rights are "mutually reinforcing or mutually dependent, but *distinct*."⁴¹ Related interdependence suggests that without the protection of social rights then the realisation of civil rights is significantly reduced. Scott states that "interdependence suggests a mutual reinforcement of rights, so that they are more valuable together, as a complete package, than a simple summation of individual rights would suggest; for

⁴¹ Scott *ibid* at 782.

example, having civil and political rights but not economic and social rights is not 'half a loaf; but substantially less.'⁴²

Accordingly, without the protection of social rights, and the realisation of a minimum level of socio-economic subsistence, individuals can not enjoy the civil rights that *are* constitutionally guaranteed to them. A common cited example of related interdependence is the relationship between the right to freedom of expression and the right to education,⁴³ whilst they can be viewed as separable rights, without the right to education enjoyment of freedom of expression is significantly reduced.⁴⁴

- *Social Rights protect Liberty*

As well increasing the realisation of certain civil rights, the recognition of social rights also increases the protection of individual liberty generally. Despite liberal rhetoric, all rights, civil and social, are orientated towards the protection of liberty,⁴⁵ that is if liberty is correctly interpreted. The liberal rights paradigm misinterprets and under protects liberty in the following ways; firstly, negative liberty is too narrowly

⁴² Scott *ibid* at 783.

⁴³ See for example Jackman *supra* note 31.

⁴⁴ Whether the terms related and organic interdependence (or interdependence and indivisibility) are distinct concepts is questionable as it is arguable that the relationship between the right to education and the right to freedom of speech also fulfils Scott's definition of organic interdependence as "the effectiveness of one right depends on the other." However, for present purposes it is sufficient to note that a relationship of interdependence exists between civil and social rights.

⁴⁵ Alexandre Berenstein; 'Economic and social rights: their inclusion in the European Convention on Human Rights: Problems of formulation and interpretation'(1981) 2 HRLJ 243.

"The objective of all fundamental rights is the same; to strengthen the freedom of individuals and of the groups they from."

construed as the absence of government restraint. In certain situations, negative liberty may be increased by government intervention aimed at controlling private individuals who exert undue power so as to restrict the negative liberty of others; “when power differentials among social classes interfere with the negative freedom of the weaker class, then government restraints on the unduly powerful can actually facilitate negative freedom.”⁴⁶

Secondly, liberty must be interpreted in both its negative *and* positive capacity.

Positive liberty involves the ability to make free choices about one’s own life, the realisation of which is only possible with certain socio-economic tools; notably food, shelter, health and education.

Some proponents of social rights freely accept that the realisation of social rights will involve some modification or reduction in priority of the civil right to property, but justify it by the greater good. This actuality is illustrated by the South African constitutional experience, where the recognition of social rights in the Final Constitution was accompanied by the replacement of the right to property, present in the Interim Constitution, with a more limited right to free choice of trade.⁴⁷ The devolution of the right to property can be justified on the basis that the net restriction

⁴⁶ Melvin Rader “Ethics and the Human Community” cited in Alan Rosenbaum eds “The philosophy of Human Rights; International Perspectives” (1980) Greenwood Press, Westport, Connecticut at 30.

⁴⁷ *The Constitution of the Republic of South Africa 1996* as adopted by the Constitutional Assembly 8 May 1996, see Constitutional Assembly Database Project at www.law.uct.ac.za. Section 22;

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

on liberty is less than that occasioned by the exclusion of social rights; “the forced loss of the superfluous, and even of comforts, restricts liberty less than the forced loss of articles of basic necessities.”⁴⁸

(iii) Social Rights impose an inappropriate role upon the State

The content of human rights necessarily implicates the purpose for which government is created and the nature and reach of state power. Under the liberal rights paradigm, rights are protected through non encroachment and can constrain and define, but never compel, government action.⁴⁹ Thus, the government is perceived as having a minimalist or *laissez-faire* role. Social distribution is left to market forces which are thought to fairly allocate resources, poverty being perceived as the product of irresponsibility or ineptitude in an otherwise egalitarian market;

“the capitalist market in and of itself is (considered) sufficient to guarantee social justice as long as private property is protected, contracts are honoured, and the rules of competition are fair. The human rights concerns of radical capitalists are narrow, confined to property rights and the civil and political rights needed to carry out one’s own affairs in peace.”⁵⁰

The recognition of social rights contemplates a government with a more interventionist mandate, tempering capitalism and the free market economy with some

⁴⁸ Carnt ‘Political Philosophy’ Oxford University Press (1967) cited in Berenstein *supra* note 45
Berenstein himself states;

“The freedom of *all* is thus favoured by the limitation of non-egalitarian freedoms and of rights superfluous for the free development of *all* persons.

⁴⁹ Scott and Macklem *supra* note 5.

⁵⁰ Howard *supra* note 26 at 3.

element of government planning and social redistribution. It has been frequently argued in the political debates that such restrictions on the free market are an illegitimate intrusion into the private sphere.⁵¹ This was one of the principle objections raised to social rights during the South African constitutional debates, for example, the South African Law Commission and the National Party (NP) argued against the inclusion of social rights on the basis that this would require an “activist and interventionist state,”⁵² whilst the South African Chamber of Business (SACOB) argued that the inclusion of social rights would “conflict with the principle of an open economy.”⁵³ De Villiers has summed the position up as follows;

“The contents of the Bills of Rights as put forward by these parties depended on their respective philosophical approaches to the role of the state in the future dispensation. Those parties that advocated limited state powers were largely opposed to the inclusion of wide ranging social and economic rights, while those in favour of extensive state powers supported the inclusion of such rights in the Constitution.”⁵⁴

⁵¹ For political reiteration of the liberal view see the United States representative to the General Assembly (1988) cited in Alston *supra* note 35

“Responsible adults select their own careers, obtain their own housing and arrange for their own medicare. It is true that the state must establish a legal framework which encourages fairness and prohibits fraud, but, having one so, the state must then get out of the way and permit individuals to live their lives as they see fit.”

⁵² De Villiers *supra* note 11 at 599

“the National Party (NP), on the basis of the approach adopted by the South African Law Commission ... argued against the inclusion of social and economic rights on the basis that such rights would require an activist and interventionist state”

⁵³ Minutes of national public hearing on social and economic rights held in 1995 *supra* note 14.

⁵⁴ De Villiers *supra* note 11 at 599.

The issue of the appropriate role of the state, *laissez-faire* capitalism versus planned (democratic) socialism, has extremely overt political connotations and inevitably belies a policy choice. During the cold war the issue necessarily took an east-west dimension, with the relative value of the two systems being implicitly contested and defended in the international arena under the veil of the human rights question.

Although Scott argues that the principle arguments in the United Nations centred around the implementation question, he averts to the underlying influence of the East-West split in international politics; “while delegations did not expressly invoke such political grounds as an explanation for their own positions for or against a single covenant they often asserted that such reasons were behind the positions of other states.”⁵⁵

Similarly, Jhabvala deduces the political undercurrents from the voting positions of the parties: “It is clear from the record that all Soviet-bloc states backed the idea of one comprehensive covenant, while all Western-bloc states supported the separation of the two sets of rights into different treaties, thus making clear the ideological and political importance the decision was perceived as having.”⁵⁶

⁵⁵ Scott *supra* note 40 at 795 See also at 797

“Political motives can easily be dressed up in different language and, in a any case, are intimately related to other sincere stances. Debates on implementation measures belie ideological predispositions, for instance.”

⁵⁶ Jhabvala *supra* note 2 at 159.

In the post cold war era the issue retains political significance, the collapse of the Soviet Union and the move by the former Communist states of Eastern Europe to establish a free-market economy is "taken in some quarters as a complete vindication of capitalism"⁵⁷ and evidence that the market interference necessary to realise social rights is ultimately destructive.

- Countering the minimalist role of the state

Objections to social rights that centre around the appropriate role of the state can be countered in the following ways; firstly, to some degree the free market is already restricted in developed societies through the existence of the welfare state, the recognition of social rights would merely put what already exists on a constitutional / human rights footing. Secondly, references to the Soviet experience distort the issue somewhat as the recognition of social rights in a democracy does not have to entail the extent of social planning that took place under communism; the market is tempered but not eradicated.

Thirdly, it is incorrect to assume that the maintenance of the free market does not itself require government intervention and planning, for example, the right to property is upheld by elaborate contractual laws enforced judicially. Schwartz has stated "(t)hat of course, overlooks the vast panoply of protections that property owners expect the state to provide - police, courts, a legal structure - in order to give substance to

⁵⁷ Howard *supra* note 26.

property rights.”⁵⁸ Accordingly, the free market does not represent government neutrality and non-interference, but rather government support of selected values and interests, those of property.

Fourthly, the recognition of social rights involves an overt political choice about the type of society and government that is desirable and necessary. Whilst the minimalist role of the state had currency in an era when government was considered omnipotent and the principle violator of human rights, it is inappropriate today when power is more dispersed among private bodies. Today violations of human rights increasingly emanate, not only from the state, but also from systemic factors and inequalitarian power structures. Accordingly, it is increasingly apparent that the free market cannot deal with the socio-economic problems and disparities that are prevalent in modern society and that an interventionist state is necessary;

“The type of socio-economic problems that are being faced today by populations in the developing and developed countries are of such a nature that extensive state involvement is required to address them. The traditional *laissez-faire* approach cannot solve the critical problems of illiteracy, education, unemployment, housing shortages, and starvation.”⁵⁹

⁵⁸ Schwartz *supra* note 6.

⁵⁹ De Villiers *supra* note 11 at 604. See also at 600

“The shift in the human rights debate towards a more balanced approach has been necessitated by, among other things, the changing environment in which people and governments find themselves. The role of the state is being defined differently today than at the turn of the century, with new problems and expectations in the social and economic spheres requiring a more active state that can address alone or in partnership with other organisations - the social and economic ills and disparities of society.”

Part (II) Practical / Implementation Objections

A number of implementation concerns have been advanced that, it is argued, apply to social but not civil rights, and necessitate the conclusion that social rights *cannot* be enforced in the same manner as civil rights, if at all. The relative importance to the political debates of the practical arguments vis-a-vis the philosophical arguments is a matter of contention, but practical concerns appear to have been at the fore of each of the debates. According to Scott, although ideological concerns influenced the drafting of the International Covenants “the focal point of the debate was the implementation question.”⁶⁰

Enforcement problems have been used to conclude either that social rights are not human rights or that, whilst being human rights, they differ in nature from civil rights. It is argued that they are *not* human rights on the basis that, by definition, human rights are capable of enforcement. This is the stance taken by Cranston in concluding that social rights fail the practicability component of his three tier test.⁶¹ A similar conclusion is reached by Vierdag who takes the approach that the term ‘right’ should be reserved for those rights that are capable of being enforced in a court of law or in a comparable manner.⁶²

⁶⁰ Scott *supra* note 40 at 795.

⁶¹ Cranston *supra* note 16 at 65 - 71.

⁶² Vierdag *supra* note 33.

The more frequent argument is that social rights *are* human rights but differ in nature to civil rights, necessitating differing approaches to implementation. Some who take this line of argument assert that social rights are therefore 'second rate human rights' and de-prioritise them, as is the position taken by Bossuyt.⁶³ Alternatively, it is asserted that, despite the differing implementation, social rights remain in principle equally important to civil rights, as is the position most often taken in political rhetoric. Referring to the debates preceding the adoption of the International Covenants, Scott states; "it was consistently contended (that human rights) could be classified into two categories according to their different natures (but) it was carefully stated that no hierarchy of importance or priority of attention resulted from this division."⁶⁴

A number of standard practical arguments are advanced to back up the assertion that social rights are not susceptible to effective enforcement. These objections can be divided into two categories; those that, orientated around a negative / positive rights dichotomy, focus upon problems conceptualising and enforcing the rights, and those that focus upon *judicial* enforcement of social rights, questioning legitimacy and competency.

⁶³ Marc Bossuyt cited in Van Hoof *supra* note 3.

⁶⁴ Scott *supra* note 40.

(i) The Positive / negative dichotomy; Conceptualisation and Enforcement

Problems

The objections to social rights that focus upon conceptualisation and enforcement problems stem from, or are orientated around, a dichotomy drawn between negative and positive rights, which is concurrently perceived to be a dichotomy between civil and social rights. As we have seen, civil rights are generally considered to be negative, respected through state abstention not intervention, that is they prohibit interference with life, liberty, association and expression. Conversely, social rights are considered to be positive rights, respected through state action, that is they mandate the state to provide housing, education, healthcare and food. It is argued that the positive character of social rights gives rise to a number of problems in their conceptualisation and enforcement that do not exist in respect of their negative civil counterparts;

- Imprecise and variable character of obligations

The obligations imposed by civil rights, being obligations of non-interference, specify the result that should be achieved as well as the prohibited conduct. The obligations inherent in civil rights are therefore considered to be precise and self-evident, and, thus, capable of being legally defined and judicially enforced. However, social rights, portrayed as positive and progressive in nature, are considered to impose *imprecise* or unascertainable obligations, they state an end that must be worked towards but do not define the conduct that is obligatory.⁶⁵

⁶⁵ Schwartz *Supra* note 6

As the mandatory or prohibited conduct is not defined, it is argued that a *legal* obligation can not be conceptualised, making it impossible to recognise and enforce violations of social rights. This is the argument advanced by Vierdag who argues that “in order to be a legal right a right must be legally definable; only then can it be legally enforced, only then can it be said to be justiciable. All elements of economic social and cultural rights: elements, form, goal, methods of implementation, and so on are economic, social and cultural not - as yet - legal.”⁶⁶

The imprecision of the obligations imposed by social rights is considered to give rise to a second related problem; whilst the obligation imposed by civil rights remains constant between jurisdictions, the imprecise obligation imposed by social rights is considered to be *variable* and *not absolute*, contingent upon resources and the level of development in a particular country.

- Resource Intensive and subject to progressive realisation

It is argued that, whilst the negative nature of civil rights renders them cost free, the positive nature of social rights makes them *resource intensive*, involving vast and indefinite financial outlay, to provide, for example, education and healthcare.

Furthermore, while civil rights are perceived to be immediately satiable requiring only

“The economic, social and cultural rights are broadly recognised but the corresponding obligations are not. They are largely formulated as broad obligations of result rather than specific obligations of conduct.”

⁶⁶ Vierdag *supra* note 33.

the passing of legislation, the resource intensive nature of social rights means that their implementation will take time and can, therefore, only be *progressively* realised. Cranston has stated that “(t)he traditional civil and political rights can be readily secured by legislation; and generally they can be secured by fairly simple legislation. For a government to provide social security it needs to do more than make laws; it has to have access to great capital wealth, and many governments in the world today are still poor.”⁶⁷ Concerns about the resource intensive and progressive nature of social rights were raised in the South African context where the vastness of the socio-economic problems set against the lack of government resources was utilised to argue against the inclusion of social rights in the Constitution.⁶⁸

The above problems in conceptualising social rights arise largely from lack of practical experience in their implementation. Rights, whether civil or social, become refined with practical experience, for example, it is not instantly apparent what is required by the right to equality or the right to freedom of association, definition coming through academic scholarship and practical experience, both of which have been relatively scarce in the area of social rights. As Scott and Macklem have stated;

“The lack of precision associated with many social rights should not be held up as a justification for their non entrenchment. On the contrary, non

⁶⁷ Cranston *supra* note 16 at page 66. See also

“If it is impossible for a thing to be done, it is absurd to claim it is a right. At present it is utterly impossible, and will be for a long time yet, to provide ‘holidays with pay’ for everybody in the world.”

⁶⁸ See Jeffrey Randel “Social and economic rights in the South African constitution: legal consequences and practical considerations” (1993) 27 Colum. J. L & Soc. Probs. 1.

entrenchment is to a very large extent the reason for the lack of precision. Historical, ideological and philosophical exclusion of social rights from adjudicative experience has resulted in a failure to accumulate experience that would render the imprecision of social rights less and less true as time goes by.”

However, “far more attention than ever before is currently being devoted to social rights,”⁶⁹ and three relatively recent developments in academic scholarship and practical work have gone a significant way towards countering the implementation based objections levied at social rights by dispelling the negative / positive rights dichotomy and defining the obligations imposed by social rights so as to render them capable of judicial enforcement. The first of these developments is the employment of obligation focused analysis of social rights, the second is the development of a minimum core content to social rights and the third is the work of the United Nations in giving precise content to certain social rights and in supporting their justiciability.

- Obligation Focused analysis

Obligation focused analysis has highlighted that all rights whether civil or social entail different levels of obligation that range from the truly negative to the truly positive.

The analysis was originally undertaken by Shue, who stated that;

“Instead of engaging in the artificial, simplistic and arid exercise of attempting to classify every right as flatly either negative or positive, it is more fruitful to examine the relatively negative (duties to avoid depriving), the relatively positive (duties to aid the deprived) and the intermediate (duties to protect

⁶⁹ Report of the High Commissioner for Human Rights on the Right to Food E/CN4/1998/21 at www.unhchr.ch.

from deprivation) elements that are mixed together in various proportions in the implementation of just about every right.”⁷⁰

Various formulations of the levels of obligation have been put forward, modifying to different degrees, the structure of ‘avoid, aid and protect’ proposed by Shue. Indeed there is “no great typology in the sky”⁷¹ and whether there are three or four obligations and the terminology employed to describe them is less important than the idea that underlies them; that all rights, both civil and social, have positive and negative dimensions corresponding to different levels of obligation imposed upon the state.

The United Nations has adopted the tripartite structure proposed by Eide that, modifying slightly the original work of Shue, suggests that there are three levels of obligation inherent in all rights: the duty to protect, the duty to respect and the duty to fulfil.⁷² The duty to respect is the completely negative duty, usually recognised in relation to civil rights, that prohibits state interference. The duty to protect is a hybrid negative / positive duty that requires the state to take action to prevent private parties from interfering with the right. Lastly, the duty to fulfil, is a positive duty that requires

⁷⁰ Henry Shue “The interdependence of duties” in Alston, Philip and Tomasevski Katarina eds. “The right to Food” (1984) Boston: M Nijhoff; (Utrecht): SIM Netherlands Institute of human Rights, 1984.

⁷¹ There have been extensive discussions, including for example Shue, Eide, Alston and Van Hoof, questioning what is the correct typology. Shue, *ibid*, has correctly stated;

“There is, I take it, no great - typology - in - the - sky at which we are all guessing, and the question about which typology to employ is not one of the ultimate questions. Categories like avoidance, protection and aid are general kinds of duties, not specific duties. At best such general categories help to organise the debate over precisely which duty falls to which agent.”

⁷² Asbjorn Eide “Realisation of social and economic rights: the minimum threshold approach” (1989) 43 Int’l Comm’n jurists rev 40.

the state to ensure that individuals have the means to realise the right, in the first instance this will involve giving them the tools that empower them to realise the right, in the last instance it involves realising the right for them.

The typology illustrates that we cannot “make a neat distinction around the axis ‘negative /positive’”⁷³ between civil and social rights, but must recognise that the “layers of obligation are found in each separate right.”⁷⁴ The misconception that civil rights are purely negative arises from the tendency to view them at their primary level, involving only a duty to respect, however, in reality civil rights also have positive dimensions, corresponding to the duty to protect and the duty to fulfil.

Taking the right to freedom of expression as an example, the duty to protect may involve the state legislating and providing forces to prevent others from interfering with free expression, whilst the duty to fulfil may involve creating a forum in which to speak and giving individuals the socio-economic means to do so. As Van Hoof has stated, “(a)n example is freedom of expression, which at least in some countries, has come to include, apart from the prohibition on censorship, an obligation to create conditions favourable to the freedom to demonstrate (police escort, police protection etc.) and to pluralism in the press and the media in general.”⁷⁵

⁷³ Eide *ibid* at 41.

⁷⁴ Van Hoof *supra* note 3.

⁷⁵ Van Hoof *ibid*

The same analysis can be applied to *all* civil rights, taking freedom of association as a second example; the duty to protect may require restrictions on employer's interference with trade unions, whilst the

Conversely, the misconception that social rights are purely positive rights arises from the tendency to view them at the tertiary level of obligation, involving only a duty to fulfil. This misconception has significantly hindered advancement in the implementation of social rights, the United Nations High Commissioner for Human Rights has noted; “(a) fundamental misunderstanding which has impeded the implementation of the right to food (for example) has been the notion that the principal obligation is for the state to feed the citizens under its jurisdiction (fulfil the right to food) - rather than respecting and protecting the rights related to food.”⁷⁶

In reality social rights entail not only positive duties but also the relatively negative duty to respect and duty to protect. Indeed in a prosperous society, some social rights will, for the majority of citizens, be best protected through non-intervention, for example, through a prohibition on the state excessively interfering with earned income and private housing.⁷⁷

Taking the right to housing as an example, the duty to respect may involve prohibiting the state from interfering with or taking private housing, whilst the duty to protect

duty to fulfil may require the government to adopt a role in facilitating the formation of trade unions through financial or social support.

⁷⁶ Report of the High Commissioner for Human rights on the Right to Food E/CN4/1998/21.

⁷⁷ Van Hoof *supra* note 3

“Economic and social rights can in many cases best be safeguarded through non interference by the state with the freedom and use of resources possessed by individuals.”

may impose an obligation on the state to prevent private parties from demolishing areas where poorer people are housed, as Van Hoof has stated;

“The obligation to respect and protect the right to adequate housing laid down in Article 11 of the covenant, would in my view be violated, if the government’s policy, even in the least developed countries, allowed the hovels of poor people to be torn down and replaced by luxury housing which the original inhabitants could not afford and without providing them with access to alternative housing on reasonable terms.”⁷⁸

The problems (imprecision, variability, resource intensity and progressive realisation) traditionally associated with social rights, increase as you move towards the positive level of *all* rights. The misconception that social, but not civil rights, involve these problems is to compare civil rights and social rights at different levels of obligation, that is to compare civil rights at the negative level of obligation with social rights at the positive level. As Scott and Macklem have stated;

“Imprecision increases the more one moves toward tertiary obligations to fulfil social rights. Yet this is also the case with civil rights, which can be hopelessly imprecise in the context of determining what a state must do to fulfil civil and political rights. In effect, when critics claim that, unlike civil and political rights, social rights suffer from a lack of precision and therefore ought to be imagined as non justiciable, they are comparing apples and oranges. That is they are comparing civil and political rights at the relatively precise first level of obligations with social rights at the relatively imprecise third level of obligations.”⁷⁹

⁷⁸ Van Hoof, *ibid.*

The same analysis can be applied to all Social rights. Taking the right to food as a second example, the duty to respect may involve a prohibition on the government expropriating land from people for whom the land provides their primary source of food, unless appropriate alternative measures are taken, whilst the duty to protect involves preventing others from doing so, either by force or economic dominance.

⁷⁹ Scott and Macklem *supra* note 5 at 76.

When conceived at their positive level civil rights, like social rights, involve financial outlay, for example, the right to a fair trial is respected at a relatively positive level in modern society, compelling the state to provide police, the courts and often legal aid. Many civil rights when conceptualised at the positive level, not only involve financial outlay, but will necessarily be progressive, for example, creating the circumstances under which everyone can freely express themselves will necessarily take time. Conversely, when social rights are conceived at the negative level of the duty to respect they are “relatively straightforward and precise”⁸⁰ and will not necessarily involve financial expense.

The obligation focused analysis is useful in highlighting two points; firstly, implementation problems apply equally to social and civil rights as we move towards positive enforcement and, therefore, cannot legitimately be used to deny protection to *only* social rights. Secondly, the typology illustrates that, at a minimum, the negative aspects of social rights can be rendered justiciable and enforced immediately in the same manner as the negative aspects of civil rights.

(ii) Development of the Minimum Core content of Social rights

Whilst the development of the typology of obligations has highlighted the justiciability of the negative aspects of social rights, significant work has been undertaken to refine those aspects of the positive duties that are justiciable. Experts in

⁸⁰ Scott and Macklem *Ibid* at 76.

the area of social rights have worked towards developing a minimum core content to social rights, that has universal normative force irrespective of the state of development in a particular country. Alston has argued that each right “gives rise to an absolute entitlement, in the absence of which a State party is to be considered to be in violation of its obligations.”⁸¹

The minimum core content has been defined as “that essential element without which a right loses its substantive significance as a human right.”⁸² In line with this idea, the Limburg principles⁸³ were developed by a group of leading experts on social rights and amount to near absolute core entitlements which must be enforced immediately.⁸⁴ The Limburg principles assert that “state parties are obligated, regardless of economic development, to ensure respect for the *minimum subsistence* rights for all.”⁸⁵

The idea of the minimum core content of rights has been adopted by the United Nations Committee on Economic, Social and Cultural rights (CESCR), under the chairmanship of Alston. In its Third General Comment, the Committee specified the

⁸¹ Kitty Arambulo, “Drafting an optional protocol to the international covenant on ESCR: Can an ideal become reality” (1996) 2 U.C Davis J Int’l. L. and Pol’y 111 at 130.

⁸² Arambulo *ibid* at 130.

⁸³ Limburg Pr on the Implementation of the International Cov on economic, social and cultural rights, UN ESCOR< Comm’n on Hum Rts, 43rd sess, Annex, Agenda items 8&18 at 1 UN doc E/CN.4/1987/17.

⁸⁴ Scott and Macklem *supra* note 5 at 81.

⁸⁵ Para 25 cited in Andreassen, Bard Anders, Smith, Alan G, Stokke Hugo “The problem: The status and implementation of social and economic rights and the challenge of measuring compliance with social and economic human rights standards” in Eide and Hagtvet eds “Human Rights in perspective”(1988) (1992) Oxford, UK: Cambridge, Mass, USA: Blackwell Business, 1992.

existence of a “minimum core obligation for state parties to ensure the satisfaction of minimum essential levels of each of the rights.”⁸⁶ In practice these amount to near absolute obligations to aid those who would not otherwise be able to provide for their basic needs. As Scott and Macklem state;

“The developing practice of the new CESCER demonstrates that there can be clear, near absolute, core entitlements to the provision of the basic subsistence needs of the most vulnerable in all states party to the ICESCR. With respect to the most vulnerable, the obligation to *fulfil* is immediate in nature and is not dependant upon scarcity of resources, except perhaps in the most impoverished of countries where even total redistribution of wealth might not meet everyone’s needs.”⁸⁷

- (iii) *The Work of the United Nations*

The recent work of the United Nations on social rights has been extensive and under the auspices of Mary Robinson, the High Commissioner for Human Rights, emphasis is being placed on promoting the importance of *all* rights and redressing the current imbalance in protection. The work can be divided into two areas, firstly, the United Nations has undertaken studies to clarify the specific obligations inherent in individual social rights so as to render them capable of judicial enforcement and, secondly, it has actively advocated the need to render social rights justiciable in both domestic and international law.

⁸⁶ Arambulo *supra* note 81 at 131.

⁸⁷ Scott and Macklem *supra* note 5 at 81.

- Clarification of specific duties

Utilising the two concepts outlined above, the typology of obligations and the minimum core content of rights, the United Nations has undertaken a number of studies that seek to clarify the nature of governmental obligations pertaining to individual social rights. The first social right to be the subject of a 'general comment' is the right to adequate housing, dealt with by the CESCR in 'Fact Sheet Number 21'.⁸⁸

The fact sheet endorses the minimum core content approach, and perceives the core requirement to be the provision of "basic shelter and housing for all." It then goes on to identify and break down the general obligations to respect, protect and fulfil into specific duties that exist in addition to the core content. Taking the duty to protect as an example, it requires the government to protect tenants from forced eviction, discrimination, harassment and unreasonable or sporadic rent increases and to provide housing subsidies for those in need. The fact sheet further verifies that certain elements of the right to housing, for example forced evictions, are clearly and presently justiciable.

Similarly, a significant amount of work has been undertaken either independently or under the auspices of the United Nations to clarify the right to food.⁸⁹ As Special

⁸⁸ United Nations High Commissioner for Human Rights 'Fact Sheet No 21, the Human Right to Adequate Housing.'

⁸⁹ See, for example, Philip Alston and Katarina Tomasevski eds. "The right to Food" (1984) Boston: M Nijhoff; (Utrecht): SIM Netherlands Institute of human Rights, 1984; Asbjorn Eide et al eds "Food as a Human Right" Tokyo, Japan: United Nations University, c 1984.

Rapporteur on the Right to Food, Eide has taken steps in shaping the obligations of positive conduct that the right imposes. These include establishing a nation wide system of identifying local needs, drawing up a national plan for food security, setting up a monitoring system, identifying the most vulnerable groups within society and determining the areas in which international assistance is needed.⁹⁰

- Towards justiciability

As well as defining the content of social rights so as to render them justiciable, the United Nations is also actively advocating their justiciability in *both* domestic and international law. The CESCR has released a general comment listing the provisions that it considers currently and universally justiciable,⁹¹ and has stated that non-justiciability is “not warranted either by the nature of the rights or by the relevant covenant provisions” and that “there is no covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable elements.”⁹²

The CESCR has strongly and repeatedly urged that appropriate judicial remedies should be made available at *domestic* level and has highlighted the deleterious effect of not providing such remedies. The Committee has stated that;

⁹⁰ Scott and Macklem *supra* note 5 at 82.

⁹¹ These include, *inter alia*, aspects of the right to education.

⁹² General Comment 9 “The Domestic application of the covenant” 3/12/98 E/C/2/1998/24.

“The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”⁹³

At *international* level, the United Nations is currently moving towards the adoption of an optional protocol to the ICESCR, similar to that currently in place for the ICCPR.

The process of drafting began at the World conference in Vienna in 1993 where the CESCR spoke on the benefits that would be gained by a complaints procedure, including the bringing of relief in concrete cases and the incentive it would provide for states to create more effective remedies at domestic level.⁹⁴ At the CESCR's fifteenth session held at the end of 1996 a draft covenant was finalised that contemplates giving individuals and groups the right to submit communications to the CESCR alleging specific violations of economic, social and cultural rights. Although not yet adopted, the CESCR has declared an optional protocol to be “essential” in order to redress “the imbalance that presently exists” between civil and social rights.⁹⁵ The preamble to the draft optional protocol states that “(t)he possibility for the subjects of economic, social and cultural rights to submit complaints of alleged violations of these rights is a *necessary* means of recourse to guarantee the *full* enjoyment of the rights.”⁹⁶

⁹³ *Ibid.*

⁹⁴ Arambulo *supra* note 81 at 127.

⁹⁵ Report on 15th session of the CESCR 18/12/96 E/CN.4/1997/105.

⁹⁶ *Ibid.*

(ii) Judicial Legitimacy and Competency

The social rights debate, especially at domestic level, brings into question judicial legitimacy and competency in enforcing social rights. Whilst supporting the progressive values underlying social rights, some argue that these values are best protected at the discretion of the legislature rather than through judicial (national or international) enforcement. The arguments that the legislature rather than the judiciary should deal with social rights take the following forms;

- Social Policy Issues are not appropriate for judicial resolution

It is argued that social rights raise issues of broad social policy and, therefore, should be dealt with by the legislature. Two alternative reasons are put forward; firstly, the doctrine of the separation of powers is invoked to argue that in principle issues of policy should be dealt with by a democratically elected executive and that judicial enforcement of social rights will politicise the judiciary. This argument is invoked by Vierdag who argues that the constitutionalisation of social rights would involve the judiciary in “utterly political questions,” “nullify” the separation of powers and “turn the judiciary into a political organ.”⁹⁷

Secondly, it is argued that the judiciary is not competent to deal with broad issues of social policy. It is contended that the issues involved in social rights are too complex for the judiciary as they often raise issues of broader social and political significance

⁹⁷ Vierdag *supra* note 33.

than the immediate case, for example, a particular case challenging the adequacy of healthcare may raise broader issues such as prioritisation within the national healthcare system. Furthermore, there are certain institutional constraints on the judiciary, such as agenda constraints, restrictions on admissible information and availability of remedies, that restrict their capacity to deal with broader issues.⁹⁸

- The Regressive Potential of Social Rights

The concern has been raised that judicial enforcement of social rights may lead to them being employed to thwart progressive reform. There are three main concerns; firstly, that the judiciary is unrepresentative of society in terms of class, race and gender and, therefore, may bring regressive values to bare in interpreting social rights; “(s)ome argue that social rights should not be justiciable because judicial conservatism and unfamiliarity with positive rights would result in narrow and possibly regressive interpretations.”⁹⁹

Secondly, it is feared that the concept of adequacy, for example adequate housing or adequate healthcare, may be used by the government in policy formation to justify freezing or cutting social programs on the basis that they are already more than adequate to meet the requirements of social rights.

⁹⁸ Jackman *supra* note 31.

⁹⁹ Joel Bakan ‘Just Words, Constitutional Rights and Social Wrongs (1997) University of Toronto Press, at 137.

Thirdly, it is feared that litigation may be initiated by private actors against government regulation of their activities on the basis that such regulation interferes with social rights, for example, government standards on the habitability of property may be challenged by landlords as against the right to housing.¹⁰⁰

Whilst many of these concerns relating to social rights have validity, the extent of the problem in each instance is a question of debate, whilst in many instances the concerns apply equally to civil rights;

- Involvement of the Judiciary in policy issues

Judicial enforcement of social rights would result in the judiciary playing a greater role in policy issues, however, it is incorrect to assume that this will amount to a fundamental change of role for the judiciary. Firstly, in common law countries the judiciary has always been involved to some degree in policy issues, the most overt example is the manner in which the judiciary shaped the modern law of negligence.¹⁰¹ Secondly, judicial enforcement of social rights will not alter the respective roles of the executive and the judiciary. The implementation of social rights and the design of social policy would still primarily remain with the executive, the judiciary would take a secondary role in reviewing legislation to ensure compatibility with the rights, a role that is not different in nature to the one it currently adopts in enforcing civil rights.

¹⁰⁰ Bakan *ibid.*

¹⁰¹ Paul Hunt "Reclaiming Economic, Social and Cultural Rights" (1993) 1 Waikato LR 141.

- Minimising the regressive potential

The argument that social rights can be employed regressively is true to some degree, however, it can be challenged or minimised in the following ways. Firstly, the regressive potential of rights is a consequence of accepting a constitutional democracy not a consequence of the substantive content of social rights. Therefore, the risk of regressive use cannot logically be employed to reject judicial protection of social rights if it is accepted in relation to civil rights. Indeed compared to many civil rights, such as freedom of expression or equality, the instances in which social rights can be utilised regressively by private parties are few. The list of private business activities in which civil rights can cut is open ended, however, in relation to social rights it is limited to a comparatively small market area, that is where a private actor is providing housing, education or healthcare in the private market.

Secondly, it is possible to structure social rights so that they can be invoked only by those in need. This is one of the principles behind the minimum core content of rights, that the underlying purpose of social rights is to provide for the basic needs of those who cannot provide for themselves. During the 1992 constitutional debates in Canada some of the suggested Social Charters incorporated clauses that limited social rights to the 'protection of vulnerable groups' or mandated that the court look from the 'perspective of the poor.'¹⁰²

¹⁰² Nedelsky and Scott "Constitutional dialogue" in Bakan and Schneiderman eds "Social Justice and the Constitution; Perspectives on a Social Union for Canada" (1992) Ottawa, Carleton University Press 59; Scott and Macklem supra note 5.

Conclusion

This chapter has sought to illustrate that the arguments, both philosophical and practical, that have sustained the secondary status of social rights have increasingly come under attack in recent years and can no longer stand up to academic scrutiny. A strict dichotomy between civil and social rights that accords the former but not the latter the status of justiciable legal norms is neither analytically possible nor theoretically desirable; in modern society social rights should and can be enforced in the same manner as civil rights. Indeed, the equal enforcement of social rights is imperative if civil rights are to be effectively enjoyed by all and the social exclusion of the poor, that is an increasingly apparent feature of modern society, is to be challenged.

Whilst academic analysis and political rhetoric have reached the position where the equal and binding status of social rights is increasingly being advanced, this has failed to significantly penetrate positive law and institutional practice, at both international and domestic level. Chapters 3 and 4 will illustrate how this failure to translate theoretical developments into positive institutional change has had deleterious effects in the Canadian context, and how, ultimately, the dis-benefits arising from selective constitutionalisation outweigh any possible problems in the implementation of social rights.

Chapter 3

Selective Constitutionalisation: The Case Law

The *Canadian Charter of Rights and Freedoms*¹ does not accord constitutional protection to the specific social rights under consideration in this study. Given the exclusion of specific social rights from the *Charter*, constitutional challenges to inadequacies or inequities in the provision of social programs have been restricted to attempts to indirectly invoke social rights by encouraging a positive ‘social’ interpretation of the right to equality (Section 15)² and the right to life, liberty and security of the person (Section 7).³

In constitutional jurisprudence these rights have traditionally been defined and interpreted as exclusively civil in nature. The right to life, liberty and security of the person has traditionally been interpreted as covering deprivation of *physical* life, liberty and security, generally invoked to impose procedural safeguards in criminal

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c.11.

² *Ibid* Section 15 (1)

“Every individual is equal before and under the law and has the right to the equal protection and the equal benefit of the law without discrimination and in particular without discrimination without discrimination based on race, national or ethnic origin, colour, religion sex, age or mental or physical disability.”

³ *Ibid* Section 7 (1)

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”

matters,⁴ whilst the right to equality has traditionally been interpreted as covering instances of *legal* not systemic socio-economic inequality.

However, it is increasingly being recognised that strict demarcation between civil and social rights is neither possible nor desirable,⁵ and that the right to equality and the right to life, liberty and security of the person are “cross cutting rights” which have both civil and social dimensions.⁶ The social dimension to the right to life, liberty and security of the person imposes responsibility upon the state for deprivations of this right that arise from citizens lacking the *socio-economic* means to satisfy their basic needs, whilst the social dimension to the right to equality involves mandating the government to pursue social policies that take account of socio-economic inequality.

The text of the *Charter* does not, in and of itself, preclude according this social dimension to Section 7 or Section 15⁷ and a number of cases have come before the

⁴ For analysis of the traditional interpretation of the right to life, liberty and security of the person in Canada see Hogg ‘Constitutional law of Canada’ (1998) Carswell, Thomson Canada Ltd at 876-887.

See also Lamer J in *Ref. Re Criminal Code, Ss 193 & 195.1(1)*, (1990) 4 W.W.R. 481 (S.C.C.) at 523

“The interests protected by section 7 are those that are properly and have been traditionally within the domain of the judiciary. Section 7 ... protect(s) individuals against the state when it invokes the judiciary to restrict a person’s physical liberty through the use of punishment or detention, when it restricts security of the person or when it restricts other liberties by employing the method of sanction and punishment traditionally within the judicial realm.”

⁵ See Chapter 2.

⁶ The term cross cutting rights is taken from Shadrack Gutto, “Beyond justiciability: challenges of implementing / enforcing socio-economic rights in South Africa” (1998) 4 Buff. Hum. Rts. L. Rev. 79 Gutto also classifies these rights by drawing a distinction between ‘open’ and ‘closed’ social rights. Under this classification, the right to equality and the right to life, liberty and security of the person are ‘closed’ social rights in that their social nature is not immediately apparent.

⁷ Martha Jackman “Poor rights using the Charter to support social welfare claims” (1993) 19 QLJ 65 at 66 and 92;

Supreme Court, and the lower courts, that have sought to challenge the operation of social programs by according such a social dimension to these sections. In so doing, these cases have urged an interpretation of the *Charter* that has the substantive effect of indirectly invoking the specific social rights to food, housing and healthcare that are not expressly included in the text.

This chapter will analyse Supreme Court cases and selected lower court cases since 1990 that have sought to challenge inequities or inadequacies in social programs under section 7 and / or section 15 of the Charter. An overview of the case law illustrates that generally the courts have dismissed cases that attempt to challenge social policy shying from an interpretation of the *Charter* that would impose positive obligations upon the government in relation to social programs. Taking social assistance cases as an example, whilst there has been some success in contesting individual administrative decisions,⁸ cases that have challenged social policy in terms

"In principle, the *Canadian Charter of Rights and Freedoms* and in particular the right to life, liberty and security of the person under section 7, and the right to equal protection and equal benefit of the law under section 15, provide a solid basis for challenges to inadequacies and inequities in social welfare legislation."

"The failure of *Charter* based challenges to remedy inadequacies in social welfare programs and legislation is not attributable to any limits inherent in the language of sections 7 and section 15."

See also G Brodsky "Social Charter Issues" in Bakan and Schneiderman eds. "Social Justice and the Constitution; Perspectives on a Social Union for Canada" (1992) Ottawa; Carleton University Press.

⁸ For example in *Carvey v Halifax (City)* (1993) 105 D.L.R. (4th) 353; 123 N.S.R. (2d) 83; 340 A.P.R. 83; (N.S. C.A.) the applicant challenged a decision of the Social Assistance Appeal Board denying her emergency social assistance. The court held that the discretion of the board was not exercised consistently with the legislative purpose to furnish assistance to all persons in need.

of the level of, or eligibility requirements for, social assistance have been largely unsuccessful.⁹

Analysis of the case law will be divided into two parts; *Part (I)* will address the court's approach under section 7 and *Part (II)* will address the court's approach under section 15. Each part will examine the approach of the court in terms of, firstly, the level of review that has been achieved, that is the extent to which the courts have moved towards according a positive social dimension to each of the sections, and, secondly, the reasoning of the courts, both implicit and explicit, that explains the limited success of cases challenging the provision of social programs.

Part (I) Section 7: The Right to Life, Liberty and Security of the Person

Cases under section 7 have raised directly the question of imposing a positive obligation upon the government to provide the minimum resources necessary to satisfy basic needs. In so doing, they have expressly challenged the *inadequacy* of a social program, asserting that it is insufficient for the maintenance of life, liberty and

⁹ For example, in *Masse v Ontario (Ministry of Community and Social Services)* (1996) 134 D.L.R. (4th) 20; 35 C.R.R. (2d) 44; 89 O.A.C. 81 (Ont. Div. Ct.) a case challenging the adequacy of social assistance levels was dismissed. In *Corbin v Manitoba* (1996) 110 Man. R. (2d) 192; 118 W.A.C. 192 (Man C.A.) and challenges to the eligibility requirements, determining the distribution *Falkiner v Ontario (Ministry of Community and Social Services)* (1996) 140 D.L.R. (4th) 115; 94 O.A.C. 109; 40 C.R.R. (2d) 316 (Ont. Div. Ct.) of social assistance, were unsuccessful.

In *Falkiner v Ontario* a challenge to the definition of spouse under the Family Benefits Act and the General Welfare Assistance Act which included persons residing with a member of the opposite sex, where one resident was providing financial support for the other, or where they have a mutual arrangement regarding their financial affairs, was dismissed. In *Corbin v Manitoba* a statement of claim that challenged the imposition of a residence requirement upon the receipt of social assistance was struck out on the basis that there were "insufficient allegations ... to raise a genuine Charter issue."

security of the person.¹⁰ Without exception, section 7 arguments that have challenged the provision of social programs have been unsuccessful.

According to the Supreme Court, the question of whether section 7 covers deprivations of life, liberty and security of the person arising from the state's failure to provide for basic needs is officially open. In the case of *Irwin Toy Ltd v Quebec*,¹¹ the Court stated that the use of the wording 'security of the person,' as oppose to 'property,' in section 7 did not imply that any right with an "economic component" would necessarily fall outside security of the person.¹² The court stated;

"This is not to declare, however, that no right with an *economic component* can fall within "security of the person." Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal worth, *adequate food, clothing and shelter*, to traditional property - contract rights. To exclude all of these at this early moment in the history of charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights *fundamental to human life or survival* are to be treated as though they are of the same ilk as corporate commercial economic rights."

Since its decision in *Irwin Toy* the Supreme Court has not given judgement in a case that has directly raised this question in relation to a social program. However, the

¹⁰ As opposed to challenging an *inequity* in a program as is often the case under Section 15.

¹¹ *Irwin Toy Ltd v Quebec (Procureur general)* [1989] 1 S.C.R 927; 58 D.L.R. (4th) 577; 39 C.R.R. 193 (S.C.C) at 1003-4.

¹² The wording of the Charter was contrasted with the position in the Fifth and Fourteenth Amendments in the American Bill of Rights, that provide that no person shall be deprived of "life, liberty or property, without due process of law."

Supreme Court recently dismissed an application for appeal in the case of *Masse v Ontario*,¹³ a stance that, firstly, sits uneasily with the Supreme Court's prior assertion in *Irwin Toy* that the issue is open, secondly, sends ambiguous signals to the lower courts and, thirdly, indicates that the Supreme Court may be selectively side-stepping cases that raise *directly* the issue of social rights.

The lower courts have almost invariably failed to utilise the window of opportunity left open by the ambiguity of the Supreme Court jurisprudence, and the potential of section 7, espoused by academics in the early days of *Charter* litigation,¹⁴ remains unrealised. The lower courts have routinely dismissed section 7 arguments dealing with the range of social programs; healthcare, housing and social assistance, giving short shrift to any conception of the right to life, liberty and security of the person that would impose positive obligations on the government in relation to social programs. The following two cases, one dealing with the right to health and the other with social assistance will be considered as examples of the courts reasoning under section 7;

In *Brown v British Columbia (Minister of Health) (1990)*¹⁵ the plaintiff challenged the decision of the Minister of Health to place the drug AZT, used in the treatment of

¹³ *Masse v Ontario (Ministry of Community & Social Services)* (1996) 89 O.A.C. 81 (Ont Div Court) leave to appeal to S.C.C. refused (1996), 40 Admin. L.R. (2d) 87n; 97 O.A.C. 240. (S.C.C)

¹⁴ M Jackman "The Protection of welfare rights under the Charter" (1988) 20 Ottawa LR, 257; Ian Morrison 'Security of the Person and the person in need: Section 7 of the Charter and the Right to Welfare' (1988) 4 J.L. & Social Policy 1; I Johnstone, 'Section 7 of the Charter and Constitutionally Protected Welfare' (1988) 46. U.T.Fac141 Uni Penn LR, 1. L.Rev.1.

¹⁵ *Brown v British Columbia (Minister of Health)* (1990) 66 D.L.R. (4th) 444; 42 B.C.L.R. (2d) 294; 48 C.R.R. 137 (B.C. S.C)

aids, under the provincial pharmacare plan that provided for only *partial* state funding. The plaintiff was unable to pay for the drug and argued that the decision of the Minister of Health violated section 7 on the basis that the plaintiff was deprived of life and security of the person by reason of the affect of the decision on his physical and psychological health. The section 7 argument was dismissed on the basis that the claim rested on “*economic deprivation*” (as opposed to physical) and that the plaintiff was seeking a benefit that would “*enhance* life, liberty and security of the person.”

In *Masse v Ontario (Ministry of Community and Social Services)*¹⁶ the plaintiffs challenged regulations passed by the provincial government that reduced the level of social assistance in Ontario by 21.6%. The section 7 argument in *Masse* clearly raised the question of a right to an adequate standard of living, the applicants claiming, under section 7, that they had been left with living standards below an “irreducible minimum.” The reality that the applicants would be unable to satisfy their basic needs was adverted to by the court in considering the personal effects of the reductions. Corbett J noted that *Masse* would be left with an income, after rent, of only \$3 month, and in relation to other applicants he stated that they “fear losing their existing accommodation and the deprivations associated with lower income such as less money for food, clothing and educational needs.”¹⁷

¹⁶ *Masse v Ontario supra* note 9

¹⁷ Corbett J at para 37 and para 40

The application was dismissed on the basis that “section 7 does not provide the applicants with any legal right to minimal social assistance.”¹⁸ Much of the standard section 7 counter rhetoric, evident in other cases, surfaced in the judgements of O’Brien J, O’Driscoll J and Corbett J;

“it is a plea for *economic* assistance which goes beyond a claim with an economic component to claim utility services as a basic economic and social right”¹⁹

“where a legislative act is admitted to ameliorate the condition of a class of individuals that act cannot be said to simultaneously deprive the class of liberty or security of the person,”²⁰

“inaction cannot be the subject of a charter challenge”²¹

“it would bring under judicial scrutiny all elements of the modern welfare state....(which are) issues upon which elections are won and lost.”²²

In *Masse* and *Brown*, like other social program cases, the section 7 argument stumbled on judicial reluctance to question government inaction,²³ social policy or economic matters. This deferential approach, also evident under section 15, has been

¹⁸ O’Driscoll J para 350

¹⁹ O’ Brien J para 225

²⁰ O’Driscoll J para 361

²¹ O’Driscoll para 347

²² O’Brien para 226 citing Hogg ‘Constitutional Law of Canada’ (1998) Carswell, Thomson Canada Ltd at pp.44.8 - 44.9

²³ The assertion that the court should not review government inaction is questionable after the decision in *Eldridge* and *Vriend*, considered below at 86-90. The decision that a failure to act can be the subject of a charter challenge under section 15 adds strength to the argument that inaction should not be a bar to review under section 7. Further, the invocation of inaction as a means of rejecting review under section 7, but not section 15, substantiates the argument that the court has sought to ‘shut down’ section 7 as a means of review.

particularly destructive to section 7 arguments. Although the Supreme Court officially left section 7 open as an avenue of review, it has effectively been 'shut down' by the lower courts classifying social programs as 'economic' interests and declaring economic interests outside the ambit of the section. A challenge to the failure to fully fund a medical drug in *Brown*, and a challenge to reductions in social assistance in *Masse* were classified as wholly economic, O'Brien classifying the challenge in *Masse* as "a plea for *economic* assistance."²⁴

While the claims in *Brown* and *Masse* have economic components their classification as wholly or primarily economic interests is misplaced; firstly, it misapplies the decision in *Irwin Toy*, for when the Supreme Court averted to rights that have *only* an 'economic component' it referred expressly to social programs.²⁵ Secondly, in a society based on the welfare state these programs have as much social as economic connotations and to hold otherwise ignores societal and historical context.²⁶ Thirdly, classification of the claim as economic is achieved by focusing on the *means* by which the deprivation is caused, not the actual deprivation itself, or the nature of the right being claimed. In both *Masse* and *Brown* the threatened deprivation was *physical* life or *physical* security, the withholding of economic assistance was only the means by which this deprivation was imposed. In both cases the true right being claimed was

²⁴ O'Brien *supra* note 19

²⁵ *Irwin Toy supra* note 11

²⁶ See Jackman *Supra* note 7

not the right to financial assistance but the right to health and to an adequate standard of living.

The curt rejection of challenges under section 7 has had the effect of channelling cases that challenge social programs into section 15. It is notable that section 7 arguments now appear to be raised less frequently than section 15 arguments, although on the facts the applicant is clearly left with income insufficient for basic living requirements. This trend is exemplified by the case of *Way v Covert*²⁷ which challenged the termination of the applicant's Shelter Allowance Benefit. The effect of the termination was to reduce the applicant's total income from \$303 to \$74 a month, however, only section 15 arguments were raised. Where section 7 arguments continue to be raised they rarely reach the higher courts and are conspicuously absent from Supreme Court jurisprudence.

Part (II) Section 15: The Right to Equality

In general, the use of section 15 has proven more productive in challenging social programs than section 7, however its potential has not been fully realised. Firstly, while cases have successfully challenged *inequities* within social programs, success has been variable and the notion of substantive equality, espoused by the courts, has not been fully developed or consistently applied. Secondly, attempts to challenge

²⁷ *Way v Covert* (1997) 147 D.L.R. (4th) 405; 160 N.S.R. (2d) 128 (N.S.C.A.)

substantive *inadequacy*, as opposed to inequity, and thus invoke a right to a certain level of the social program, have generally been unsuccessful.

In contrast to section 7, the arguments under section 15 have not directly addressed the issue of imposing a positive obligation upon the government to provide for basic needs. Rather the applications are framed in terms of inequity in the operation of the social program as this is the form that has proved acceptable to the court. This has allowed for some success under section 15, where it was not forthcoming under section 7, as the court has been able to move incrementally towards a more substantive notion of equality whilst avoiding addressing outright the question of imposing positive obligations upon the government in relation to social programs.

Accordingly, for the purpose of analysis, section 15 cases can be divided into three loose categories that, based upon the type or degree of review sought, move progressively away from the formal equality paradigm and towards the recognition of positive obligations. The first category covers cases of *direct discrimination* that fit squarely within the formal equality paradigm, in that the social program distinguishes between X and Y, either expressly or in its administration. The second category covers cases of *adverse affects discrimination* where the program is provided without distinction to X and Y but either imposes a greater burden on X, or due to extraneous circumstances X cannot benefit equally. The third category covers instances of *positive equality* imposing an obligation upon the government to provide a certain level of social services aimed at alleviating pre-existing socio-economic inequality.

- Challenging Inequity: Direct Discrimination

The courts have clearly allowed challenges to social programs that are based on direct discrimination in that the social program *directly* excludes a protected group, for example, in *Tetreault-Gadoury v Canada*²⁸ the Supreme Court found that the Unemployment Insurance Act was discriminatory in that it excluded persons over sixty-five years of age from receiving unemployment insurance benefit. The substantive effect of the decision in *Tetreault-Gadoury* was that the benefit was extended to cover persons over sixty five years of age.

However, the concept of direct discrimination has not always, or indeed frequently, availed the applicants in social program cases as the discrimination may be found to be justified under section 1 of the charter; for example in *Mohamed v Metropolitan Toronto (Department of Social Services General Manager) (1996)*²⁹ the Ontario court of Justice found that the prohibition on direct payment of welfare assistance to persons under sixteen years of age was directly discriminatory under section 15, but justified under section 1, on the grounds that the objective of the prohibition was to ensure proper provision for all children and to promote the integrity of the family unit.

²⁸ *Tetreault-Gadoury v Canada (Canada Employment and Immigration Commission)* [1991] 2 S.C.R. 22; 1 D.L.R. (4th) 358; 4 C.R.R. (2d) 12 (S.C.C). See also *Schachter v Canada* [1992] 2 S.C.R. 679; 93 D.L.R. (4th) 1; 10 C.R.R. (2d) 1 (S.C.C)

²⁹ *Mohamed v Metropolitan Toronto (Department of Social Services General Manager) (1996)* 133 D.L.R. (4th) 108 (Ont. Div. Ct.)

- Challenging Inequity: Adverse Effects Discrimination

The courts have also allowed challenges to social programs that are based on *adverse effects discrimination* in that, although a law is neutral on its face, its impact is felt disproportionately on the basis of a prohibited ground.³⁰ The willingness to allow claims on the grounds of adverse effects discrimination stems from the Supreme Court's recognition in *Andrews v Law Society of British Columbia*³¹ that "identical treatment may frequently produce serious inequality" and therefore "the main concern must be the impact of the law on the individual or the group concerned."³²

The Court initially recognised the existence of adverse effects discrimination where a facially neutral law imposed a disproportionate *burden* on a protected group.³³ An application of this in a social program case is provided by the reasoning of the Federal Court of Appeal in *Granovsky v Canada*.³⁴ The court held that the requirement that an individual makes a minimum number of contributions under the Canada Pension Plan before he becomes eligible for a pension was discriminatory in that it "impose(d)

³⁰ See *Granovsky v Canada (Minister of employment and Immigration)* (1998) 158 D.L.R. (4th) 411 222 N.R. 2 (Fed. C.A.) Stone J.A

"Adverse affects discrimination occurs where a law which is neutral on its face and applies equally to all persons is nonetheless discriminatory in its effect on an individual or group, based on a prohibited ground"

³¹ *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143; 56 D.L.R. (4th) 1; [1989] 2 W.W.R. 289 (S.C.C.)

³² *Ibid* per McIntyre J at 164, 165

³³ For the recognition of the concept in Charter Litigation see *Rodriguez v British Columbia (Attorney General)* [1993] 3 S.C.R. 519; 107 D.L.R. (4th) 342; 17 C.R.R. (2d) 193 (S.C.C). For its development in Human Rights Law see *Ontario Human Rights Commission v Simpsons-Sears Ltd.* (1985) 2 S.C.R. 536; 23 D.L.R. (4th) 321; 12 O.A.C. 241 (S.C.C.)

³⁴ *Supra* note 30

an unequal burden on disabled persons which (was) directly related to their disability”.³⁵

In *Eldridge v British Columbia*,³⁶ the Supreme Court held that adverse effects discrimination may result, not only from the imposition of a disproportionate *burden* upon a protected group, but also from a failure to ensure that a protected group can *benefit* equally from a service offered to everyone. The plaintiffs in *Eldridge* challenged the *Medical and Health Care Services Act* and the *Hospital Insurance Act* for their failure to provide medical interpreter services for the deaf as an insured benefit. It was argued that this failure amounted to discrimination on the grounds of disability under section 15 as without interpreter services deaf patients could not benefit equally from medical services offered to all.

The Supreme Court found that the failure to provide interpreter services for the deaf as part of the health service violated section 15 on the basis that adverse effects discrimination obliges the government to take account of disadvantage that exists ‘independently’ of the impugned provision, and may require them to take positive steps to ensure that protected groups can benefit equally from public services. La Forest J stated that “if we accept the concept of adverse effects discrimination, it seems inevitable at least at the section 15 (1) stage of analysis that the government

³⁵ Note that the Court found that the discrimination was justified under section 1 on the basis that the requirement served the pressing and substantial purpose of ensuring that contributions are relatively recent and continuous for protection from a loss of earning due to disability.

³⁶ *Eldridge v British Columbia (Attorney General)* (1997) 151 D.L.R (4th) 577 (hereinafter *Eldridge*)

will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from the government service.”³⁷

Despite the courts recognition that section 15 covers adverse effects discrimination, *Eldridge* is a rare case in which section 15 has been successfully employed to challenge a social program. Cases that appear to fit squarely within section 15 analysis have been rejected for a variety of reasons, implicit or explicit in the reasoning of the courts. These reasons can be divided into two broad categories reflective of different methods or approaches to dismissing these cases. The first effectively puts the subject matter of the case outside the scope of judicial review through judicial deference, whilst the second restricts or distorts review once it is undertaken. Brodsky and Day have stated;

“The standard oppositional moves that are made to counter claims of discrimination in government economic policy involve pushing the subject matter of the claim outside the boundary of law and into the realm of the social and economic, and conducting the discrimination analysis in such a way as to break the cause and effect linkage between the inequality complained of and the *Charter's* equality guarantees.”³⁸

Judicial Deference

As we saw under section 7, concerns about the legitimacy of judicial review become more acute when the case raises social and economic issues. The exclusion of specific

³⁷ *Ibid* at para 77

³⁸ S Day and G Brodsky, “Women and the equality deficit; The Impact of Restructuring Canada’s Social Programs” (1998) Publication funded by Status of Women Canada at 82

social rights from the *Charter* has lead to the elevation of social and economic policy issues to a position outside the constitutional mandate and above judicial review. The domain of constitutional law has been demarcated as the relationship between the individual and the state, not the balancing of competing interests inherent to policy making.³⁹ The seminal statement on the deferential approach under section 15 is that of La Forest J in *Andrews v Law Society of British Columbia*; “(m)uch economic and social policy-making is simply beyond the institutional competence of the courts; their role is to protect against incursions on fundamental values, not to second guess policy decisions.”⁴⁰

This deferential approach can be seen in a number of the social program cases that have raised section 15 arguments, for example, in *Masse v Ontario* O’Brien J stated that “generally, courts should not lightly second-guess legislative judgement as to just how quickly it should proceed in moving towards the ideal of equality.”⁴¹ In many cases the court does not just give more leeway to the government on social and

³⁹ See Sopinka J in *Egan v Canada* [1995] 2 S.C.R. 513; 124 D.L.R. (4th) 609; 182 N.R. 161 (S.C.C) at 572

“The legislation in question represents the kind of socio-economic question in respect of which the government is required to mediate between competing groups rather than being the protagonist of an individual. In these circumstances the Court will be more reluctant to second-guess the choice which parliament has made.”

⁴⁰ *Andrews supra* note 31.

⁴¹ O’Brien J citing La Forest J in *McKinney*. See also O’Brien citing Sopinka J in *Egan*

“It is not realistic for the Court to assume that there are unlimited funds to address the needs of all. A judicial approach on this basis would tend to make a government reluctant to create any new social benefit scheme because their limits would depend on an accurate prediction of the outcome of court proceedings under s 15 (1) of the Charter.”

economic issues, by not *lightly* second guessing the government, but actually excludes social and economic issues completely from review, on the basis that they are outside its mandate or competence. For example, in *Way v Covert* Gruchy J declared his disapproval of the reduction in Shelter Allowance on a “humanitarian level” but then went on to conclude that “(t)he decision to reduce the overall cost of benefits to disabled persons was budgetary in nature. My reluctance to approve the reduction of the applicant’s benefit is outweighed by my *inability* to second guess the government’s budgetary process.”⁴²

Extreme deference on social and economic issues has the effect of discriminating against the poor and excluding them from the court’s protection, as poverty and welfare related concerns are routinely classified as socio-economic policy issues, and therefore immune to review. This is exemplified by the statement of Driscolli J in *Masse* that “(t)he intractable economic, social and even philosophical problems presented by welfare assistance programs are not the business of the court.”⁴³

Additionally, it is clear that deference is not the neutral or value free exercise it is portrayed to be but is a *choice* to uphold the legislation, and there are concerns that

⁴² *Way v Covert* *supra* note 27 at para 40 and 41

⁴³ *Masse v Ontario* *supra* note 9. The impact of the deferential approach has been noted by Brodsky and Day *supra* note 38 at 86, who have stated;

“what is most striking about the *Masse* decision is how closely connected the legal category of socio-economic policy is to the exclusion of poor people from rights. Poor people’s issues, by definition, are seen as issues for socio-economic policy and not as rights issues.”

deference may be selectively employed when the judiciary support the legislative purpose; for example Day and Brodsky have stated that

“The striking thing about La Forest J’s opinion in *Egan* is that it shows very clearly that talk of judicial deference, while purportedly about refraining from making a value judgement, can actually be a cover or reinforcement for the judge’s values. In *Egan* La Forest J does not decide to defer to parliament based on the notions of institutional role articulated in *RJR MacDonald*. He decides to defer to parliament because he agrees with the values that are promoted by the legislation.”⁴⁴

Not an Analogous group

The requirement under section 15 that the applicant is a member of an enumerated or analogous group has significantly restricted challenges to social programs because the courts have proved reluctant to find analogous groups helpful to the applicant.

Applications under section 15 have attempted to classify the plaintiffs in various ways, for example as ‘the poor,’ ‘social assistance recipients,’ ‘public housing tenants,’ ‘sole support parents’ and ‘single mothers on welfare.’ The Supreme Court has not directly addressed the issue of whether these various categorisations could constitute analogous groups due to historical disadvantage. Although the lower courts have considered the issue on a number occasions, their approach has proven inconsistent both between cases and within an individual case.

The lower courts have generally refused to find that ‘the poor’ or ‘social assistance recipients’ are analogous groups, for example, in *Masse v Ontario Driscoll* J

⁴⁴ S Day and G Brodsky *Ibid* at 87

dismissed the argument that social assistance recipients were an analogous group on the basis that “the class of social assistance recipients is heterogeneous and their status is not a personal characteristic within the meaning of s15. The class is not related to merit or capacity. Statistics show that the class is not immutable”⁴⁵

However, it has been pointed out that a lower court has never *unanimously* held that the poor or social assistance recipients can not constitute an analogous group, the judgements in an individual case diverging in their analysis. Judith Keene has stated that “some judges (*never an entire panel*) have ruled that social assistance recipients cannot be considered an unenumerated group in the circumstances of a particular case, but there is no jurisprudence that discusses the principles behind that decision.”⁴⁶

Whilst no case has succeeded on the grounds that the poor or social assistance recipients form an analogous groups, there has been some success in relation to the other categorisations employed by applicants. In *Dartmouth/ Halifax County Regional Housing Authority v Sparks*⁴⁷ the applicant successfully challenged the non-application of the security of tenure provisions of the Residential Tenancies Act to public housing tenants. The Nova Scotia Court of Appeal found that the Residential Tenancies Act contravened section 15 in that it discriminated against public housing

⁴⁵ *Masse supra* note 9 per Driscoll J at para 374

⁴⁶ Judith Keene ‘Claiming the protection of the court: Charter Litigation Arising from Government ‘Restraint’ (1998) 9 N.J.C.L 98 at 111

⁴⁷ *Dartmouth / Halifax County Regional Housing Authority v Sparks* (1993) 101 D.L.R.(4th) 224; 30 R.P.R. (2d) 146; 119 N.S.R (2d) 91; 330 A.P.R. 91 (N.S. C.A.)

tenants and single mothers, both of which constituted analogous groups under section 15.

Public housing tenants were held to constitute an analogous group by reason of the “combined effect of several personal characteristics listed in section 15,” including race, gender and age, as well as the fact that “low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing.”⁴⁸ Single mothers were held to constitute an analogous group on the basis that “(s)ingle mothers are known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect members of this group. This is no less a personal characteristic of such individual than non-citizenship was in *Andrews*.”⁴⁹

Members of the court have adopted a similar approach in other cases, however *Sparks* appears to be the only case in which the determination that ‘single mothers’ or ‘sole support parents’ constitute an analogous group has resulted in a positive substantive outcome. Generally, cases in which members of the court have found these categorisations to constitute analogous groups have failed on one of two grounds. Firstly, the opinion has been in the minority, for example, in *Masse v Ontario Corbett J*, dissenting, held that “sole support parents in receipt of social assistance” were an

⁴⁸ *Ibid* Per Hallet JA at 8

⁴⁹ *Ibid* Per Hallet J A at 8

analogous group.⁵⁰ Secondly, the case has been dismissed on an alternative ground, for example, on the basis of a break in the causal connection between the distinction and the protected characteristic.⁵¹

Misapplying Adverse Effects Discrimination

The courts have misapplied the concept of adverse effects discrimination to the detriment of those challenging social programs, in two significant ways. Firstly, the courts have at times insisted that for a case of adverse effects discrimination to be made out then *only* members of the protected group should be adversely effected, whereas a correct application of adverse effects discrimination involves a lower standard, only requiring that the group be *disproportionately* effected. An example of the misapplication of adverse effects discrimination is provided by the approach of the Federal Court of Appeal in *Thibaudeau v Canada*,⁵² Hugessen J “recognised that within the group negatively effected by the challenged provisions of the ITA, women were overwhelmingly represented. However, because two percent of the negatively affected group were custodial fathers the claim of sex discrimination was not borne out.”⁵³ Similarly in *Brown v British Columbia*⁵⁴ the court misapplied the concept of adverse effects discrimination, failing to find discrimination on the grounds of sexual

⁵⁰ *Masse v Ontario supra* note 9. See also McLachlin J (dissenting) in *Thibaudeau v Canada* [1995], 2 S.C.R. 627; 124 D.L.R. (4th) 449; 29 C.R.R. (2d) 1 (S.C.C) held that separated or divorced parents were an analogous group.

⁵¹ The approach of the lower court in *Dartmouth / Halifax County Regional Housing Authority v Sparks*, analysed below, provides an illustration of this point.

⁵² *Thibaudeau v Canada* (1995) 2 S.C.R. 627; 124 D.L.R. (4th) 385; 50 C.R.R.(2d) 1 (S.C.C)

⁵³ G Brodsky and S Day *supra* note 38 at 92.

⁵⁴ *Supra* note 15

orientation because the pharamcare plan applied equally to all residents, despite the fact that 90% of AZT users were homosexual or bisexual males.

Secondly, the courts have failed to recognise the intersectionality between protected groups and the usage of social programs. The relationship between gender, race and disability and the incidence of poverty, subsidised housing, public healthcare and social assistance is well documented, for example, Keene has stated;

“in North America, poverty has strong historical links to sex (female), race / ethnicity (particularly non-white), disability (particularly visible disability), age (the extremes of the age spectrum), citizenship (non-citizens) and other characteristics that have been recognised as grounds of discrimination in provincial human rights legislation, the *Charter*, or both.⁵⁵

However, this has generally⁵⁶ not been recognised in the case law. For example in *Masse v Ontario*⁵⁷ it was argued that social assistance recipients had been discriminated against in that they had to bear an inordinate share of the budget cuts. Having decided that social assistance recipients were not an analogous group the court rejected the case, failing to even consider the possibility of adverse effects

⁵⁵ Keene *supra* note 46 at 111. See also Day and Brodsky *Ibid* 5-8, at 7

“it is clear that female sex, motherhood and single status are significant determinants of poverty. Being a women of colour, an Aboriginal woman, or w woman with a disability further increases the risk of poverty.”

⁵⁶ For a rare success see *Dartmouth / Halifax County Regional Housing Authority v Sparks supra* note 47

⁵⁷ *Supra* note 9

discrimination on the grounds that social assistance recipients are disproportionately female, non-white and disabled.

- Break in Causal Connection

On other occasions the courts have found the applicant to be a member of an analogous group but have dismissed the case finding a break in the causal connection between the discrimination and the protected grounds, for example, by holding that the alleged discriminatory conduct was not attributable to the plaintiff being a member of an analogous group. In *Way v Covert (1996)*⁵⁸ the plaintiff challenged regulations made pursuant to the Family Benefits Act that introduced a means test whereby an individual residing with his or her family was ineligible for Shelter Allowance Benefit unless 'family income', including that of a co-resident sibling, fell below a certain level. The applicant's Shelter Allowance Benefit was terminated on the basis that her brother's income exceeded the specified level, and she appealed against the decision under section 15 on the grounds that the regulations had a disproportionate impact on disabled benefit recipients. The case was rejected on the basis that although the plaintiff was a member of a protected group "her exclusion from the receipt of benefits ... (was) not the result of her personal characteristics, but rather by reason of her family income."⁵⁹

⁵⁸ *Supra* note 27

⁵⁹ *Ibid* per Gruchy J at para 33. Note that the decision was subsequently reversed on appeal to the Nova Scotia Court of Appeal on an alternative basis.

The judgement of the lower court, the Nova Scotia County Court, in *Dartmouth / Halifax County Regional Housing Authority v Sparks*⁶⁰ provides a second illustration of this approach. The court took the step of recognising that social assistance recipients may be an analogous group, but ultimately dismissed the application on the basis that this protected characteristic did not motivate the distinction that was being drawn. According to the court the applicants were being “treated differently because and solely arising from having met the criteria for public housing” not on the basis that they were social assistance recipients.

- Inappropriate judicial attitudes

In a number of cases the judiciary have exhibited inappropriate negative attitudes towards the applicants and it appears that within social program cases a hierarchy of protection may be emerging dependent on two factors; the identity of the applicant and the nature of the social program being challenged.

Firstly, within those groups that are officially protected by section 15 success has been variable. This is not the place for detailed analysis of this issue, but a comparison between the success of an age discrimination claim in *Tetreault-Gadoury*⁶¹ the success of a disability discrimination claim in *Eldridge* and the failure of sexual orientation discrimination claims in *Egan* and *Brown* seems to indicate preferential or inferior treatment for certain groups. Pothier has stated that “the contrast between

⁶⁰ *Dartmouth / Halifax County Regional Housing Authority v Sparks* 112 N.S.R. (2d) 389 (N.S. Co. Ct)

⁶¹ *Supra* note 28

Eldridge and Egan seems to reinforce the conclusion that gays and lesbians have inferior protection under s15.”⁶²

Secondly, underlying social assistance and housing cases is a highly negative attitude towards the applicants, who are invariably poorer persons dependant upon the state.

Keene has stated that “the more the claimant resembles the lawyers and judges in social class” the likelier it is that a favourable decision will be rendered, and that “of the range of social program cases, a *Charter* claim in a social assistance case is the most difficult for judges and lawyers to understand. The claimant in social assistance cases is by definition a member of the most disadvantaged social class, and faces a reality that is light years away from anything experienced by judges (and) lawyers.”⁶³

It is not insignificant that the most successful recent challenge to a social program was to the healthcare service, which, open to all, is the most socially accepted and least stigmatised social program.⁶⁴ As Margot Young has stated;

“*Eldridge* ... revolved around spending in a social program area that is characterised by high public acceptance, interest and commitment. Health services are a universally delivered good - everyone in society benefits from their provision, regardless of affluence level. Of all the benefits that the

⁶² Dianne Pothier “The Sounds of Silence: Charter Application when the Legislature Declines to Speak” (1996) 7;4 Con Forum 1

⁶³ Keene *supra* note 46 at 99

⁶⁴ Young, Margot “Change at the Margins: *Eldridge v British Columbia (A.G)* and *Vriend v Alberta*” (1998) 10 CJWL 244 at 60

Canadian welfare state provides, health care is arguably the most acceptable, publicly desired and least stigmatised.”⁶⁵

It is also the social program that the federal government has recently, through the introduction of the *Canadian Health and Social Transfer (CHST)*, prioritised above other social programs.⁶⁶

Thirdly, it appears that even between applicants in social assistance cases there maybe some hierarchy of judicial support. The case law depicts poverty as a self inflicted phenomenon and draws a moral, and legal, distinction between the ‘deserving’ and the ‘undeserving’ poor. This is illustrated by the judgement of Corbett J in *Masse v Ontario*. His opinion that the temporarily disabled and single mothers, but not social assistance recipients generally, were an analogous group was motivated by a distinction between those who were employable and those who, due to disability or single parenthood, were not. The reduction in social assistance was, according to Corbett, acceptable for those who were employable as a means of “encouraging employable individuals to return to employment.”⁶⁷

- Positive Equality: The imposition of Positive Obligations

Cases that are decided upon the basis of direct or adverse effects discrimination do not impose an obligation on the government to provide the social program, but only to

⁶⁵ *Ibid* at 60

⁶⁶ See below chapter 4, part (II)

⁶⁷ *Masse v Ontario supra* note 9 at para 18

avoid discrimination when it chooses to act. A case has not come before either the Supreme Court or the lower courts that has *directly* asked them to consider whether the government can be liable, under the right to equality, for failing to act *at all*, that is whether section 15 imposes a positive obligation upon the government to act.

Even so, the Supreme Court has made a number of pronouncements upon the question of whether section 15 can impose an obligation upon the government to act. However, these pronouncements have been brief and *obiter dicta*, the court clearly distinguishing the present case from the question of positive obligations. Furthermore, viewed together, these statements have proved extremely equivocal.

In *Shachter v Canada*⁶⁸ Lamer C.J stated that “in some contexts it will be proper to characterise section 15 as providing positive rights,” whilst in *Haig v Canada*⁶⁹ L’Heureux-Dube J recognised that “section 15 of the Charter is indeed a hybrid of positive and negative protection, and (that) a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15”

⁶⁸ *Schachter v Canada* (1992) *supra* note 28, per Lamer C. J. cited in Bruce Porter ‘Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend’ (1998) 9:3 Constitutional Forum 71 at 72

⁶⁹ *Haig v Canada (Chief Electoral Officer)* [1993] 2 S.C.R. 995, per L’Heureux-Dube cited in Porter *Ibid* at 73

However, these statements were swiftly contradicted, by the same justices, in *Egan v Canada*⁷⁰ and *Thibaudeau v Canada*.⁷¹ In *Egan* Lamer C.J stated "it is clear that parliament does not have any constitutional obligation to provide benefits," whilst in *Thibaudeau* L'Heureux-Dube J stated that "section 15 of the Charter does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality."⁷²

The recent Supreme Court decisions in *Eldridge*⁷³ and *Vriend v Alberta*⁷⁴ have generated considerable debate as to their broader impact upon the issue of positive obligations.⁷⁵ Although both cases involved a failure to act (to provide interpreter services or legislative protection), the application and the judgement were, in both instances, formulated as cases of underinclusiveness or 'discrimination within government action.'⁷⁶ This allowed the court to again distinguish the case at hand

⁷⁰ *Egan v Canada* [1995] 2 S.C.R. 513; 124 D.L.R. (4th) 609; 182 N.R. 161 (S.C.C.) cited in Porter *Ibid* at 74

⁷¹ *Thibaudeau v Canada* *supra* note 50 cited in Porter *Ibid* at 74

⁷² *Thibaudeau* *Ibid* per L'Heureux-Dube cited in Porter *Ibid* at 74

⁷³ *Supra* note 36

⁷⁴ *Vriend v Alberta* [1998] 1 S.C.R. 493; 156 D.L.R. (4th) 385; 50 C.R.R. (2d) 1 (S.C.C.) (hereinafter *Vriend*). This case challenged the exclusion of sexual orientation as a protected ground under Alberta Human Rights legislation, although not relating to a social program, the court's observations and dealings with the issue of positive obligations are directly relevant to the present discussion.

⁷⁵ See for example Porter *supra* note 68; M Young *supra* note 63; D Pothier 'Eldridge v British Columbia (AG) How the Deaf were Heard in the Supreme Court of Canada' (1998) 9 NJCL 263

⁷⁶ Porter *supra* note 68 at 75

"In both *Eldridge* and *Vriend* the appellants and their supporting intervenors framed their section 15 claim within the formal equality paradigm of discrimination - through under inclusion. They argued that their claims did not require the Court to consider whether governments have a positive obligation to provide benefits or to legislate. The issue as they

from the question of the imposition of positive obligations.⁷⁷ La Forest J stated in *Eldridge* that the question raised in the present case was of a “wholly different order,”⁷⁸ while in *Vriend* the majority held that “it is also unnecessary to consider whether a government could properly be subjected to challenge under section 15 of the Charter for failing to act at all, in contrast to a case such as this where it acted in an under inclusive manner.”⁷⁹

The official step forward that was achieved in *Eldridge* and *Vriend* was very limited: the court sidelined the restrictive position adopted in *Thibaudeau* and *Egan* and reiterated the existence of the *Schachter / Haig* line of authority, thus leaving the issue of whether section 15 can impose positive obligations upon the government officially open once again. In *Eldridge* the court stated:

“It has been suggested that s 15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau*, supra, at para 37 (per L’Heureux-Dube). Whether or not this is true in all cases, and *I do not purport to decide that matter here*, the question raised in the present case is of a wholly different character.”⁸⁰

defined it was whether a legislative omission or underinclusion resulted in discrimination within the scheme for the provision of benefits or legislative protections.”

⁷⁷ See B Porter *supra* note 68

⁷⁸ *Eldridge supra* note 36 at para 621

⁷⁹ *Vriend supra* note 73 at para 63

⁸⁰ *Eldridge supra* note 36 at para 73

In *Vriend* the court cited the affirmative statements made in *Haig* and *Eldridge* and stated "it has not yet been necessary to decide in other contexts whether the Charter might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the Charter. Nonetheless the possibility has been left open in some cases."⁸¹

Whilst the court officially abstained from the question of whether section 15 can impose positive obligations, in substance the decisions in *Eldridge* and *Vriend* did impose positive obligations upon the government, in the former case a duty to provide the deaf with interpreter services and in the latter a duty to provide legislative protection for lesbians and gay men. Notably, as a result of the decision in *Eldridge*, the provincial government has, since April 1998, begun to provide interpreter services for deaf patients.⁸²

In *Eldridge*, the connection between the discrimination in issue and government action, in the form of the *Medical Protection Act* and the *Hospital Insurance Act* was tenuous, as Porter states:

"The discrimination at issue in *Eldridge* was not really tied in any direct way to an act of the legislature or even to decisions of elected representatives not to act ... (the problem) was that those who had the authority and the means to ensure that such services were provided - officials within the Health Ministry

⁸¹ *Vriend* *supra* note 73 at para 64

⁸² See Margot Young *supra* note 63. Phase 1 that came into effect on 14 April 1998 provided interpretation for emergency health services, including consent for surgery, pre-natal physician care, and childbirth. Phase 2 that came into effect in August 1998 provided interpretation for non-emergency physician and hospital services.

and the hospital administration - simply ignored the needs of a marginalised group.”⁸³

However, although the discrimination in *Eldridge* was only loosely tied to a specific legislative act, the obligation imposed in *Eldridge* was still not a positive obligation *per se*, that is an obligation imposed independently of government action. It was at best a type of ‘quasi positive obligation,’ which, although only artificially tied to a specific legislative act, was still clearly tied to ‘discrimination within government action’, in that it was contingent upon the government’s pre-existing provision of healthcare and its duty, under the concept of adverse effects discrimination, to ensure that protected groups can benefit equally from a service that the government has chosen to provide to all.⁸⁴

As well as limiting the scope and future import of the decision in *Eldridge* by locating the obligation to provide interpreter services within an area of pre-existing government action, the finding that interpretation was ‘integral’ to, that is ‘part of’, the delivery of health care, also has the practical effect of limiting the import of the decision. The stringent degree of proximity between the primary and secondary service, present in *Eldridge*, may prove difficult to emulate in future cases, for

⁸³ Porter *supra* note 68 at 76

⁸⁴ The question of how the court could utilise section 15, the right to equality, to recognise positive obligations is difficult. The quasi-positive approach adopted by the courts allows them to measure what is required for the plaintiff by reference to the service that the state has chosen to provide to others. How the court could, in the absence of such a reference point, judge, within the framework of equality rights, the level of service required is unclear, and substantiates the argument that the utilisation of cross cutting rights, whilst necessary under the current constitutional situation in Canada, is an inferior method of imposing positive obligations upon the government than the recognition of specific social rights.

instance where the provision of the secondary service is necessary for the enjoyment of the primary service, but not a part of it, for example, the provision of transportation to public facilities.

Similarly the scope and import of the decision in *Vriend* was limited by the court tying the obligation to the government's decision to legislate human rights protection.⁸⁵ The connection to legislative action in *Vriend* was more apparent than in *Eldridge* and, whilst in *Eldridge* the remedy was expressed in mandatory form, in *Vriend* it was not, the court implying that the government could have chosen to avoid discrimination by not legislating at all. The majority merely stated that "it is reasonable to assume that, if the legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen."⁸⁶

Ultimately, in both cases we must return to the reality that if the government had not decided to provide healthcare or to legislate there would have been no obligation upon it to do so. When La Forest J spoke in *Eldridge* of a "thin and impoverished vision of section 15" he was referring to an interpretation that would allow the government to "provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of *those* benefits." He was not referring to the impoverishment of a vision of section 15 that would allow the

⁸⁵ *Vriend supra* note 73 at para 63

⁸⁶ *Ibid* para 151

government to refrain from acting at all, that is failing to provide healthcare, social assistance, or subsidised housing, an issue on which the court ultimately abstained.

Conclusion

As a direct result of the failure to constitutionalise social rights challenges to inequities and inadequacies in the provision of social programs have been restricted to the assertion of the right to life, liberty and security of the person and the right to equality. The courts have proven unwilling to interpret these rights in a full and expansive manner that recognises their positive and / or social dimension. The consequences of the courts approach have been twofold, firstly, as has been illustrated above, inequities in the administration of social programs have often and somewhat arbitrarily been left unaffected by constitutional litigation and, secondly, inadequacies in the provision of social programs have to date not been included within the scope of constitutional review, the courts abstaining upon the question of whether the right to life, liberty and security of the person and the right to equality can be interpreted so as to impose positive obligations upon the government in relation to the provision of social programs.

The court's approach to cases challenging social programs illustrates that, in light of the non-constitutionalised status of social rights, the values underlying these rights have been excluded from, or at least marginalised within, legal discourse. Although various reasons are articulated to justify a given decision, the non-constitutionalised status of social rights has worked to largely remove these rights from what is

perceived to be the proper scope of judicial scrutiny, thus foreclosing litigation as an avenue of review and a possible means of redressing regressive trends in modern welfare policy.

Chapter 4

Selective Constitutionalisation: The Broader Implications

Chapter 3 examined the narrow jurisprudential consequences of a policy of selective constitutionalisation, and illustrated how social rights have been excluded from, or at least marginalised within, legal discourse, and litigation has been foreclosed as an avenue of seeking redress. This chapter will consider the ‘broader’ implications of selective constitutionalisation in terms of the marginalisation of social rights within *political* and *social* discourse. It is proposed that, at a time when ‘rights’ are increasingly demarcated by constitutional law, to exclude social rights from such law is to implicitly suggest that the values underlying social rights are illegitimate or of lesser value than those rights that are constitutionally protected, and the importance of these rights in legal, but also political and social discourse, is significantly eroded.

Part (I) will consider, from a theoretical perspective, the inter-relationship between legal, political and social discourse in terms of the constitutive effect of legal discourse upon the development of political and social discourse. *Part (II)* will illustrate how this constitutive relationship has materialised in political discourse and policy formation within Canada. It will, firstly, review recent welfare reforms that suggest a de-prioritisation of social rights in policy formation and, secondly, outline the concluding observations of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in reviewing Canada’s third periodic report on its implementation of the International Covenant on Economic Social and Cultural

Rights (ICESCR),¹ that highlight the deleterious impact of these reforms upon the realisation of social rights.

Part (I): The Constitutive Relationship

The inter-relationship between legal, political and social discourse, is such that each can not be viewed in isolation but is somewhat constitutive of the other. In particular legal discourse has a determining influence upon political and social discourse in the following ways;

Political de-prioritisation

The legal status of social rights, that of non-constitutionalised rights, has the effect that, whereas civil rights are elevated to the position of politically binding and theoretically inviolable norms, the implementation of social rights remains within the domain of government discretion. Whilst social rights may be protected to a degree in statutory law, their continued implementation is optional; they can de-prioritised within political policy and sacrificed for political and economic expediency. The inevitable consequence of not constitutionalising social rights within a constitutional democracy is that they adopt the status of 'second class' rights, as those rights that are constitutionalised and whose implementation is mandatory take priority within political discourse and policy formation. As Scott and Macklem have warned

¹ Concluding Observations of the Committee on Economic, Social and Cultural Rights; Canada. 04/12/98 E/C.12/1/Add.31.

“In the absence of constitutionalised social rights, it would be unwise to expect that the values left unconstitutionalised (and thus not reinforced by the continuing process of constitutional interpretation) could hold their own in wider political discourse...if arguments concerning fundamental social values are not available because the rights that are labels for those values are not entrenched, the other values will come to dominate the broader political discourse.”²

De-prioritisation of social rights within policy formation can be attributed to a number of factors, including globalisation and the pre-eminence of liberal ideology. However, it is fair to say that the non-constitutionalised status of social rights has been a contributory factor to the marginalisation of these rights within Canadian political discourse, due to the non-mandatory status attributed to them. The passing of the *Charter* in 1982 before the current neo-liberal ideology took full force supports the argument that the non-constitutionalised status of social rights has had a contributory effect upon political de-prioritisation, as oppose to the relationship being solely one of politics influencing law. At a minimum, the non-constitutionalised status of social rights removes a possible tool for countering these neo-liberal trends in welfare policy.

Social Relations

In the modern world, litigation and legal discourse provide an important forum in which citizens concerns can be voiced and social relations can be negotiated.³

² Scott and Macklem “Constitutional ropes of sand or justiciable guarantees; social rights in the South African Constitution” (1992) 141 *Uni Penn LR* 1 at 35.

³ Legal conventions provide some of the most important “strategies of action” through which citizens routinely negotiate social relationships. See A Swidler (1986) “Culture in Action; Symbols” and Strategies’ 51 *American Sociological review* 273 cited in Michael McCann *Rights at Work: Pay Equity*

Although litigation is not itself sufficient to bring about vast social change, there is evidence that it can be an important tool within a broader strategy that encompasses grass root mobilisation and political lobbying, that is that “selective reliance on constitutional rights as part of broader political and social efforts” can have “strategic and symbolic importance.”⁴

The exclusion of social rights from legal discourse has had the affect of denying those affected by government reforms the courtroom as a socially accepted forum in which to voice their concerns, and litigation as a strategy for negotiating social change. As Scott and Macklem have stated; “(d)enying an individual or groups the ability to make constitutional claims against the state with respect to nutrition, housing, health and education excludes those interests from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing of injustices.”⁵

reform and the Politics of Legal Mobilisation’ (1994) The University of Chicago Press, Chicago & London at 6.

⁴ Scott and Macklem *supra* note 2 at 7

“it is fruitless and even dangerous to look to the courts for the first and last word on any matter concerning the vindication of fundamental societal values. ... It is possible, perhaps crucial, to see constitutional adjudication as one locus of struggle in a broader constitutional politics without succumbing to a view that equates constitutional adjudication with court-led reform.”

For an example of the possible positive impact of litigation as part of a larger strategy for social change, within the context of the pay equity movement, see Michael McCann ‘Rights at Work: Pay Equity reform and the Politics of Legal Mobilisation’ (1994). For a critical approach to the impact of litigation, within the context of Gay and Lesbian rights see Didi Herman ‘Rights of Passage; Struggles for Lesbian and Gay Legal Equality’ (1996).

⁵ Scott and Macklem *ibid* at 29.

This is particularly detrimental given that in social program cases litigation has proven to be a strategy of the last resort, utilised when the traditional political forum has proven inaccessible or unresponsive, as Keene has stated “in respect of cuts to social programs, both levels of government have confined their listening to the voices of the powerful. Efforts by minority groups and their advocates to consult with government to effect law reform are generally rebuffed or met with silence... People have no choice but to go to court.”⁶ Thus, the exclusion of social rights from legal discourse has the effect of depriving social program users of *any* legitimate and socially recognised forum in which to voice their concerns and to seek social change.

It is apparent that the impact of legal discourse is wider than direct contact with the legal system in a specific instance of litigation and, thus, the implications of excluding social rights from legal discourse are broader than the immediate consequences of isolated litigative failure. The inter-relationship between legal and social discourse is such that legal discourse is to a large extent constitutive of social relations and perceptions; legal symbols and conventions propound and legitimate a given perception of self and society;

“Because of the ubiquity of law, the impact of legal construction of social reality is much broader than direct contact with the legal system. Legal discourse constitutes how individuals understand everyday events and relationships, their perceptions and interests, their expectations and desires.”⁷

⁶ Judith Keene “Claiming the protection of the court: Charter Litigation Arising from Government ‘Restraint’” (1998) 9 N.J.C.L 98 at 103.

⁷ Joel F Handler “‘Constructing the political spectacle’: the interpretation of entitlements, legalisation, and obligations in social welfare history” (1990) 56 Brook. L. Rev 899 at 959.

“legal knowledge to some degree prefigures social activity; inherited legal conventions shape the very terms of citizen understanding, aspiration, and interaction with others.”⁸

The exclusion of social rights from meaningful legal discourse and the classification of the interests that they protect as ‘non-legal’ constitutes the poor within society as non-rights bearing ‘citizens.’ This has two main effects, firstly, the authority, formality and legitimating force inherent in the label ‘rights’ is denied to the social issues that are of most immediate concern to the poor and, secondly, they are denied the essential resources that are provided by the realisation of social rights. Resources must be understood as covering not solely monetary gain but also the resources of improved health, education and a fixed abode, that are to a large degree determinative of social position and power relations. As Twine has stated “the power of political democracy can be used to introduce social rights that empower people through the redistribution of resources. *Redistributing resources redistributes power and choice.*”⁹

Without the authority, formality and entitlement implicit in ‘rights’ and the resources provided by social rights, the poor are ‘disempowered,’ occupying a subservient position in their dealings with society, in terms of their relationship with both government and private actors. Firstly, without a right to social assistance or housing

⁸ McCann, M ‘Rights at Work: Pay Equity reform and the Politics of Legal Mobilisation’ (1994) The University of Chicago Press, Chicago & London at 6.

⁹ Twine, Fred “Citizenship and Social Rights: The Interdependence of Self and Society” (1994) Sage Publications, London at 103.

the poor are rendered impotent in their dealings with government bureaucracy and are deprived of dignity, being defined not as rights bearing citizens but as supplicants.

Secondly, they occupy a subordinate position within the private arena, for example, the under-availability of subsidised housing and the under-regulation of market activities, renders the poor vulnerable to exploitation in the private housing market, in terms of paying extortionate rent and accepting inadequate housing conditions.¹⁰

Similarly, without a right to an income independent of the employment market, that is a right to social assistance or social security, dependency on the private market renders the poor susceptible to commodification, inadequate wages and poor working conditions.

The existence of social rights would not rectify the imbalance of power within social relations, but it may strengthen the position of the poor vis-a-vis society as rights can act as *power resources*, legitimising the concerns that they protect and increasing the dignity of the rights holders. In reference to the relationship between social program users and government bureaucracy, Scheingold has stated "(l)itigation may ... prove to be a useful tool for redefining the status of poor people in their relations with public

¹⁰ There is clear evidence that this is the case in Canada. In estimating the number of households living below acceptable housing standards, the Canadian Mortgage and Housing Corporation (CMHC) uses affordability as one of their criteria. It states that "dwellings are affordable if households do not have to spend 30% or more of their total household income on shelter." Statistics Canada estimated that in 1996 43% of the 3.9 million renter households spent more than 30% of their household income on shelter. The National Anti-Poverty Organisation's submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the consideration of Canada's third report on the implementation of the International Covenant on Economic, Social and Cultural Rights, November 1998 at www.napo-onap.ca/napo-finaldoc.

bureaucracies... for the poor who depend so heavily on public bureaucracies the right to have rights is especially important. It is a necessary though hardly sufficient condition of human dignity.”¹¹

In reference to the relationship between the poor and the private market, Scheingold has stated that “litigation may ... be useful in the long run for improving the legal status of poor people in commercial dealings where they are peculiarly vulnerable to exploitation”¹² whilst Esping-Anderson has stated that the granting of social rights on the basis of citizenship rather than performance will entail a “de-commodification of the status of individuals vis-a-vis the market” and that “the balance of class power is fundamentally altered when workers enjoy social rights, for the social wage lessens the worker’s dependence on the market and employers, and this turns into a *potential power resource*.”¹³

Political and Societal perceptions of poverty

Legal discourse has a constitutive effect, not only upon political prioritisation and social relationships, but also political and social perceptions, in terms of influencing societies understanding of poverty and the self-perception of the poor.¹⁴ The non-

¹¹ Stuart Scheingold “The Politics of Rights: Lawyers, Public Policy, and Political Change” (1974) New Haven and London, Yale University Press at 106.

¹² *Ibid* at 106.

¹³ Esping-Anderson “The three worlds of welfare capitalism” (1990) cited in Twine *supra* note 9 at 103.

¹⁴ Scott and Macklem *supra* note 2 at 15 state

constitutionalised status of social rights has facilitated a political interpretation of poverty that shifts responsibility from society to the individual. Given that political equality is constitutionally protected, social and economic inequality is depicted as a self inflicted phenomenon, the product, not of systemic or structural factors, but personal irresponsibility or ineptitude on an otherwise egalitarian playing field;

“The existence of civil rights laws on the books has persuaded the majority that equality has now been accorded and that existing inequalities are the fault of the victim.”¹⁵

“An ideology of the culture of poverty blames those on welfare for their own fate. The poor are assumed to be passive, to have disorganised families, to have rejected the middle-class work ethic. The structural factors that, in any capitalist state, prevent huge numbers of people from acting efficaciously in the economic marketplace are ignored in favour of this ideology that, in effect, blames the victims of capitalism for their own fate.”¹⁶

This individualised view of the origins of poverty is evidenced in both political rhetoric and policy formation. The government, federal and provincial, has utilised an individualised interpretation of poverty and the tactic of political ‘poor bashing’ to justify regressive welfare reforms. Reductions in the level of social assistance and social security and the imposition of stricter eligibility requirements have been justified as necessary to combat welfare fraud and to force employable individuals to return to work. As Keene has stated that;

“the exclusion of social rights (from a South African constitution) would threaten the realisation of social justice (in South Africa) because of the law’s constitutive influence on society’s and individual’s self-understandings.” My brackets.

¹⁵ Handler *supra* note 7 at 959.

¹⁶ Rhoda Howard “Human Rights and the Search for community” (1995) Westview Press, Inc Harper Collins Publishers, Inc. at 170.

“(m)inisters of government justify cuts to programs of last resort by saying that such programs are too “passive,” that they foster “dependency” and that they need to be more “active” (ie focusing on getting people back to work). “Generous” social programs were said to cause “disincentives to work.” Programs needed to be reformed to eliminate “waste and duplication,” to reduce “fraud and abuse,” to ensure that benefits were only paid to the “truly needy” or the “truly disabled.”¹⁷

An example is provided by the stance of the provincial government of British Columbia in imposing a residence requirement of three months upon the receipt of social assistance on the grounds that it would deter out of province residents moving to British Columbia in order to collect benefits.¹⁸ Additionally, the National Anti-Poverty Organisation (NAPO) has referred to the rationale behind recent restrictions on the receipt of social security as representing

“an attitude of blaming the individual for their own unemployment and penalising them accordingly. This belief is not based on the current conditions in the labour market in Canada, but rather represents the philosophical shift that underlies many changes to social policy; that individuals can be held solely responsible for their own poverty, unemployment, disability, underemployment and misfortune.”¹⁹

Similarly, one of the most prolific of the eligibility criteria for social assistance, the imposition of a mandatory work requirement (workfare) stems directly from a

¹⁷ Keene *supra* note 6 at 105 - 106.

¹⁸ The National Anti-poverty Organisations (NAPO) submission to the United Nations Committee on Economic, Social and Cultural Rights February 1996 at the Charter Committee on Poverty Issues (CCPI) website at www.web.net/ccpi/un/napo.html. The government justified the residence requirement as necessary to prevent welfare fraud, estimating that “in the first nine months of 1995, out of province residents joined BC welfare rolls at a rate of more than 2,200 a month.”

¹⁹ NAPO *supra* note 10 at Para 166.

perception of unemployed status, and consequently poverty, as self induced. As one commentator has stated;

“Political discourse is orientating itself away from the notion that a person in need has a right to receive welfare to one in which recipients are to be bound by a “reciprocal obligation” to “pay back” the state whatever benefits they acquire. The pay back requirement often entails that welfare benefits are to be earned through responsible behaviour. These attitudinal shifts correspond with an individualised view of the origins of poverty: instead of perceiving poverty as emanating from structural factors, it is believed to flow from the misconduct and irresponsibility of the recipient.”²⁰

It is clear that within Canada this individualised interpretation of poverty, evident in legal and political discourse, has permeated societal perceptions of the nature and origins of poverty. The government has *publicly* propagated negative images of the poor, resulting in the social vilification of poverty and the pitting of the wealthy against the poor. Keene has stated that the government has attacked “our most disadvantaged citizens in the media, using them as scapegoats for what is “wrong” with Canada today, and damning them as the dread “special interest” groups,”²¹ while NAPO has stated;

²⁰ Drumbl, Mark Anthony: Exploring the Constitutional Limits to Workfare and Learnfare: (1994) 10 Journal of Law and Social Policy 107.

²¹ Keene *supra* note 6 at 105. See for example Prime Minister Chretien’s statement at a black tie dinner for media executives:

“it’s better to have them (social assistance recipient) at 50% production than sitting at home drinking beer at zero % of productivity.”

E. Stewart ‘Chretien set for fight over social safety net’ The Toronto Star 21 Apr 1994) cited in Keene.

“Provincial governments have engaged in actions that promote the growing intolerance for social assistance recipients. They have provided the press with an endless stream of rhetoric about the need for increased policing measures to stem the flood of welfare frauds and cheats. Welfare recipients are barraged with images and slogans blaming them for being poor, targeting them as the cause of high debts and deficits; reinforcing notions that they are ‘lazy’ and ‘worthless’”²²

It is evident that a large proportion of the population have accepted an individualised view of the origins of poverty and that the internalisation of government rhetoric has generated widespread social support for recent welfare reforms. For example, the Social Planning Council of Metropolitan Toronto has observed how “workfare becomes popular in periods of high unemployment,” “emerging as part of a larger blame the victim campaign against welfare recipients” that attracts widespread social approval: “polls taken during the last election showed workfare to be a popular issue - 87% of people asked supported forcing welfare recipients to work for their cheques.”²³

Citizenship

Concerns have long been expressed that the exclusion of social rights has the effect of denying ‘citizenship’ to those individuals, the poor, who are reliant upon the state for the realisation of their social rights. T.H Marshall²⁴ defined the three stages towards the development of full citizenship in terms of civil rights, political rights and social

²² NAPO *supra* note 10 at para 123.

²³ Social Planning Council of Metropolitan Toronto ‘Workfare watch’ Issue 1, Feb 1996 at worldchat.com.

²⁴ T.H Marshall ‘Citizenship and Social Class’ (1950) Cambridge University Press at 104.

rights, seeing the development of social rights as a pre-requisite to the inclusion of the poor as citizens. Twine has stated;

“In the twentieth Century Marshall’s three elements of citizenship must stand together; civil and political rights must be supported by social rights, otherwise the ‘three-legged stool of citizenship’ will be unbalanced. Without substantial social rights to material resources (and health and education) the social inclusion and therefore the citizenship of the unemployed person is placed in jeopardy.”²⁵

In the modern world ‘citizenship’ must be understood not solely in a political sense but as encompassing *social inclusion*; citizens must possess the resources to make choices and to pursue development of their ‘social self.’²⁶ Most significantly social citizenship, and the development of the social self, entails *participation* in the political, legal and social community. The exclusion of social rights from the constitution depicts an impoverished vision of citizenship that denies its social and participatory aspects, defining it solely in terms of formal political rights. This is a vision of citizenship that does not resonate with the experiences of the poor, as participation is illusory for those who are plagued by poverty, homelessness,

²⁵ Twine *supra* note 9 at 104. See also R Howard *supra* note 16

“To be a citizen is to be entitled to education, healthcare and a minimum decent standard of living. It is assumed that all people need these things, which must be provided by the society as a whole for those individuals who cannot provide them for themselves.”

²⁶ Twine *ibid*, at 104, approaches citizenship from the perspective of the interdependence of self and society;

“In discussing citizenship and social rights we are fundamentally concerned with the social conditions for the development of the ‘social self’. The social self cannot develop outside society, and the human self in developing within society also changes that society. This is the interdependence of self and society.”

malnutrition and low educational attainment. Scott and Macklem have noted the impoverished image of self and society inherent in a solely political interpretation of citizenship;

“By constitutionalising half the human rights question (South Africans) would be constitutionalising only half of what it is to be human. A constitution containing only civil and political rights projects an image of truncated humanity. Symbolically, but still brutally, it excludes those segments of society for whom autonomy means little without the necessities of life.”²⁷

Part (II) Evidence of political de-prioritisation in Canada

It is evident that within Canada the exclusion of social rights from legal discourse has had a constitutive effect upon political discourse and policy formation. The interests protected by social rights, reflective of the concerns of the poor, have been excluded from or at least marginalised within political discourse resulting in a policy of restructuring and reducing social programs that has significantly eroded the welfare state and decreased the realisation of social rights in Canada.

In light of the non-constitutionalised status of social rights, political policy since 1990 has progressively eroded the protection of social rights within statutory law. The position has been summarised by the National Anti-Poverty Association as follows;

²⁷ Scott and Macklem *supra* note 2 at 28.

“The rights of low income people, as one of the most vulnerable, marginalised and effectively disenfranchised groups in Canada, has quickly *fallen off of the agenda* of the government in the narrow minded pursuit of cost cutting and deficit reduction”²⁸

“The past five years has seen the most dramatic reversal of social and economic equalisation initiatives since Canada’s social security system was conceived over thirty years ago.”²⁹

In its concluding observations on Canada’s third periodic report the CESCR emphasised the apparent de-prioritisation of social rights within recent government policy. It noted that “since 1994 in addressing the budget deficits by slashing social expenditure, the State party has *not paid sufficient attention* to the adverse consequences for the enjoyment of economic, social and cultural rights by the Canadian population as a whole, by vulnerable groups in particular,”³⁰ and reiterated its prior assertion that within Canada “economic and social rights should not be *downgraded* to “principles and objectives.”³¹

The de-prioritisation of social norms has been witnessed throughout the range of social programs; social assistance, social security, housing and healthcare. Recent

²⁸ NAPO *supra* note 10 at para 32.

²⁹ NAPO *ibid* at Para 25.

³⁰ CESCR *supra* note 1 at para 1.

³¹ *Ibid* at para 52

“The Committee, as in its previous review of Canada’s report, reiterated that economic and social rights should not be downgraded to “principles and objectives” in the ongoing discussions between the federal government and the provinces and territories regarding social programmes.”

welfare reforms that have “slashed social expenditure”³² and significantly restructured social programs would have arguably been unconstitutional if social rights had been accorded constitutional status, and have been condemned by the CESCRC as in violation of Canada’s obligation in international law to progressively realise these social rights.

- Social Assistance

The social program that has proven most susceptible to reform is social assistance, the least politically and socially palatable of the social programs. The *Budget Implementation Act 1995*³³ replaced the *Canada Assistance Plan (CAP)* that had since 1966 provided the framework for cost sharing social assistance between the federal and provincial governments with the *Canada Health and Social Transfer (CHST)*. In the absence of constitutionally protected social rights, CAP was the primary mechanism utilised by the government to argue that it was fulfilling its international obligations, specifically regarding the right to an adequate standard of living. As the Charter Committee on Poverty Issues (CCPI) stated “CAP is the Federal legislation which addresses the requirement to provide social assistance... It has been CAP which the government of Canada has cited in order to demonstrate its

³² The aggregate monetary effect of pursuing a policy of fiscal restraint in the area of social programs has been summarised by NAPO as follows; “in real per capita terms federal cash transfers to the provinces for healthcare, post secondary education and social assistance fell by more than 40% between 1993 and 1997.”

³³ *The Budget Implementation Act 1995*, S.C. 1995, c.17.

compliance with the Covenant and, in particular article 11 respecting the right to an adequate standard of living.”³⁴

Under CAP the federal government funded half of provincial social assistance costs attaching ‘national conditions’ to the receipt of this funding. These conditions included the requirements that the provinces provide assistance to every person in need regardless of the cause of that need,³⁵ that they take into account a person’s budgetary requirements and the income and resources available to meet them,³⁶ that they provide an appeal mechanism³⁷ and that they do not require recipients to work against their will as a condition of receiving assistance.³⁸ These conditions amounted to a “national set of rights for social assistance recipients”³⁹ as in *Finlay v Canada (Minister of Finance)* (1986) the Supreme Court declared them “legally enforceable by individual social assistance recipients.”⁴⁰

³⁴ Vince Calderhead and Sarah Sharpe Presentation to Committee on Economic, Social, and Cultural Rights outlining the structural changes to the social security system, on behalf of the Charter Committee on Poverty Issues (CCPI), the National-Anti-Poverty Organisation (NAPO) and the National Action Committee on the Status of Women, at www.wb.net/ccpi/un/emerc-76.html, at para 4 and 5.

³⁵ CAP s 6 (2) (a), cited *ibid*.

³⁶ CAP s 6 (2)(b), cited *ibid*.

³⁷ CAP s 6 (2)(e), cited *ibid*.

³⁸ CAP s 15 (3)(a), cited *ibid*.

³⁹ Calderhead and Sharpe *supra* note 34.

⁴⁰ *Finlay v Canada (Minster of Finance)* [1986] 2 S.C.R 607.

CHST replaced CAP with a 'block funding' system under which an aggregate sum is transferred to the provinces for education, healthcare and social assistance. The national standards that formed a statutory set of rights for social assistance recipients under CAP have been eliminated, replaced with near total provincial discretion in the provision of social assistance. The deleterious consequences of this shift in federal and provincial responsibilities in the area of social assistance were noted by the CESCR in its concluding observations;

"The replacement of CAP by the CHST entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. ... The Committee regrets that, by according virtually unfettered discretion in relation to social rights to provincial governments, the government of Canada has created a situation in which covenant standards can be undermined and effective accountability has been radically reduced."⁴¹

The consequences of increased provincial discretion are twofold, firstly, the total spent on social assistance is now within provincial discretion and indeed the provincial government is no longer under a statutory obligation to provide social assistance *at all*. As NAPO stated in its submission to the CESCR;

"The CHST block fund for healthcare, post secondary education and social assistance makes no requirement for the provinces to maintain let alone enhance, a social assistance system. On the contrary, it appears that provincial governments could choose not to fund social assistance at all, and use the

⁴¹ Concluding Observations of the CESCR *supra* note 1 at para. 19.

The Committee also noted the inconsistency in the government's argument that welfare reforms were motivated by the need for 'provincial flexibility' in the provision of social programs, given that national standards were retained for healthcare. This indicates possible agreement with NAPO's assertion that the restructuring of social assistance was not motivated primarily by fiscal concerns but a desire to target welfare recipients.

funding for the more politically palatable health care and post secondary education.”⁴²

In light of this discretion the level of social assistance has been reduced in a number of provinces, for example, by 10% for single persons in Manitoba, 35% for single persons in Nova Scotia and 21.6% for families and single persons in Ontario.⁴³ In its concluding observations the CESCR directly addressed cuts in social assistance, concluding that “these cuts appear to have had a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger.”⁴⁴

Secondly, the abolition of the requirement that social assistance be provided to all persons in need and the removal of the prohibition on requiring recipients to work against their will, has left it open to provincial governments to impose eligibility requirements upon the receipt of social assistance that deny assistance to non-compliant applicants, even if in need. This has resulted in the imposition of a number of eligibility requirements that refer to, amongst other things, residence, cohabitation, family income and compulsory work. NAPO has stated that “(t)he repeal of CAP has resulted in the proliferation of requirements that must be met by people in need in order to receive financial assistance. The poor are being told to ‘sing for their supper.’”⁴⁵

⁴² NAPO *supra* note 10 at para 122.

⁴³ Concluding Observations of the CESCR *supra* note 1 at para 20.

⁴⁴ *Ibid.*

⁴⁵ NAPO *supra* note 10 at Para 29.

The most prolific and notorious of the eligibility requirements is workfare. NAPO has stated that “workfare is usually designated as a criteria for eligibility to receive financial assistance. Under CAP workfare was prohibited and eligibility for welfare was only to be based on need.”⁴⁶ Since the repeal of CAP at least six provinces; New Brunswick, Saskatchewan, Quebec, Ontario, Alberta and British Columbia, have imposed mandatory work requirements upon the receipt of social assistance.⁴⁷ The CESCR specifically considered the proliferation of workfare schemes in its concluding observations, noting with concern that they “either submit the right to social assistance to compulsory employment schemes or reduce the benefit of social assistance when recipients, who are usually young, assert their right to choose freely what type of work they wish to do.”⁴⁸

⁴⁶ NAPO *supra* note 18.

⁴⁷ The Ontario Works Project provides an apt illustration of workfare; introduced through provincial legislation the project was phased in beginning with twenty municipalities in June 1997. The scheme requires a person who has been receiving welfare assistance for more than four months to undertake ‘community participation’ in exchange for their welfare benefits. Participants have been mandated to work for up to seventy hours a month and placements have included garbage clearance, lake cleaning and tree plantation. Social Planning Council of Metropolitan Toronto ‘Workfare watch’ Issue 2, Aug 1996 at worldchat.com; Ontario Works Act 1997’ at www.ontla.on.ca.

⁴⁸ NAPO *supra* note 10 Para 30.

The committee further noted that in operation workfare has violated a range of human rights including the right to work freely chosen and fundamental labour related rights (para 30) and urged review of legislation to ensure compatibility with these rights (para 55) It further noted that Ontario’s Bill 22 “An Act to prevent unionisation” (of workfare participants) violated the right to join a trade union, collectively bargain and strike and as such was a “clear violation of article 8 of the covenant”, and called upon the State Party to “take measures to repeal the offending provisions.”

In its final remarks the CDESCR recommended that a statutory right to need based social assistance be reinstated;

“The Committee recommends that the State party consider re-establishing a national programme with designated cash transfers for social assistance and social services which include universal entitlements and national standards, specifying a *legally enforceable right to adequate assistance for all persons in need*, a right to work freely chosen, a right to appeal and a right to move freely from one job to another.”⁴⁹

- Social Security

Social Security, provided through the Employment Insurance (EI) program, has also suffered a series of recent cutbacks, in 1993, 1994, 1996 and 1997, that have reduced the level of benefits, the period for which they are available and the number of persons eligible. Most notable of these reforms is the *Employment Insurance Act 1996* that instigated a shift from eligibility based on weeks of employment to eligibility based on hours worked, thus increasing the length of the eligibility period especially for part time workers.⁵⁰ Other reforms include a reduction in the period during which a person can claim benefits by as much as sixteen weeks,⁵¹ and a reduction of 5% in the level

⁴⁹ Concluding Observations of the CDESCR *supra* note 1 at para 40.

⁵⁰ For example prior to 1996 20 weeks of employment was required to be eligible for benefits, which could be satisfied by working 15 hours per week. The Employment Insurance Act 1996 requires 700 hours of work before a person qualifies for maternity or parental benefits. This means that a person with a 15 hour per week job needs almost 47 weeks of employment to qualify. The impact is felt disproportionately by women who comprise over three quarters of the part time workforce. NAPO *supra* note 10 at Para 113.

⁵¹ An evaluation report on the impact of the 1994 cuts, produced for Human Resources Development Canada, estimated that the period over which benefits could be claimed had been reduced by as much as sixteen weeks, depending upon employment history and local labour market conditions. NAPO *supra* note 8 at para 111.

of benefits for 'repeat users.'⁵² As a result of such reforms, the percentage of unemployed persons eligible for Employment Insurance fell drastically between 1990 and 1998 from 83% to 36%.⁵³

In its report the CESCRC noted the effect that restrictions and reductions in Employment Insurance have had in denying an income, and thus an adequate standard of living, to unemployed persons and lower income families;

"The Committee is concerned that newly-introduced successive restrictions to unemployment insurance benefits have resulted in a dramatic drop in the proportion of unemployed workers receiving benefits to approximately half of previous coverage, in the lowering of benefit rates, in reductions in the length of time for which benefits are paid and in the increasingly restricted access to benefits for part-time workers. Whilst the new programme is said to provide better benefits for low-income families with children, the fact is that fewer low-income families are eligible to receive any benefits at all."⁵⁴

- Adequate Housing

A similar de-prioritisation of the right to adequate housing is evident in recent government policy, in particular the state provision of subsidised housing has

⁵² Repeat users are defined as those persons who have collected benefits for more than 20 weeks in the five previous years. For each week of EI benefits above 20 weeks the standard EI benefit rate of 20% will be reduced by one percentage point, up to a maximum of 5%. NAPO *supra* note 10 at para 114.

According to the Canadian Council of Social Development nearly one million claimants, about 40% of the total number of claimants in 1993, had three or more claims in five years and are therefore likely to be penalised under the 'repeat user' rule. NAPO *supra* note 10 at para 115.

Notably, this policy of penalising persons who are unemployed for more than 20 weeks (five months) in five years substantiates the argument that reforms are motivated by an individualised / voluntary perception of the origins of unemployment and poverty.

⁵³ NAPO *supra* note 10 at para 37.

⁵⁴ Concluding Observations of the CESCRC *supra* note 1 at para 20.

diminished since 1990. Country wide there were 652,000 subsidised housing units in 1992. In 1993 federal funding of subsidised housing, with the exception of Indian reserves and short term initiatives, was terminated. The budget for existing social housing was capped in 1994 and subsequently reduced in 1995 and 1996.⁵⁵

The position has varied between provinces, in reference to the situation in Ontario NAPO has stated that "in July 1995, the newly elected Conservative government in Ontario declared that it was "out of the housing business" and vowed to put an end to rent controls. This government also cancelled 385 social housing projects, an estimated 16,732 units, already initiated throughout the province."⁵⁶

The report of the CESCR stated that the Committee was "gravely concerned" that a country as wealthy as Canada had "allowed the problem of homelessness and inadequate housing to grow to such proportions that the mayors of Canada's ten largest cities have declared homelessness a national disaster."⁵⁷ The Committee "urged" the government to "implement a national strategy for the reduction of homelessness and poverty" and recommended that

"the federal, provincial and territorial governments address homelessness and inadequate housing as a national emergency by reinstating or increasing, as the case may be, social housing programmes for those in need, improving and properly enforcing anti-discrimination legislation in housing, increasing shelter allowances and social assistance rates to realistic levels, providing

⁵⁵ Canada's third periodic report, cited in NAPO *supra* note 10 at Para 148.

⁵⁶ NAPO *supra* note 18.

⁵⁷ Concluding Observations of the CESCR *supra* note 1 at para 24.

adequate support services for persons with disabilities, improving protection of security of tenure for tenants and improving protection of affordable rental housing stock from conversion to other uses.”⁵⁸

- Healthcare

In contrast to its treatment of social assistance, the *CHST* retains national standards and conditions that the provinces must meet in order to receive federal funding for healthcare indicating that healthcare has not been de-prioritised in government policy to the same extent as social assistance. However, de-prioritisation is still evident in that government expenditure on public healthcare has been decreasing; in 1996 for the first time since the conception of the national healthcare system, expenditure was down on the previous year, by \$262 million, as provincial governments cut their healthcare budget in response to reductions in federal funding.⁵⁹

This reduction in funding has lead to the closure of a number of hospitals; between 1986-7 and 1994-5 approximately 20% of hospitals were closed, amalgamated or converted to other uses.⁶⁰ Furthermore, patients are increasingly being required to pay for prescription drugs and a number of medical services have been “de-listed” from provincial health plans.⁶¹

⁵⁸ *Ibid* at para 46.

⁵⁹ *NAPO supra* note 10 at para 166.

⁶⁰ *NAPO Ibid* at para 164. During this period 246 hospitals were closed, reducing the number of hospitals from 1224 to 978. The level of cuts varied between provinces, the highest reduction in hospital beds in percentage terms was in Alberta (53.5%), Saskatchewan (35.7%), Nova Scotia (34.8%) and New Brunswick (34.1%).

⁶¹ *NAPO ibid* at para 169.

The effect of the government's de-prioritisation of healthcare has been an increase in the incidence of private healthcare and the emergence of a situation under which the standard of health is increasingly dependent upon wealth and social class. NAPO has stated that "over the past three years, Canada has moved rapidly in the direction of a two tier health system with dramatic shifts from public to private sources of funding.

The healthcare system has been transformed from a fully universal model into one where access to services is increasingly dependent on individual's ability to pay."⁶²

Conclusion

This Chapter has sought to illustrate that the negative consequences of 'selective constitutionalisation,' that is a policy of constitutionalising civil but not social rights, are broader than the direct impact of isolated litigative failure, due to the inherent inter-relationship between legal, political and social discourse. Firstly, the non-constitutionalised status of social rights has arguably contributed to the de-prioritisation of social rights within *political* discourse and policy formation, evidenced in the erosion of the statutory protection of these rights within Canada.

⁶² NAPO *ibid* at para 162.

Statistics Canada have stated: "When examining the health of Canadians at different ages in relation to their socio-economic characteristics, the results were consistent; having a low level of educational attainment, being unemployed, being an unskilled worker or living in a household with a low income were all related to having lower health levels." cited in NAPO *supra* note 18.

Secondly, there is evidence that the non-constitutionalised status of social rights has had an impact upon *social* discourse, in terms of social perceptions and relations. In terms of social perceptions, an individualised interpretation of poverty has permeated societal understanding of its origins, invoking widespread social support for recent welfare reforms. In terms of social relations, the non-constitutionalised status of social rights has constituted the poor within society as non-rights bearing citizens, contributing to disempowerment in their dealings with government and private actors and depriving them of full citizenship.

Chapter 5

The South African Constitution: Justiciable Social Rights in practice

The preceding two chapters have outlined the deleterious consequences of pursuing a policy of selective constitutionalisation that puts social rights by definition beyond the scope of judicial enforcement. Drawing together the analysis contained in chapters 3 and 4, it is proposed that, within the Canadian context, a policy of selective constitutionalisation, has had the effect of marginalising the concerns of social program users within legal, political and social discourse, rendering the *Canadian Charter* incapable of protecting the interests of the poorer sections of society.

This chapter will outline the approach taken to social rights under the *Constitution of the Republic of South Africa*.¹ The South African Constitution includes social rights in expressly justiciable form, and is instructive in illustrating the real, as oppose to theoretical possibility, of rendering social rights justiciable; that is binding upon the legislature, backed by judicial enforcement. *Part (I)* will outline the approach taken to social rights in the constitution, *Part (II)* will outline the case-law to date and analyse the impact of constitutionalised social rights upon the approach of the court and *Part (III)* will consider the broader political and social impact of constitutionalised social

¹ *The Constitution of the Republic of South Africa 1996* as adopted by the Constitutional Assembly 8 May 1996, see Constitutional Assembly Database Project at www.law.uct.

rights. *Part (IV)* will then conclude the thesis by drawing together the analysis and conclusions reached throughout.

It must be stated at the outset that this is not intended to be a definitive exploration of the workings of social rights in South Africa but merely an attempt to illustrate that the alternative to the approach adopted in Canada exists, not only in theory, but also in constitutional practice. It must be further stated that any analysis undertaken at this stage is both limited and tentative, given that the Final Constitution of the Republic of South Africa did not come into force until 1996. Much remains to be seen as to how the jurisprudence of the Constitutional Court will develop and the extent of the political and social impact of constitutionalised social rights.

Part (I) Social Rights in the South African Constitution

The Interim Constitution of the Republic of South Africa was enacted in 1994. A transitional document, it established the Constitutional Court,² provided a human rights framework for the transition period and lay down guidelines, the constitutional principles (CPs), for the drafting of the Final Constitution. During the period prior to the adoption of the Final Constitution an extensive negotiation procedure was undertaken during which representations were received from NGOs, human rights organisations, foreign specialists and other interested parties.

² The Constitutional Court held its first sitting in February 1995. The court is comprised of eleven judges picked for their work within the human rights area. Currently four of the judges are black, two are women, including one black woman. The judges serve for non-renewable terms of twelve years. Burnham, Margaret A "Cultivating a Seedling Charter: South Africa's Court Grows its Constitution" (1997) 3 Mich. J. Race & L 29.

The Final Constitution was adopted in 1996 after certification by the Constitutional Court that the document was in compliance with the constitutional principles set down in the Interim Constitution.³ The Interim Constitution had not itself expressly protected social rights and at the time of certification a number of arguments were put forward alleging that the inclusion of social rights was incompatible with the constitutional principles; namely that social rights were not fundamental rights (CPII), that they were not justiciable (CPII) and that they were inconsistent with the separation of powers (CPVI).⁴

The Constitutional Court found the inclusion of social rights to be compatible with the constitutional principles and ultimately the full range of social rights under consideration in this study were included in the Final Constitution; the Right of access to Housing (Section 26),⁵ the right of access to healthcare, food, water and

³ See Constitutional Court of South Africa "Certification of the Constitution of the Republic of South Africa" (1996) at www.law.wits. The Interim Constitution (IC 71(2)) required the Constitutional Court to certify whether all the provisions of the Final Constitution complied with the 34 constitutional principles set out in the Constitution. The initial draft of the Final Constitution was rejected, for reasons unrelated to the present issue, and the constitution was finally certified on 6 September 1996.

⁴ *Ibid.*

⁵ Section 26

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

social security (Section 27),⁶ the Right to Education (Section 29),⁷ as well as a number of specific social rights pertaining to children (Section 28).⁸

The rights enunciated in the South African Constitution, whilst not particularised in full, are specified to a greater degree than in the ICESCR, for example, the right to an adequate standard of living, contained within article 11 of the ICESCR, is broken down in to its various components of housing, healthcare, food, water and social security, whilst the right to adequate housing expressly includes the derivative right not to be arbitrarily evicted from housing or to have that housing demolished.⁹

However, the social rights, like the civil rights contained in the constitution, are far from fully particularised. Further definition of the content of these rights is likely to

⁶ Section 27

- (1) Everyone has the right to have access to
 - (a) healthcare services, including reproductive health
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance
- (1) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (2) No one may be refused emergency medical treatment.

⁷ Section 29

- (1) Everyone has the right
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state must take reasonable measures to make progressively available and accessible.

⁸ Section 28

- (1) Every child has the right
 - (a) ...
 - (b) to family care, parental care, or appropriate alternative care when removed from the family environment
 - (c) basic nutrition, shelter, basic health care services, and social services.

⁹ See Section 26(3) *supra* note 5, a person cannot be evicted and their housing cannot be demolished without an order of court and after consideration of all relevant circumstances.

be drawn from international law, in particular the work of the United Nations Committee on Economic, Social and Cultural Rights, and comparative constitutional law, particularly the jurisprudence of the Supreme Court of India.¹⁰ The drafting of the constitution was greatly influenced by the numerous international human rights documents that South Africa is now a party to and, in light of this, Article 39 of the Final Constitution expressly mandates the court to consider international law and authorises it to consider foreign law when interpreting the text of the constitution.¹¹

The need to reconcile the recognition of social rights with economic realities in South Africa, a concern that was prevalent during the constitutional debates,¹² resulted in a progressive or aspirational formulation of the rights much like that in the ICESCR.

The rights impose an immediate obligation of conduct upon the state to “take reasonable legislative and other measures” to progressively realise the right but not an obligation of result in respect of total fulfilment of the right. Sections 26 and 27, the right of access to housing, healthcare, food, water and social security are expressly

¹⁰ For the comparative relevance of the Indian jurisprudence see below at note 38 and 39.

¹¹ Section 39 of the Constitution states;

(1) When interpreting the Bill of Rights, a court, tribunal or forum

(a) *must* consider international law

(b) *may* consider foreign law.

It appears from the court’s jurisprudence that it has been adhering to Article 39. See Margaret A. Burnham *supra* note 2 at 34

“The new Constitutional Court has remained remarkably faithful to this injunction. In virtually every case it has decided, and on a variety of issues, ranging from jurisprudential matters to substantive law, it has referred both to international and to foreign law.”

¹² See chapter 2.

limited by an 'internal modifier'¹³ that specifies that "the state must take reasonable legislative and other measures, *within its available resources* to achieve the progressive realisation of this right."¹⁴

This does not mean that the obligation imposed on the government is negligible. Section 7 of the constitution defines the state's duty as regards the bill of rights and, adopting the terminology of the obligation focused analysis of social rights outlined in chapter 2, it obliges the government to "respect, protect, promote and fulfil" the rights contained in the constitution.¹⁵ The fulfilment aspect of the right "does not (always) involve the direct provision, free of charge, on demand of commodities from the state, but requires the state to ensure that conditions are created within which individuals and groups are able to gain access to these socio-economic rights through their own initiative and effort."¹⁶ Whilst the internal modifier limits the state's

¹³ Internal modifiers are present throughout the constitution and, unlike the limitation clause, they form part of the definition of the right. As such, if the state took all measures within its available resources, it is not the case that the right is breached and this breach is justified by the internal modifier, rather it is the case that the right is not breached at all. Justice Arthur Chaskalson, president of the Constitutional Court has stated the role of the internal modifier as follows;

"Where there is an internal modifier, to determine whether a right has been infringed or not our Court has held until now that you look at the right subject to the modifier....It's part of the definition of the right. You look at that and then you decide whether that right has been breached or not."

Kate Kempton and Malcolm MacLaren 'The Protection of Human Rights in South Africa: A Conversation with Justice Arthur Chaskalson, President of the Constitutional Court of South Africa' (1998) 56(1) U.T.Fac.L.Rev 161.

¹⁴ See Section 26(2), 27 (2). Notably the right to education and the social rights of children are not subject to this internal modifier.

¹⁵ *Constitution of the Republic of South Africa* *supra* note 1, Section 7 (2);

"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

¹⁶ Mirian Wheeldon "Socio-economic rights in the new constitution" in "The Legal resources Centre: Constitutional newsletter" February 1998 at 4.

obligations in this regard, it is thought that it does not effect the state's obligation to facilitate fulfilment of the minimum core content of each of the social rights. As one commentator has stated, "these internal limitations do not, however, enable the state to avoid its primary obligation to ensure the fulfilment of a minimum essential level of each right."¹⁷

The South African Constitution differs fundamentally from the ICESCR and other domestic constitutions in that the social rights that it protects are clearly justiciable. The text of the constitution does not distinguish between civil and social rights as regards justiciability, section 7 of the constitution¹⁸ applies to all rights without distinction. In its certification of the Constitution, the Constitutional Court expressly stated that "these rights, are at least to some extent justiciable" and that "at the very minimum, socio-economic rights can be negatively protected from improper invasion."¹⁹ The approach of the court in the case of *Soobramoney*, considered below, clearly establishes the justiciability of social rights in South Africa, as one commentator has stated; "the constitutional construction in South Africa is clear that socio-economic rights are as justiciable as any other rights and freedoms."²⁰

¹⁷ Mirian Wheeldon *ibid* at 5.

¹⁸ *Ibid* note 15.

¹⁹ See the Certification of the Constitution of the Republic of South Africa 1996 *supra* note 3.

²⁰ Shadrack Gutto "Beyond justiciability : challenges of implementing / enforcing socio-economic rights in South Africa" (1998) 4 Buff. Hum. Rts. L. Rev. 79 at 102.

Part (II) Judicial Approach

The Case-Law: The Soobramoney Decision

To date only one case has come before the Constitutional Court in which the applicant has sought to directly invoke one of the specific social rights contained in the constitution. In *Soobramoney v Minister of Health (KwaZulu-Natal)* (1997)²¹ the applicant, who suffered from kidney failure, was denied admission to the dialysis program at a state funded hospital on the basis that, due to limited resources, hospital policy was to admit only those patients who could be cured within a short period and those who, due to chronic renal failure, were eligible for a kidney transplant.

The applicant challenged the hospital decision on the basis that it violated the right to life contained in section 11 of the constitution and the right to receive emergency medical treatment contained in section 27(3). The challenge under section 11 invoked the jurisprudence of the Supreme Court of India to argue that the right to life should be interpreted to cover basic needs, including medical treatment. The Court expressly considered and noted the value of the Indian jurisprudence but rejected the section 11 argument on the basis that it was not necessary or appropriate to use the 'cross-cutting' right to life to invoke the right to medical treatment, given that the latter right was itself expressly protected in the constitution. The Court stated:

²¹ *Soobramoney v Minister of Health (KwaZulu-Natal)* (1997) CCT 32/97 at www.law.wits.

“Whilst the Indian jurisprudence on this subject contains valuable insights it is important to bear in mind that our constitution is structured differently to the Indian Constitution. Unlike the Indian Constitution ours deals specifically in the bill of rights with certain positive obligations imposed on the state and where it does so, it is our duty to apply the obligations as formulated in the Constitution and not to draw inferences that would be inconsistent therewith.”²²

As regards the section 27(3) argument, that the applicant had been denied *emergency* medical treatment, the Court held that this subsection did not apply in the present case as the kidney treatment needed by the applicant was not the result of an “emergency which calls for immediate remedial treatment” but an “ongoing state of affairs resulting from a deterioration of the applicant’s renal function.”²³ Accordingly, the court dealt with the case under section 27(1) and 27(2) which cover non-emergency healthcare and grant everyone the right to have access to health care services. Whereas the right to receive emergency medical services is absolute in that it is not subject to the internal modifier, the right of access to non-emergency healthcare is subject to available resources.

The case was ultimately dismissed on the basis that the government had, given their limited resources, discharged their obligations as regards state provision of healthcare. The limited nature of the right to healthcare was made clear at the outset, Chaskalson stating;

²² *Ibid* Chaskalson P at para 15. See also Chaskalson P at para 19

“In our Constitution the right to medical treatment does not have to be inferred from the state established by the constitution of from the right to life which it guarantees.”

²³ *Ibid* Chaskalson P at para 21.

“The obligations imposed on the state by sections 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, and ... the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”²⁴

Madala J concurred, expressing the position of social rights within the constitution as follows;

“The guarantees of the Constitution are not absolute but may be limited in one way or another. In some instances, the constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources “to achieve the progressive realisation of each of these rights.” In its language, the Constitution accepts that it cannot solve all of our society’s woes overnight, but must go on trying to resolve these problems.”²⁵

The court made clear the limited nature of the health services in South Africa, Chaskalson P stating that the regional department of health had overspent its budget in the previous year by 152 million Rands. Given limited resources, the guidelines that the health service had adopted were thought to be fair in that “more patients are benefited”²⁶ by the existence of such guidelines and “if everyone in the same

²⁴ *Ibid* Chaskalson P at para 11.

²⁵ *Ibid* Madala J at para 45.

²⁶ *Ibid* Chaskalson P at para 25

“By using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed at curing patients, and not simply to maintaining them in a chronically ill condition.”

condition as the appellant were to be admitted the carefully tailored programme would collapse and no one would benefit.”²⁷ The extra cost of treating the applicant was estimated to be 60,000 Rands per annum which, if an affirmative decision was given, would have to be incurred in relation to every patient in the applicant’s position, something which would not be possible under the existing health budget.²⁸

The appellant accepted that the existing health service budget was not extensive enough to cover such treatment but argued that the state could, and should, make additional funds available to the clinic.²⁹ It was concluded that given the numerous demands on the state’s resources it would not be reasonable at this point in time to expect the state to give additional resources to the healthcare service for this purpose. It was made clear that the realisation of social rights, within the South African socio-economic context, required an holistic perspective that took into account other demands on the government’s resources, including the demands imposed by the other social rights. This need to balance competing interests was described by Chaskalson

²⁷ *Ibid* Chaskalson P at para 27.

²⁸ *Ibid* Chaskalson P at para 28

“The appellants needs must be seen in the context of the needs which the health services have to meet, for if treatment has to be provided to the appellant it would also have to be provided to all other persons similarly placed... It is estimated that the cost to the state of treating one chronically ill patient by means of renal dialysis provided twice a week at a state hospital is approximately R60,000 per annum.”

²⁹ *Ibid* Chaskalson P at para 23

“This funding was not disputed by the appellant, but it was argued that the state could make additional funds available to the renal clinic and that it was obliged to do so to enable the clinic to provide life saving treatment to the appellant and to others suffering from chronic renal failure.”

as follows; “(t)he state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals.”³⁰

The jurisprudential significance of constitutionalised Social Rights

The ultimate question that lies at the base of our analysis of South Africa is the impact of social rights upon judicial analysis and resolution of cases that challenge state conduct in the provision of social programs. It is this question that has wider significance in terms of the future development of social rights within international and domestic law. At this early point in the history of social rights in South Africa we are left with as many questions as we have answers, much remaining to be seen as to how the jurisprudence of the constitutional court will develop. The following limited observations can be made from the approach of the court in *Soobramoney*;

- Judicial Recognition of social inequality

Soobramoney indicates that, in light of the constitutionalised status of social rights, judicial recognition of social inequality may be greater, something which directly bares upon the attitudes and approach of the court. In analysing the Canadian approach to social rights we saw how in legal, political and social discourse an individualised interpretation of the origins of poverty was prevalent and that within specific judgements appreciation of systemic socio-economic inequality was often

³⁰ *Ibid* Chaskalson P at para 31.

significantly lacking. In *Soobramoney* the court noted in some depth the presence of systemic socio-economic inequality in South Africa, Chaskelson stating at the outset of his judgement;

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”³¹

Contextual awareness is evident not only in those cases that seek to directly invoke the specific social rights in the constitution, but also in other cases where socio-economic context is relevant to full enjoyment of the rights under question; particularly in those cases relating to the right to equality. As one commentator has stated; “the court has contextualised its rights jurisprudence by demonstrating that poverty defines the way in which individual’s experience rights. This point is illustrated in *Coetzee v Government of the Republic of South Africa*, a case in which the court declined to accept the facial neutrality of the law requiring the imprisonment of judgement debtors. Instead the court looked beyond the text to identify the law’s operational bias against the poor.”³²

³¹ *Ibid* Chaskelson P at para 8.

³² Burnham *supra* note 3 at 57.

It is an obvious truth that socio-economic problems are far vaster in South Africa than in Canada and that the reality of this situation has itself invoked within the political and legal community greater awareness of the existence of, and the need to address, these problems. However, the presence of social rights within the constitution has arguably contributed to increased judicial recognition and sensitivity to systemic socio-economic inequality by bringing to the legal fore rights that directly address poverty.

- The 'Available resources' modifier and judicial deference

The case of *Soobramoney* raises clearly, at this early point in the court's jurisprudence, the question of the role of the 'available resources' modifier and the utility of social rights in the South African context, given that lack of resources will frequently provide a 'defence' to alleged violations of social rights. The court was eager to make clear that they were not using the 'lack of resources' argument to avoid review; Sachs carefully asserted that the judgement did not merely "toll the bell of lack of resources,"³³ stating that "in all open and democratic societies based upon dignity, freedom and equality with which I am familiar the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to healthcare."³⁴

³³ Sachs J at para 52.

³⁴ *Ibid.*

It does seem that within the South African socio-economic context the government's allocation of resources was rational and the court's decision reasonable. However, *Soobramoney* highlights perhaps the most difficult question relating to social rights, that is whether their presence and their progressive nature will merely provide an alternative method of reaching the same conclusions that would be reached in their absence: that is that cases that are dismissed in Canada on the basis that the *Charter* does not protect social rights will be dismissed in South Africa via the 'available resources' internal modifier.

The question of the appropriate use of the 'available resources' internal modifier is intricately related to the question of the appropriate scope of judicial review and the role of judicial deference given the presence of social rights. In chapter 3 we saw how, in the absence of constitutionalised social rights, an over deferential approach was being adopted by the Canadian courts where cases involve issues of social policy and the question arises as to whether the presence of constitutionalised social rights will impact upon this approach so as to redraw the line of appropriate judicial scrutiny in favour of increased review. In dismissing the application in *Soobramoney* Chaskalson J stated that "(t)hese choices involve difficult decisions to be taken at the political level in fixing the health budget, and at a functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."³⁵

³⁵ Chaskalson P at para 29.

The above statement made by Chaskalson's in *Soobramoney* is not dissimilar to the deferential statements made by the Canadian judiciary,³⁶ and it remains to be seen how, in light of the constitutionalised status of social rights, the South African case law will develop in relation to the appropriate scope of review and use of the available resources modifier. However, the approach taken by the court in *Soobramoney* indicates that the presence of constitutionalised social rights has influenced the depth and focus of review in two significant ways, that indicate that extreme judicial deference is less likely when these rights are constitutionalised.

Firstly, the duty upon the government to take all steps within its available resources to realise these rights compels the court to examine closely the budgetary and policy decisions of the government to ensure fulfilment of this duty. Although ultimately in *Soobramoney* the court deferred to the government's decision it considered closely the rationality of this decision and the government's budget allocation, something that was not evident in the Canadian case law where the socio-economic nature of the issue often provided a bar to closer examination of government (in)action.

Secondly, a comparison of the courts approach in *Soobramoney* with that of the Canadian courts indicates that the presence of constitutionalised social rights focuses

³⁶ See Chapter 3 at note 36 and 37. La Forest J in *Andrews v Law Society of British Columbia*; "(m)uch economic and social policy-making is simply beyond the institutional competence of the courts; their role is to protect against incursions on fundamental values, not to second guess policy decisions."

O'Brien J in *Masse v Ontario*; "generally, courts should not lightly second-guess legislative judgement as to just how quickly it should proceed in moving towards the ideal of equality."

the analysis of the court in a significantly different, and more appropriate way, than in cases where challenges are restricted to the assertion of cross cutting rights. In the Canadian context, the usage of cross cutting rights has had a distortive effect upon the formulation, analysis and resolution of the case. The applicant's immediate allegation is that the government has breached an obligation to adequately provide, however, by tailoring a claim to fit section 15 or section 7, the allegation is distorted becoming one of discrimination or deprivation of life, liberty and security of the person. Particularly in the case of section 15, this has resulted in a defocusing of the central question and the erection of additional hurdles for the applicant to overcome, which given the nature of the central question, are irrelevant.

This point is illustrated by a comparison of the South African Constitutional Court's approach in *Soobramoney* and that of the Canadian Supreme Court in *Eldridge*.³⁷

Although the latter but not the former case had a favourable resolution, the approach of the court in *Soobramoney* was more appropriate given the nature of the issue and the applicant's true allegation. In both *Eldridge* and *Soobramoney* the action arose from the non provision of an aspect of the health service, however, in the former instance the pre-existence of a right to health allowed the court to focus directly on the primary question of whether, given available resources, the obligation imposed on the government had been breached. Conversely, in *Eldridge*, as a consequence of invoking the right to equality, the primary question became one of discrimination,

³⁷ *Eldridge v British Columbia (Attorney General)* (1997) 151 D.L.R (4th) 577. For details of the case see above chapter 3.

the question of resource allocation was secondary and the question of positive obligations was sidelined.

Part (III) The Political and Social Significance of Social Rights

Given the peculiarities of the political and socio-economic situation in South Africa and the short duration of time during which the constitution has been operating it is not possible to assert any conclusions as to the broader political and social impact of social rights, however, a number of issues can be identified and points can be made in this respect.

Analysis in part (III) will focus primarily upon South Africa but will also draw upon the constitutional experience of India to substantiate points that are being made and to indicate what further issues are likely to arise in the South African context. As noted in chapter 1 the Constitution of India includes social rights as directive principles that are expressly non-justiciable, however, the Supreme Court of India has proven highly innovative in interpreting the constitution so as to protect social rights.³⁸ The Indian experience is instructive to the analysis in Part (III) as the Indian judiciary have

³⁸ Of most relevance to the present analysis is the approach of the Indian Supreme Court in interpreting Article 21 of the Constitution, the right to life, so as to cover the provision of basic needs.

“The Indian Supreme Court decided that “life” does not mean merely physical existence, but also includes “the use of every limb of faculty through which life is enjoyed.” Implicit in this right was the right to “live with basic human dignity and all that goes along with it, including the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the base minimum expression of the human self.”

Jeremy Cooper “Poverty and Constitutional Justice: The Indian Experience” (1993) 44 Mercer L Rev. 611 at 620, citing P.N Bhagwati “Fundamental Rights in their Economic, Social and Cultural Context” (1988) Commonwealth Secretariat 57.

expressly sought to influence politics and social change through the constitution and much debate has been generated as to the broader impact of this approach.³⁹

Within South Africa and India debate on the political and social impact of constitutional litigation has been significant, with a spectrum of views emerging. In both instances there has been significant negative conjecture as to the social impact of the constitution, and the theoretical argument that constitutionalised rights merely preserve the status quo⁴⁰ has been applied to the practical realities of the South African and Indian experiences.

In relation to the South African Constitution one commentator has stated that “(t)he new constitutional rights framework has frozen the hierarchies of apartheid by preserving the social and economic status quo ... Except for largely cosmetic effects, there is little possibility that the particular conceptualisation of rights in the new South Africa will alter patterns of power, wealth and privilege established under apartheid.”⁴¹ Similar concerns have been expressed about the use of constitutional litigation in India, one commentator has stated that “litigative strategies can never

³⁹ One Commentator has referred to the study of Indian Constitutional law as follows: “With an extraordinarily innovative judiciary pursuing a legislated mandate of social change, India is an ideal focus of study for anyone interested in the transformative power of law.” See Jamie Cassels “Bitter knowledge, vibrant action: Reflections of law and society in modern India” (1991) *Wis. L. Rev.* 109 at 109.

⁴⁰ See above Chapter 2, Part II.

⁴¹ Makau wa Mutua “Hope and Despair for a new South Africa: The Limits of Rights Discourse” (1997) 10 *Harv. Hum. Rts. J.* 63 at 68.

substantially redistribute wealth or power, nor penetrate and affect the economic and cultural conditions which define the reality of Indian life.”⁴²

A key concern in this respect is the lack of cases being initiated that seek to enforce social rights, *Soobramoney* being the only such case in South Africa in the three years since the final constitution came into force. The Final Constitution mandates the South African Human Rights Commission to monitor state compliance with social rights, and if necessary initiate constitutional challenges. The role of the commission in this area is difficult and the lack of litigation is perhaps what one would expect in the initial period of constitutionalisation given the current political and social situation in South Africa.

Firstly, there is a reluctance to challenge government initiative for fear of reversing any progress being made; one commentator has stated that the commission “must walk a tight rope and balance its fight for socio-economic rights with economic realities in the country” and expressed concerns that the initiation of constitutional challenges would “unravel progress” in this area.⁴³ Secondly, “the government’s lack of resources and an absence of clear normative standards”⁴⁴ make it difficult for the Human Rights Commission, or other bodies, to assess when an obligation is being

⁴² Jamie Cassels ‘Judicial Activism and Public Interest Litigation in India: Attempting the Impossible’ (1989) 37 Am. J. Comp. L. 495 at 503 cited in Jeremy Cooper *supra* note 38 at 629.

⁴³ Ncaba Hlophe ‘In Conflict with tight state spending’ Independent Online 15/7/97 at www2.inc.co, citing Terence Corrigan, researcher at the South African Institute of Race Relations.

⁴⁴ Makau wa Mutua *supra* note 41 at 85.

breached. Accordingly, it will take time for the commission to develop or adapt existing standards to the South African context, as one commentator has stated: “the commission will need to harness whatever jurisprudence exists internationally, contextualise it for South Africa, and develop normative criteria with which to assess the progress made by the state.”⁴⁵

In India the lack of cases being brought to enforce social rights by beneficiaries has been coupled with a large number of cases being brought that seek to use the rights regressively. “When petitions are brought against the state to enforce fundamental rights, they are ordinarily brought, not in order to require the government to take its commitment to substantive equality seriously, but to challenge and undermine what steps have been taken. Litigation seeking to ensure constitutionally-ordained equality “has by and large been initiated not by the beneficiaries of protective discrimination, but by those complaining of schemes which effect their interest.”⁴⁶

In South Africa it appears to be the case that restraint is being exercised by *all* parties in the bringing of litigation that seeks to directly invoke the specific social rights in the constitution. However, although the specific social rights have not yet been utilised in this way, similar concerns are beginning to be expressed in South Africa about the regressive use of constitutional litigation generally, including litigation that raises social and economic issues. In relation to the right to equality it has been stated

⁴⁵ *Ibid.*

⁴⁶ Jamie Cassels *supra* note 39 citing Marc Gallanter *Law and Society in Modern India* (1989) at 130.

that “the relatively privileged sections of society are more visible as plaintiffs or defendants, applicants or respondents, in court cases where equality and non-discrimination issues are involved. The privileged are using equality and non-discrimination provisions to defend the status quo. The struggle over rates and service charges by local authorities as well as employment and promotion in the public service are cases in point.”⁴⁷

It is apparent that in India, where the Supreme Court has been indirectly invoking social rights for two decades, large scale social change has not occurred, extreme poverty remaining prevalent within Indian society. It has been noted that the difference between the promise of the constitution and the realities of Indian society has given a sense of artificiality to the whole notion of constitutional rights in India, as one commentator has stated the “(g)overnment has engaged in mass production of rights and entitlements that it cannot easily fulfil”⁴⁸ leading to a gulf between constitutional rhetoric and social reality.⁴⁹

Despite these concerns there is evidence from the Indian experience that social rights have had a more subtle political and social impact. In chapter 4 we saw how the

⁴⁷ Gutto *supra* note 20 at 94.

⁴⁸ Galanter ‘Law and Society in Modern India’ (1989) cited in Cassels *supra* note 39 at 131.

⁴⁹ Galanter *Ibid* has further stated that

“Paradoxically (though not surprisingly), the system’s avowed goal of achieving direct social change has not succeeded. Notwithstanding the legal system’s vitality as a conceptual system, it has exhibited only limited transformative power.”

impact of non-constitutionalisation is broader than the direct impact of litigation, in a similar vein the significance of constitutionalisation is broader in terms of its impact upon politics and society. In the Indian context it has been stated that “in practical terms, the political and symbolic function of the court’s decisions have exercised a greater influence on Indian society than the formal decision between the parties.”⁵⁰

Within South Africa it is apparent that political policy is currently orientated towards realising basic social rights for the population, and that since the adoption of the Final Constitution much legislation has been passed and steps have been taken that move towards this end. As one commentator has stated; “the government ha(s) made progress in realising people’s rights. It ha(s) provided schooling for a further 10% of children, including a daily meal to 5 million primary school children; built 500 new clinics; and provided free healthcare to millions of people.”⁵¹

However, the question of the role, if any, that constitutionalised social rights have played in influencing political policy is difficult, given that the realities of the political and socio-economic situation in South Africa have largely dictated that the government pursue such a course. However, at the least one can assert that the presence of constitutionalised social rights has made the pursuance of their realisation mandatory and, therefore, political priorities concrete. The threat of constitutional

⁵⁰ Cooper *supra* note 38 at 629.

⁵¹ Cathy Powers and sapa “Real Improvements will give meaning to human rights” Independent Online, The Star at www2.inc.co.

litigation can itself have an impact upon political policy and if government commitment to social rights were to falter, or policy to prove inadequate, then litigation could be utilised to enhance political accountability. The evidence from India is that both litigation, and the threat of litigation, have influenced politics, by highlighting maladministration and bringing greater accountability to the political process. Cooper has stated that "it is clear that the primary function of the Indian Supreme Court in constitutional rights litigation has been to stimulate government and other public bodies to adopt proper practices, under the closer scrutiny of social activist organisations. The results for the parties are ultimately of secondary importance."⁵²

It has been further noted in the Indian context that constitutional litigation has opened up a dialogue between the people, the courts and the government. This is thought to have had three consequences; firstly, it has facilitated greater popular involvement in the political process, often where other avenues have failed; "the Indian Supreme court allows for a process of "continued and effective participation in the ongoing stream of governmental decisions" in a way that no other organ of the state can achieve. For Indian social activists, it is the best thing available."⁵³

Secondly, as well as influencing politics, the efforts of the Indian Supreme Court to put social issues on the legal agenda is thought to have had a symbolic effect,

⁵² Cooper *supra* note 38 at 618.

⁵³ *Ibid* at 63.

Galanter has stated that "(l)aw as a system of symbols diverges from the law as a system of operative controls."⁵⁴ Due to the constitutive relationship between legal and social discourse, legal discourse on poverty is thought to have influenced social perceptions; "a further function of the Indian Supreme Court's work for the poor and oppressed could perhaps be described as the opening of a dialogue on oppression, as an attempt to influence and redefine public opinion."⁵⁵

Thirdly, Cooper argues that constitutional litigation has had an empowering effect, in informing the general population of their rights and creating "an aspiration for civic justice" among the people.⁵⁶ A similar sense of empowerment can be seen in South Africa where much has been done to encourage awareness and participation in the constitutional process. This was evidenced initially in attempts to include the general population, and the interest groups that represent them, in the constitutional negotiations. Since the adoption of the constitution, media coverage, political rhetoric⁵⁷ and non-governmental initiatives⁵⁸ have worked to create a greater

⁵⁴ Galanter cited in Cassels *supra* note 39 at 113.

⁵⁵ Cooper *supra* note 38 at 618.

⁵⁶ Cooper *Ibid* at 630.

⁵⁷ Political speeches and media coverage have created a 'constitutional culture' in which the promises of the constitution have been continually publicised. For example, the media reported President Mandela's speech on opening a water supply scheme at Petermaritzburg, quoting him as saying "Together we are changing the lives of millions and giving them concrete meaning to our right to water, to healthcare, to food and social security." See Cathy Powers and Sapa *supra* note 51.

⁵⁸ The South African Human Rights commission is mandated to promote and educate on human rights and has devoted a significant proportion of its time to social and economic rights. Additionally, a number of non-governmental organisations have undertaken efforts to educate and to promote constitutional litigation. For example, the Legal Resource Centre has, among other things, produced a series of free booklets entitled 'Know your Rights' that explain constitutional entitlements in an easily accessible manner.

awareness among the people of the constitution, its entitlements and the litigative process.

Conclusion

The evolution of human rights law is a question of great importance in the modern age; how do we modify and develop existing norms and practices to enhance human rights protection? Constitutionalisation of rights is currently a global phenomenon and it is proposed that, within this existing framework of rights protection, the adoption of a policy of 'selective constitutionalisation' that puts social rights by definition beyond the scope of judicial enforcement is unjustifiable, in terms of both analytical consistency and actual realisation of human rights.

Accordingly, this thesis has sought to illustrate the analytical inconsistency and the practical consequences of selective constitutionalisation. Chapter 2 outlined and assessed the philosophical and practical arguments that have, and continue to be, employed to justify denying social rights constitutional status and illustrated that, in light of modern academic developments that have elucidated the nature and normative force of social rights, these arguments are no longer sustainable. It was concluded that a strict dichotomy between civil and social rights is neither analytically possible nor theoretically desirable. Social rights can and should be accorded equal constitutional status to civil rights, that of legal norms binding upon the legislature,

backed by judicial enforcement, if the realisation of these social rights, and the civil rights to which they are intricately related, is to be maximised.

Chapters 3 and 4 illustrated that in practice, as well as theory, a policy of selective constitutionalisation has had deleterious consequences in terms of the realisation of both social and civil rights. In Chapter 3 it was shown that, given the exclusion of specific social rights from the *Charter*, constitutional challenges to inadequacies and inequities in the provision of social programs have been restricted to attempts to indirectly invoke social rights by encouraging a positive 'social' interpretation of the right to equality (Section 15) and the right to life, liberty and security of the person (Section 7). In light of the non - constitutionalised status of social rights, the courts have adopted a deferential approach and have proven unwilling to interpret the rights contained in the Charter to their full potential, rejecting a positive social interpretation of these rights that would allow for the substantive realisation of both these 'civil' rights and the 'social' rights under consideration in this study.

In Chapter 4 it was shown that the relationship between legal, political and social discourse is such that legal discourse has a constitutive effect upon political and social discourse, in terms of influencing political prioritisation, policy formation, social relations and social perceptions. It was shown that, in light of the non-constitutionalised status of social rights, a number of broader consequences have arisen; firstly, the values underlying these rights have been marginalised in political discourse, facilitating reforms that have restructured and eroded the welfare state, and

have, according to the Committee on Economic, Social and Cultural Rights, reduced the realisation of social rights within Canada. Secondly, an individualised interpretation of poverty has dominated legal and political discourse and significantly pervaded popular perceptions of the nature and origin of poverty and the appropriate means of alleviation. Thirdly, the non-constitutionalised status of social rights has constituted the poor within society as non-rights bearing citizens contributing to their disempowerment in social relations and depriving them of full citizenship.

Chapter 5 has used the South African experience of constitutionalising social rights to move beyond theory and observe the workings of constitutionalised rights in practice. The conclusions that can be drawn from chapter 5 are limited, however, the following points can be made about the jurisprudential significance of constitutionalised social rights; firstly, in light of the constitutionalised status of social rights, the contextual awareness of the court and the appreciation of systemic socio-economic inequality appears to be greater than in Canada. Secondly, the presence of constitutionalised social rights has encouraged a greater depth of review and has focused the analysis of the court in a way that is more directly relevant to the issue at hand than in the Canadian cases where litigation has been dependent upon, and moulded by, the use of cross cutting rights.

It is not possible to draw conclusions as to the political and social impact of constitutionalised social rights from the South African experience given the pre-existence of a strong commitment to social change and the limited time period in

which social rights have been operating. Combined analysis of South Africa and India reveals deep controversy on the issue of the broader impact of constitutional litigation and it is apparent from the Indian experience that the constitutionalisation of social rights and successful constitutional litigation cannot alone bring about vast social change. However, the following positive observations can be made; firstly, the presence of constitutionalised social rights creates greater political accountability that will ensure that the continued furtherance of social rights remains prominent in political policy and, secondly, the constitutionalisation of social rights has had a symbolic effect, in terms of creating awareness of entitlement, empowering rights bearers, encouraging participation and creating a dialogue on poverty that has had a constitutive influence upon social perceptions.

In conclusion, the following statement is asserted; if the decision is made to pursue a policy of constitutionalising rights, then a balance must be struck that respects the equal and interdependent status of all human rights, both social and civil. To constitutionalise civil but not social rights is to create a situation in which the latter are relegated to a secondary and subordinate status and consequently their effective enjoyment is reduced. If a policy of constitutionalisation is pursued, then the maximum enjoyment of human rights, both social and civil, is dependent upon a policy of full constitutionalisation.

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